2014 H14-0418

Nova Scotia Human Rights Board of Inquiry

In the matter of:

Beth Maclean, Joseph Delaney and Sheila Livingstone

Complainants

-and-

Disability Rights Coalition

Complainant

-and-

Province of Nova Scotia

Respondent

-and-

Nova Scotia Human Rights Commission

Commission

POST-HEARING BRIEF OF THE RESPONDENT, PROVINCE OF NOVA SCOTIA

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I. OPENING

1. Supporting persons with intellectual disabilities is one of the most important jobs a modern government has. While theories and models for undertaking that work have changed dramatically over decades, the vision for the work today is that all Nova Scotians, including those with disabilities, should be supported wherever possible to live good lives of their choosing in communities which welcome and support them. This undertaking is complex, as the people being served have complex needs. The burdens of past, flawed models of support continue to affect the shape and pace of the work today. No government has achieved perfection in this undertaking, and in all likelihood no government will. But the Province is dedicated to reforming the system to better meet its ultimate goals, and the work is ongoing.

2. This hearing is not, fundamentally, about what the best model is for delivering support to persons with disabilities. On that issue, the parties largely and in principle agree (though there is much room for disagreement about specific outcomes and about the process of reform.) The hearing is also not about whether government has struggled to live up to the ideal in providing support to specific individuals and to the community in general. On that issue, unfortunately, the parties also agree; while there will be some disputes over aspects of the evidence, the government is not looking to deny the flaws and weaknesses of the past and present.

3. This hearing is about what legal tools can be used to force specific government actions as it looks to reform the system. Modern governments strive to achieve best practices in delivering services to citizens, and frequently struggle to live up to that goal, particularly in dealing with the complex needs of the most vulnerable. At what point does the failure to achieve the ideal amount

to discrimination? At what point do we turn over the difficult policy choices to the legal system, and ask adjudicators to solve the problems with which governments struggle?

4. The implications of this complaint should not be understated. The Complainants argue that there is a baseline of services which the government of Nova Scotia is required to provide in supporting persons with disabilities, and that any failure to meet that baseline amounts to legal discrimination, justifying an intervention under the *Human Rights Act*. They require the Board of Inquiry to define that baseline of service, using an approach to the legal concept of "discrimination" which is unsupported in Canadian human rights law. And, if successful in demonstrating *prima facie* discrimination, they will require the Board of Inquiry to shape the way the government is to deliver services in this complex social policy area for the foreseeable future.

5. As the Department of Community Services strives to continue the massive project of reforming the Disability Support Program to meet the goals of the Roadmap, the Department will rightfully be held accountable to the elected government of Nova Scotia, and ultimately to the citizens who choose that government and fund its work. A finding of *prima facie* discrimination shifts that accountability, and holds the Department instead accountable to justify its practices to a Board of Inquiry appointed under the *Human Rights Act*. For such a dramatic shift to be justified, there must be the clearest possible case made out supporting a finding of *prima facie* discrimination. The Complainants have not met that burden here.

II. PRELIMINARY ISSUES

The Phase 1 Question

6. Though there is no dispute between the parties on this point, it is worth setting out clearly what the decision is that must be made at this point in the hearing. Though we refer to this as an argument about "*prima facie*" discrimination, the Board of Inquiry is in fact required to make a final ruling, at this stage, whether the test for discrimination has been met. It is only "*prima facie*" in the sense that there is another phase to come before the Board can rule whether the discrimination amounts to a violation of the *Human Rights Act*. It is not a question of whether the case has sufficient potential merit to justify proceeding to Phase II; it is the Board's final determination on the question of *prima facie* discrimination.

7. Moreover, the Board is required at this stage to rule, with specificity, what aspects of the Complainants' broad case actually meet the test for discrimination. The parties agreed to this two-phase structure for the case precisely because, if the matter proceeds to a Phase II, the Respondent needs to know specifically what case it has to prepare in order to discharge its onus at that Phase.[1] Unlike most discrimination cases, which involve relatively discreet allegations, here the Respondent will not, as a matter of natural justice, know what if any case it has to meet at Phase II without a Phase I ruling that is precise and specific about what has been determined to be *prima facie* discriminatory.

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[1] This need for a clear ruling before proceeding to Phase II has been evident in counsel's scheduling of dates for Phase II around the Board's commitment to issue a Phase I decision within 30 days of argument.

Who is the Respondent?

8. There is a preliminary point from the Complainants' Brief worth addressing before turning to the merits of the case. The Complainants make several arguments which go to the identifying the Respondent to this case. While it is not entirely clear that it is relevant to the determination of the case, it seems worth being clear on the point, particularly in light of the Complainants' position at para.4 of their Brief that the complaint is against "the Province" and not "any single government employee, department or entity."

9. The Complaint names as Respondent "The Attorney General of Nova Scotia representing her Majesty the Queen in Right of the Province of Nova Scotia (including the Minister of Community Services and the Minister of Health and Wellness), a.k.a. `the Province'". The Province, as a practice, does not raise objections to how it is identified as a party to a Complaint, so long as the Complaint clearly identifies the Department which the Province considers to be responsible for the subject-matter of the Complaint. As all Departments act on behalf of Her Majesty in Right of the Province, and the Province is globally responsible for the policy direction and budget of all Departments, little typically turns on the specific way the government respondent is identified.

10. However, the Province's position is that the Department of Community Services ("DCS") is the entity responsible for the subject-matter of the Complaint. The Complaint, put in its broadest terms, deals with the provision of residential supports to persons with disabilities, and alludes to social assistance legislation, all of which is the purview of DCS. While the Department of Health

and Wellness ("DHW") has been alluded to in the evidence, there is no specific allegation of discrimination which falls within the purview of DHW, or any other department. Thus, DCS has effectively acted as the Respondent, and in these arguments we refer to DCS and the Province interchangeably as the Respondent.

11. In our view, nothing of substance appears to turn on whether DCS or "the Province" is considered to be the Respondent. However, it is more significant to respond to the suggestion at para.4 of the Complainants' Brief, and elsewhere, that other "entities" may also be considered part of the "Province" for the purposes of the Complaint. For example, the Complainants suggest at para.178 of their Brief (under the heading "The Province is Responsible for the NSHA and DSP Service Providers in Nova Scotia") that the Province is somehow legally accountable for the Nova Scotia Health Authority and the hospitals the Health Authority operates.

12. The Nova Scotia Health Authority is established pursuant to the *Health Authorities Act*, 2014, c. 32, and pursuant to s.13 of that legislation is a body corporate with the rights, powers and privileges of a natural person. The suggestion that the Province is legally responsible for the activities of the Health Authority is without foundation. Furthermore, the separate legal identity of the Health Authority was raised several times during the disclosure phase of the proceedings, and the Province was given no notice that this argument would be raised. The Brief contains no substantive argument in support of this proposition, beyond noting that the Province "funds" the Health Authority and "is responsible for its operations" (which could be said of many arms-length Crown entities.) If this allegation were being seriously put forward by the Complainants, it would require significant evidence and argument, after notice to the Health Authority itself. However, it

appears from the Complainants' Brief that they advance no serious allegation of discrimination by the Health Authority, rendering this point moot in the Respondent's view.

13. Similarly, the Complainants at para.178 of their Brief suggest that the Province is responsible for the third party Service Providers who provide residential supports and operate facilities with the support of the DSP. There was no serious allegation to this effect at the hearing, despite the Board hearing directly from Service Providers such as RRSS and Community Living Centres, and indirectly about several others. No foundation whatsoever was laid for this claim of legal responsibility, which again would require significant evidence and argument, after notice to the various Service Provides who would be impacted by such a finding. However, as it appears from the Complainants' Brief that they advance no serious allegation of discrimination by any particular Service Provider, this point is also moot in the Respondent's view.

14. The Complainants have also argued at points of the hearing that the Province bears direct legal responsibility for the activities of municipalities, for the period prior to the Province's 1995 assumption of direct responsibility for provision of social services. The Complainants do not make this argument directly in their Brief, other than briefly alluding to municipal-Provincial cost-sharing arrangements prior to 1995 (which would not be sufficient to establish the Province's legal liability for the activities of municipalities.) However, the Brief does continue to allege that the Province's liability goes back to 1986, by implication suggesting that the Province is accountable for municipal activity prior to 1995. Again, the Brief lays no foundation for the legal argument that the Province is responsible for the municipalities' provision of services prior to 1995, and thus the Respondent finds no argument to which to reply. However, the Respondent does deny any such

liability. This relates as well to arguments the Province will make below as to timeliness of the Complaint.

Time Limits

15. In s. 29(2) of the Act, human rights claims are limited to those occurring within twelve months of the conduct giving rise to the complaint, except in the case of ongoing discrimination of which the last incident must have occurred within twelve months. In the present matter, there are a variety of claims made, many of which date back decades, all of which are subsumed under the allegation of "ongoing discrimination." However, as the evidence proceeded at the hearing, it became clear that many of the potential claims that might be advanced by the Complainants are not timely, and do not fit the definition of "ongoing discrimination".

16. In order to be "ongoing conduct" the incidents complaint of must be of the same nature:

> 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. ...
>
> ...
>
> 116 Section 29(2) is clear. If a complainant alleges discriminatory conduct which does not fall within the 12 months preceding a complaint, it can only ground liability under the legislation if it is found to be "ongoing". There is no other form of misconduct contemplated in the Act, other than a finding of discrimination as defined therein. In my view, should a board make a finding of current discrimination based on statute-barred conduct, that would constitute an improper end-run around the limitation period specified in s. 29(2).[2]

17. Of the multitude and variety of issues potentially to be raised in this case, many involve incidents not "of the same nature" and thus not examples of ongoing conduct, as discussed.

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[2] *Nova Scotia Liquor Corp.* v. *Nova Scotia (Board of Inquiry)*, 2016 NSCA 28.

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

18. This time frame is beyond the limitation period and should be eliminated from the systemic complaint. The evidence unequivocally establishes that between 1986 and 1995, the municipalities administered residential supports for people with disabilities, including small options homes, in Nova Scotia. This is acknowledged by the Complainants at paragraphs 185, 186, and 557 of their Brief. During that time, the Province provided funding, the amount of which, although significant, varied by municipality. The Province would, in turn, be reimbursed by the Federal Government. The Province did not administer the program until 1995, when the Municipal – Provincial service exchange occurred:

> Prior to the Provincial/Municipal service exchange, all residential programs were administered through various municipal units across the province, based on individual municipal by-laws, standards, and policies. A number of municipal units developed residential settings which were not subject to the requirements of the Homes for Special Care Act. This included the development of small options homes.
>
> The administrative and financial responsibility for all residential settings serving individuals with disabilities was transferred to the province during the service exchange.[3]

19. It was only following the Provincial/Municipal service exchange that the Province began administering residential supports including small options homes. The Province cannot be held responsible for a period of time in which it did not have control the administration of these options. Given the different administration of homes throughout this period, the Complainants have not laid out any basis for liability on the part of the Province prior to 1995.

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[3] JEB, Volume III Tab 9 at p. 612.

20. Relatedly, the Complainants acknowledge this period as the "golden age" in which many homes were developed. Bev Wicks, Marty Wexler and Jim Fagan all spoke of the fact that small options homes were developed during this time. Mr. Fagan testified that RRSS opened 30 homes during this period. They testified that small option home development was stymied by the Province's imposition of a moratorium in 1995 when it took over administration of these options. It is inconsistent to call the period from 1986 - 1995 the "golden age" of the development of small options homes, and yet also claim discrimination for the same time frame. And given that the "golden age" ended in 1995, so too should the limit of the claim.

Beth MacLean's Time at Kings

21. Beth MacLean lived at Kings RRC from July of 1986 until 2000 when she was admitted to Maritime Hall. While the Complainants have conflated all of Beth's time starting in 1986 as the "institutionalization" of Beth, as noted above, the Province's responsibility for supporting Beth begins in 1995. In addition, much was made at the hearing of the unusual circumstances that led to Beth's admission to Kings at a young age. That occurred in 1986 (notably during the "golden era"; presumably Beth's placement is not then attributable to any restrictions on constructing small options homes.) This exceptional occurrence over thirty years ago should be considered out of time for a discrimination claim against the Respondent.

22. There is also little evidence as to Beth's time at Kings. No one was called to testify to Beth's time at Kings, nor speak about the documents in the Joint Book that relate to Kings. We do

not have any sense of Beth's life 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, objectively, what Beth's life was like. Moreover, the time frame that Beth was at Kings, corresponds with a time in which, as noted by Dr. Bach, there was not consensus as to the best model for delivering support to individuals with disabilities. This period therefore should be determined by this Board as beyond the time limits for the complaint.

Isolated incidents and issues

23. The Complainants have referenced many isolated issues over the long history covered by this complaint; examples include the Province not adhering to a one-year agreement for Beth to live at Maritime Hall; the alleged invalid classification for Beth in 2005; Beth and Sheila being "unclassifiable" at various points in the past; Sheila's brother having to request a letter regarding her unclassifiability, and not being advised of the appeal time limit; the issues identified by Ms. Pynch with respect to assessments for residents at Kings prior to 2000[4]; and Joey's mother not being informed of the Province's decision that Joey's classification was changed from DR III to RRC, until after the fact. All of these are specific isolated incidents and issues that, even if they were discriminatory (which is not agreed), are not of the same character as the claims now before this Board. Therefore, following the reasoning in *Nova Scotia Liquor Corp.*, supra, these events are beyond the time limit for a complaint and cannot be considered.

[4] See Complainants' Brief at para.35.

Objection to inclusion of East Coast Forensic Hospital within the scope of the Complaint

24. As a final preliminary point, the Respondent wishes to formally restate one of the objections it raised during the hearing, with respect to the Complainants' attempts to include the population at East Coast Forensic Hospital ("ECFH") within the scope of this Complaint[5]. The objection was first made during the testimony of Joanne Pushie, and the Board ruled that it would hear "generic" evidence relating to the ECFH as part of the overall picture of the population affected by the DSP. The Board heard a similar objection during the testimony of Louise Bradley and of Patryck Simon, and ruled that it would hear the evidence. However, the Board did not, during the hearing, rule whether the scope of the Complaint is to be expanded to include the DSP-eligible population at ECFH.

25. The Respondent submits that the Board has, in fact, determined as part of its recusal decision that ECFH is outside the scope of the Complaint. When the Respondent, in the motion, raised concerns about the potential inclusion of the ECFH population, the Complainants made it clear that they were not included:

> Contrary to the Province's submissions that it relates to the "same client group" the June 1, 2000 letter relates to particular persons, forensic patients, under the jurisdiction of the Criminal Code Review Board. **These individuals are not the subject of this human rights complaint.**[6]
>
> Mr. Thompson finds that there are important distinctions between the people confined to hospital pursuant to the Criminal Code statutory criteria, with the people before him on the human rights complaint.[7]

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[5] The Complainants refer to the forensic population at paras. 315-326 of their Brief, and periodically throughout their arguments.

[6] DRC submissions on the Respondent's recusal motion, at para.22.

[7] DRC factum to the NS Court of Appeal on the appeal of the recusal decision, at para.15.

26. In ruling against the Respondent's recusal motion, the Board explicitly ruled that this population was excluded from the scope of the Complaint:

> [After describing the forensic patient situation] By contrast, people of the kind who are being placed before me are there, as I understand it, because their disabilities and economic circumstances dictate that they be in the care of the Province. They are, by and large, under no legal compulsion to be anywhere. The Province looks after them because they cannot look after themselves, they cannot afford to pay for the supports they need to live in the community and there is no one who can or will take them in or pay for those supports. They live where they live because, legally speaking, they have accepted the Provincial care and the placement of them the Province has made. While the decision-making about placement in the individual case under the Criminal Code shares much with the therapeutic decision-making by staff treating the mentally ill or the disabled confined by the civil law or by circumstance in more conventional institutions, the context of decision-making in my view is, under the Review Board, quite different.[8]

27. The Board's reasoning is based on valid differences between this population and the population covered in the Complaint. Having clarified, after representations to this effect from the Complainants themselves, that the ECFH population does not come within the scope of this Complaint, the Board cannot now amend the Complaint to include them.[9]

III. EVIDENCE

28. The Complainants, in their Brief, spend some time reviewing the voluminous documentary and testimonial evidence from the hearing. There is a need for the Respondent to review the evidence as well, in some cases at length. However, we approach this review from the perspective we have stated clearly from the first day of hearing—this case does not involve a great deal of

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[8] Board's decision on recusal motion, p.14.

[9] *Nova Scotia (Environment)* v *Wakeham*, 2015 NSCA 114 at para.48: "Just to be clear and to avoid any confusion on this point, a board of inquiry does not have the ability to amend complaints to something that is different than what was referred to it."

dispute over evidence. Despite the weeks of testimony and volumes of documents, the Parties largely agree on the major conclusions to be drawn from the evidence. At this phase of the hearing, the major disagreements are over legal arguments, not evidentiary ones.

29. Thus, the Respondent called the minimum number of witnesses it judged was necessary to satisfy undertakings made to the Complainants and clarify certain points of evidence, and the vast majority of the documentary evidence was admitted by consent of the Parties. There were no witnesses, for any party, whose credibility was or could be seriously challenged on areas squarely within their factual knowledge; any conflict between witnesses was largely in the subjective area of opinion evidence and speculation, which was permitted from lay witnesses. The major limitation with respect to testimony was that many witnesses were asked to comment on or interpret documents which they did not originate and had limited ability to authoritatively speak to[10].

30. Accordingly, the Respondent sees no benefit to a point-by-point response to any minor disputes in the evidence. Instead, we propose to address broad areas of evidence that we see as relevant to the Complainants' case as they state it. There are a number of places where we do not contest the broad conclusions the Complainants seek to demonstrate from the evidence; where that is the case, we prefer to simply accept the broad conclusion (while not necessarily accepting every element of the evidence going toward that conclusion.) We will limit comment to where there is, in our view, an evidentiary dispute that goes to an issue relevant to the Complainants' argument. In that case, we will state our disagreement with the Complainants' summary of the evidence, or

[10] While this was an issue throughout the hearing, it was particularly notable in the direct testimony of Joanne Pushie and Dr. Sulyman, and in the direct and cross-examinations of Denise MacDonald-Billard, Tricia Murray, Renee Lockhart-Singer, and Carole Bethune.

state whatever clarifications or additions we feel are relevant to give a more complete summary of the evidence.

The Disability Support Program

31. There is much evidence before this Board related to the Disability Support Program ("DSP"), and the following is a summary of the evidence related to the program, its eligibility requirements and the various available support options.

32. The DSP provides assistance to persons with disabilities who meet the general eligibility criteria. Although the Complainants' case focuses solely on residential support options, the DSP provides a range of benefits including financial supports mirroring those under ESIA, 24-hour residential supports, and support for families whose loved ones live at home.[11] The DSP also provides funding for participants' special needs and day program funding.

33. To be eligible for services under DSP, an individual must have an intellectual disability, long-term mental illness, a physical disability, and/or an acquired brain injury.[12] Once deemed eligible, participants are assessed to determine the level of support they require under the residential services portion of DSP. Levels of support range from one to five. An individual with level one support needs require minimal to intermittent support and supervision, whereas an individual with level five needs requires a wide range of support, and may require direct support with some or all of their activities of daily living.[13]

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[11] Exhibit 58, DSP Program Policy, 1.0 Policy Statement at p.1

[12] Exhibit 58, DSP Program Policy, 4.1.1-4.1.2 at pp. 1-2; see also evidence of Trish Murray, June 19, 2018.

[13] Exhibit 58, Level of Support Policy, 7.1 page 24; 7.5 page 36

34. The determination of needs based on levels of support came into effect in 2014. Prior to that, classifications were loosely associated with a type of residence that could best meet an individual's needs. For example, if an individual's needs were determined to be an "ARC level of care" that meant that their needs would best be met in an ARC. However, that did not preclude DCS from looking at other options that might be suitable for an individual. There was no "small options home" classification, and residents of small options homes could have any classification.[14]

35. Once eligible for placement, the participant's name is placed on a waitlist in order of priority and the date the care coordinator received the waitlist submission form. Priority is given to adult protection applicants, followed by applicants who have an absolute or conditional discharge from: the ECFH, Community Transition Program, Community Transition House, or a participant transitioning from an ARC or RRC.[15]

36. There is a range of support options within the DSP, including (but not limited to) residential support options:

- Flex at home, and Flex independent – the Flex program was developed in response to the Department hearing from families that were looking for options for their loved ones other than DCS homes for special care.[16] Flex provides funding directly to participants or the person acting on their behalf, who live at home with family or who live independently. The funding is used to purchase supports specific to the participant's needs.[17] There are three levels of funding – the foundational allowance of up to $500.00 per month; the intermediate funding of up to $2,200 per month; and enhanced funding of up to $3,800.00 per month.[18]

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[14] JEB I Tab 3, Classifications & Assessments Manual, December, 1993, pages 48 – 62.
[15] Exhibit 58, DSP Program Policy 8.2.4 at p 12.
[16] Direct evidence of DM Lynn Hartwell, August 9, 2018.
[17] Exhibit 58; Program Policy, 5.1.1 at p 5.
[18] Flex Individualized Funding Program Policy, JEB Book IV, Tab 6-A at page 1427-1428.

- Independent Living Support Program – this program provides up to 31 hours of support per week to an individual. ILS participants are partnered with a service provider of their choice and the service provider sets up the living arrangement, and unlike Flex, funding is provided from DCS to the service provider. With Flex, the participant or their statutory decision maker, is provided funding directly.[19]

- Alternative Family Support – up to two participants live in an approved family home (unrelated) and receive varying levels of support.[20]

- Group Homes – participants receive residential living support. They tend to be larger than small options homes, and all the residents of the home generally require about the same level of support.[21]

- Developmental Residences – these also provide residential support and assistance with activities of daily living. Residents in each home generally have the same level of support. DR I homes generally have residents with moderate to severe intellectual disability; DR II generally has residents with severe intellectual disability; and DR III generally has intellectual disabilities and behavioral challenges.[22]

- Small Options Homes – these are residential options with three to four residents. Residents may require varying level of support in the same home. Some homes have a large number of staff, others have minimal staff; the staffing level depends on the needs of the clients.[23]

- Residential Care Facilities – provides residential living supports to participants who do not have significant support needs and do not have major medical or behavioral support needs.[24]

- Adult Residential Centres (ARC) – provide a residential option to those requiring a high level of supervision and support.[25]

- Regional Rehabilitation Centres (RRC) – this residential option provides a range of levels of support with activities of daily living, and high levels of support related to behavior.[26]

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[19] Exhibit 58, Program Policy, 5.1.2 at p 6.
[20] *Ibid.*
[21] Exhibit 58, Program Policy, 5.2.1 at p6; direct evidence of Tricia Murray June 19, 2018.
[22] Exhibit 58, Program Policy, 5.2.2 at p 7.
[23] *Ibid*; see also direct evidence of Tricia Murray, June 19, 2018.
[24] Exhibit 58, Program Policy, 5.3, p 7.
[25] Exhibit 58, Program Policy, 5.4.1.
[26] Exhibit 58, Program Policy, 5.4.2.

37. The DSP Program currently has about ten percent of its participants in an ARC or RRC. If RCFs are included that percentage increases to 20%.[27]

38. If a participant is hospitalized for an extended period of time, their residential support option may be cancelled. DSP policy states that the funding is to continue for 30 days, however, this is regularly extended.[28] In the cases of both Joey Delaney and Sheila Livingstone, their funding was continued for months before their funding ended when it became evident that they were too unwell to return to their small options homes.

39. In addition to residential support options, DSP also provides financial assistance that parallels that of ESIA. For an individual living in a residential support option, in addition to his/her *per diem* rate being covered, s/he is also eligible for a monthly comfort allowance, and coverage for special needs. An individual living independently or with family is entitled to a shelter allowance, personal allowance, comfort allowance, and special needs.[29] This is in addition to the supports the individual is eligible for based on the program s/he is in. For example, an individual in the Independent Living Support program receives up to 31 hours of home or personal care support each week, in addition to the shelter allowance, personal allowance, comfort allowance, and special needs.

40. In contrast to the residential supports under DSP, Employment Support and Income Assistance is a program of last resort that provides funding to those who meet its criteria. ESIA is

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[27] Direct and cross exams of DM Lynn Hartwell, August 9, 2018.
[28] Direct testimony of Tricia Murray, June 19, 2018; direct evidence of Marty Wexler, February 21, 2018; Direct evidence of Carol-Ann Brennan, June 6, 2018.
[29] Exhibit 58, Financial Eligibility Policy, 5.7.2, at p 52 – 54.

to be combined with other forms of assistance and is intended to help recipients achieve self-sufficiency.[30] There is no waitlist for ESIA because it is provided on an as-of-right basis. It is based on need and, as a program of last resort, provides for basic needs when an applicant has no other means. It provides a shelter allowance of up to $535.00 per month for one adult, a personal allowance of $275.00 per month for one adult, and provides funding for certain approved special needs.[31] In no circumstances does ESIA provide a specific residential option, and much less the residential option being sought by the to Complainants in this matter (a supportive living option of choice, in the community of choice, immediately and as of right). The annual expenditures of ESIA are approximately $310,000,000.00, the majority of which consists of ESIA payments to recipients. There are approximately 26,000 ESIA cases, and this serves 39,0000 beneficiaries.[32] As Denise MacDonald-Billard acknowledged, a significant number of ESIA recipients have disabilities. As well, as noted above, DSP participants receive financial benefits which mirror the benefits available under ESIA, and in addition receive a comfort allowance, which are also provided as of right.

Best practices for providing residential supports for persons with disabilities

41. A great deal of the Complainants' evidence, summarized in their Brief, goes to conclusions about the best practices for providing residential supports for persons with disabilities. As should be clear from the Roadmap and from the testimony of Lynn Hartwell, there is actually little disagreement on the major principles here. The Respondent agrees that residential supports for persons with disabilities have historically over-relied on the institutional model, rather that reflect

[30] Direct evidence of Denise MacDonald-Billard, June 18, 2018.
[31] JEB VII, v-2 T44, at p 5289.
[32] Direct evidence, Denise MacDonald-Billard, June 18, 2018.

the community living model. While the system has been transforming for decades, with an intensive focus on reform in the past five years, it is true that it is still over-reliant on congregant living in large facilities. The Respondent does not disagree that living in community is the preferred model of delivering residential support, or that "institutionalization" has the effects that the Complainants outline. Indeed, the Respondent chose not to call an expert witness because, in the end, any dispute in the expert evidence on this issue would be so narrow as to be of marginal relevance to the Board.

42. However, the Complainants claim not only that there is expert consensus on the best practices for delivering residential services, they also claim that this amounts to a baseline of service, below which there is a claim for discrimination. Indeed, during the testimony of Dr. Bach, the Chair identified that there was clearly a spectrum in terms of ways to deliver service, but that the question would be where on that spectrum to locate "discrimination". In light of that, it is important to keep some qualifications to this evidence in mind.

43. First, the residential supports provided through DSP are voluntary, even when they involve placement in large congregate living environments. The Complainants bristle at the characterization of these services as "voluntary", understandably, as they are often accessed by participants with very few choices. However, the Complainants' description of individuals as being "detained" in or "forced" into[33] these facilities is not correct. The Board perhaps described the situation of DSP participants best in its decision on the recusal motion:

> ...people of the kind who are being placed before me are there, as I understand it, because their disabilities and economic circumstances dictate that they be in the care of the Province. They are, by and large, under no legal compulsion to be anywhere. The Province

[33] Cf. Complainants' Brief at paras.38, 45, 312, 438, 468, 471, 505.

> looks after them because they cannot look after themselves, they cannot afford to pay for the supports they need to live in the community and there is no one who can or will take them in or pay for those supports. They live where they live because, legally speaking, they have accepted the Provincial care and the placement of them the Province has made. [34]

44. Second, if the Board is being asked to use the ideal described by Dr. Bach as the baseline for assessing discrimination, then it must be very conscious of the limits to the "consensus" on that view. Dr. Bach admitted on cross-examination that there continued to be some in the field, albeit a minority, who raise concerns about "deinstitutionalization" and its effects. He was aware of deinstitutionalization efforts in other provinces that were seen as having negative effects on the health and well-being of the residents affected, as well as indications that deinstitutionalization had led to increased presence of developmentally disabled persons in nursing homes, shelters, and jails.[35] More practically speaking, it is clear from Joey Delaney's and Sheila Livingstone's files that the team at Emerald Hall were sometimes apt to recommend that patients were suited to larger facilities. Reviews of the Province's practices also have not unanimously and unreservedly embraced the move to community-based living; for example, a 2012 Ombudsman's Report identified concerns with the placement of clients with "complex needs" in small options homes.[36] And of course, there are those within the DSP population and their families who express strong preferences for settings that are larger and more structured than a small options home; Betty Rich gave a voice and a name to this view[37], and Lynn Hartwell testified as to this being a common message heard by DCS.[38] None of this causes the Respondent to waiver in its commitment to community-based living as the optimal model. However, it should give the Board pause before

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[34] Board's decision on recusal motion, p.14.
[35] Cross-examination of Dr. Bach, February 14, 2018
[36] JEB Book V, Tab 1, p.1592.
[37] Examination of Betty Rich, August 7, 2018
[38] Direct examination of Lynn Hartwell, August 9, 2018

concluding that this model is so widely endorsed that not following it somehow amounts to discrimination.

45. Nor is it clear, among the "consensus" view, what precisely the recommended model for living in community truly is. Even something as straightforward as defining the size of a small options home is the subject of debate. The RRSS witnesses and others testified that the optimal number should not exceed three, while Dr. Griffiths identified a "magic number" of five[39]—a small distinction with massive implications for how any reform would be implemented. Dr. Bach testified that there were new and emerging ideas as to possible models for living in community,[40] and that there was less consensus on the ideal model than there was with respect to the general concept. His own model for defining an "institution"—albeit well-founded in principle—would characterize even many smaller living environments as "institutions", as they do not fully facilitate the independence and choice of the residents in the environment. He readily admitted that many jurisdictions which have "deinstitutionalized" in terms of the size of facilities relied on had not fully eliminated "institutions" on his definition. In fact, his proposal for the ideal paradigm went far beyond an individual's living environment, right down to changing the determination of what funds were to be spent on the individual and shifting control of funds to the individual rather than the state.[41] While this model has merit, he also readily admitted that no jurisdiction has achieved the kind of fundamental reform he characterized as the ideal. All of these nuances reflect part of the complex policy considerations DCS must make in providing services in this area. However, in terms of defining the standard to which the Respondent must be held in a discrimination claim, or

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[39] Direct Examination of Dr. Griffiths, March 15, 2018
[40] Cross-examination of Dr. Bach, February 14, 2018
[41] Examination of Dr. Bach, February 13, 2018

in the Chair's words locating "where discrimination is on that spectrum", there is actually little evidence of a uniform model of service delivery emerging from the broad consensus on community living.

46. Notably, the lack of a "judicially discoverable and manageable standard" for assessing government housing programs is one reason that "right to housing" claims have been considered non-justiciable in Canada:

> ...there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.[42]

47. Finally, given the historical scope of this complaint, it is worth noting that this consensus about best practice, to the extent that one exists, evolved over time. If it is appropriate to hold the Respondent accountable for the delivery of these services as far back as 1986 (which the Respondent denies,) then it is certainly impossible to say that the views about best practice that the Province had to consider in 1986 were identical to the views expressed at the hearing thirty-two years later. Dr. Bach, who has been an advocate for community living since the 1980s, conceded that in his view consensus emerged over that time frame and didn't "lock in" until the 2000s.[43] Of course, dissenting voices exist even today, as evidenced by Betty Rich's testimony. The slow and continuing evolution of the paradigm for delivering service in this area undermines

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[42] *Tanudjaja* v. *Canada (Attorney General)*, 2014 ONCA 852 (*"Tanudjaja"*) at 33.

[43] Cross-examination of Dr. Bach, February 14, 2018.

the whole idea that there is a threshold where discrimination is located at all; however, it certainly lays suspect the merits of the Claimants' historical claim of discrimination.

Hospitalization post-discharge

48. Similarly, the Complainants review in some detail the evidence going to the broad conclusion that it is inappropriate for someone with disabilities who does not require medical treatment or supervision to reside in a hospital, such as Emerald Hall. Again, as a broad proposition, the Respondent agrees with this conclusion. Residing in hospital should not be, and is not, considered a "placement" under DSP, and it has the negative effects on the individual that the Complainants cite.

49. As above, it should be noted that these references to hospital stays are all in the context of DSP being a voluntary program. No DSP participant is required against their will to stay in a hospital after discharge. This by no means indicates that a DSP participant has many options if they do not agree to stay in hospital; obviously the prospect of leaving hospital without a residence to be discharged to is a terrible prospect, just as it would be for a non-disabled person without a residence to return to. However, this does not change the fact that there is nothing mandating an individual to stay in hospital after discharge.

50. The Complainants note that some DSP witnesses were hesitant to agree to characterize the Individual Complainants' time in hospital as "inappropriate", despite questioning on cross-examination designed to elicit that admission. This was most notable in Carole Bethune's

testimony; Ms. Bethune was quite resistant to adopting the label "inappropriate". Her reasoning, however, was quite telling—she was asking herself what other options there were. This is the sort of comparative question necessary in assessing a discrimination case. It is one thing to say that an unneeded hospital stay has negative impacts. But a non-disabled person who is discharged from the hospital is left to their own resources, whether or not they have a residence to go to. There is no question that the length of the Individual Complainants' stay in hospital was problematic; but through a comparative lens, it is understandable why one might hesitate to label it "inappropriate".

51. It should also be noted that discharge from hospital does not necessarily indicate someone's readiness for a particular placement. As DCS witnesses testified, while an ALC classification may accurately reflect that someone does not require hospitalization, their circumstances may have changed such that their former residence is no longer suitable. This is a particularly relevant distinction in the cases of Joey Delaney and Sheila Livingstone, as reviewed further below.

The Moratorium

52. The Respondent does not dispute that there was a decision on the part of government in 1995 to cease the proactive expansion of small options homes, and that came to be known as a moratorium.[44] As described in documents, in 1995, the Province took over the community-based options program and the moratorium was established to enable DCS to assess the system, including identifying the population being served, and developing standards for the system.[45] However, the moratorium was not an absolute freeze; homes were developed at that time in response to the

[44] Various witnesses reported differing levels of awareness of this stance, or of the term "moratorium," but none seriously contested the fact that government ceased the proactive expansion of Small Options Homes during this period.

[45] JEB III Tab 2, at p 549 "Community Based Option Program Small Options Review" September 25, 1997.

deinstitutionalization efforts, and in response to specific concerns.[46] Many other developments occurred during that time frame, including the development of other types of community-based options:

- Seniors programs were transferred to the Department of Health thus ensuring that seniors received the correct services in the correct place.[47]
- A funding framework review in all residential homes was conducted in the late 1990's and this resulted in a significant increase in the salaries of employees at small options homes.[48]
- In 2006 – 2007 there was a management compensation salary review for all administrative staff in residential homes resulted in significant salary increases., management salaries of service providers increased significantly.[49]
- The cost of the overall program has increased. In 2005, the cost was approximately $175,000,000.00; this increased another 80% to over $300,000,000.00 by 2015-2016.[50]
- A number of new homes were created and/or expanded including developmental residences and supervised apartments.[51]
- Program capacity was also increased by the development of four to eight bed licensed facilities.[52]
- Community based options such as the Independent Living Support Program, established in 2006-2007, the Direct Family Support program, developed in 2005, and the Alternative Family Support, developed in 2005-2006.[53]

53. It is therefore erroneous to assert that the moratorium stymied growth of the Program as a whole.

54. For the moratorium to be considered discriminatory, there must be a distinction drawn on a protected ground between on those seeking small options homes (which were subject to the moratorium), and those seeking other options (which were not subject to a moratorium). However,

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[46] JEB III, Tab 3, p 555, Letter to John Hamm from John MacEachern.
[47] JEB III Tab 5, p 569, letter to W Thompson from Peter Christie, July 19, 2000.
[48] Cross Exam C-A Brennan, June 6, 2018.
[49] Ibid.
[50] JEB VI-A Tab 67 p3591.
[51] Cross Exam of Denise MacDonald-Billard, June 18, 2018.
[52] JEB V III, v 3, T 78, p 6037, Briefing Note from J. LaPierre re increased capacity.
[53] JEB VIII v. 1 Tab 29 p 4636

several of the witnesses, including Jim Fagan, Marty Wexler, and Tricia Murray, gave evidence that clearly established that persons requiring any level of support can live in a small options home. Accordingly, the distinction, yet again, is one based on type of supportive housing sought, not disability.

Waitlist

55. The Complainants state that the waitlist has grown steadily since the moratorium, and there was no waitlist before the Province took over the administration of small options homes. However, the Complainants also acknowledge at paragraph 185 the confirmation by Bev Wicks, former Executive Director of RRSS, that, in the period during which the municipalities administered small options homes prior to the moratorium, RRSS maintained its own waitlist and wait time could be up to a year.

56. While it is not in dispute that the moratorium was a factor in the growth of the waitlist, so too is the increased cost of the program, which has increased by 80% since 2005.[54]

57. The Province acknowledges that there is a waitlist for most services of the DSP, with the exception of Flex at Home. However, the waitlist does not consist solely of those with no supportive housing who are waiting to be placed immediately. The waitlist is actually comprised of several components:[55]

- Individuals are ready for immediate placement who do not currently have DSP service (419 people as of August 14, 2017);

[54] JEB VI-a, V.3, Tab 64, p 3462.
[55] JEB VII, Tab 21, at p 4180.

- Individuals who are receiving a DSP service, but are seeking something different (699 people as of August 14, 2017);
- Individuals seeking placement in the future (306 people as of August 14, 2017).

58. The average wait time was 2.94 years as of August 31, 2015.[56] So, while some individuals do wait longer than three years, many wait less. The Complainants have pointed out that one person has been on the list for 19 years. However, what the Complainants do not acknowledge that, without more information, little can be gleaned from the figure of 19 years. We do not know if that person has been ready for immediate placement for all or part of that time frame, what type of option s/he is seeking, or whether s/he has been offered and turned down placement offers. Given the significant unknowns, little value can be placed on the number.

59. Patryk Simon, Manager of Intake, registration and Reporting for the Nova Scotia Health Authority, presented figures on wait times for persons at ECFH. He testified that the average time that ECFH patients are waiting for an assessment is 371 days. However, in cross examination, Mr. Simon acknowledged that gathering "point in time" data, as he did for his report, was not the preferred method for gathering data and that there could be one or two "outliers" that would skew the data in favour of longer waits. He also agreed that those who wait less than a month for assessment are invisible in the data, as the point in time assessment does not capture them. As a result, the true average for all at ECFH is less than 371 days; Mr. Simon specifically agreed on cross-examination he could not support that number based on the flaws in his analysis.[57] Carole Bethune, the care coordinator for complex cases, testified that, in her experience, on average, it

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[56] JEB VII T15 at p 4124.
[57] Cross exam, Patryk Simon, June 4, 2018.

takes her a couple of weeks for an assessment, the outside range being about six weeks. Accordingly, the average time for assessment does not capture everyone, and is skewed in favour of longer wait times, which is not an accurate reflection of the reality of assessments for ECFH patients.[58]

Unclassifiable DSP participants, and coordination with the health system

60. The Complainants raise issues with the means used for determining eligibility for DSP residential supports, in particular a previous classification policy under which an individual might be considered "unclassifiable". As Lynn Hartwell testified, DCS determined that there were problems with this practice, which changed in 2013.[59] However, it is important to understand some context around this policy, and equally important to clarify how different the policy is today.

61. Determining eligibility for residential services under DSP (but, importantly, not financial supports under DSP) formerly involved a system of classifications which loosely corresponded to a type of facility (ARR, RRC, DIII, etc.) There were also criteria on which a participant might be considered unclassifiable for residential supports. These criteria varied, but the purpose was to attempt to capture reasons why placement in a home for special care may be inappropriate. Some criteria related to medical needs, others to the individual's ability to remain safe in the placement. For example, some criteria had to do with whether managing the person's care involved using restraints or a locked door, which could not be reproduced in a placement due to fire code regulations.[60]

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[58] Direct, Carole Bethune, August 8, 2018.
[59] Testimony of Lynn Hartwell, August 9, 2018.
[60] Testimony of Carole Bethune, August 8, 2018

62. An example of the application of the policy is found in the 2006 appeal of Beth MacLean's designation as unclassifiable; there, the Board found that she "continues to be at risk for unpredictable aggressive behavior towards staff and others" and was "a risk to herself and others".[61] This shows the policy working for a legitimate purpose of promoting safety. Indeed, Denise MacDonald-Billard wrote about the importance of this decision in convincing the hospital system to reduce reliance on locked doors, which was preventing patients from being appropriate for DCS placements. She expressed the need "to meet the criteria so that their placement in DCS homes is safe for staff and residents."[62]

63. It should be noted that aside from its application to two of the Individual Complainants, the Board heard little testimony about the overall operation of the unclassifiability policy or in what circumstances it was generally applied. It would be inappropriate for the Board to draw broad conclusions about this policy from the limited documentary references to it. Moreover, the Complainants suggest that Dr. Bach testified that this "is not done elsewhere in Canada".[63] However, there is no reference in Dr. Bach's two reports, his testimony, or the testimony of Dr. Griffiths touching on the classification practices in other provinces. There was no evidence presented by the Complainants to support this point, and thus no opportunity for the Respondent to cross-examine or offer contrary evidence on the issue.

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[61] JEB Book IX Tab 41, p7347.
[62] JEB Book IX Tab 42 p 7349.
[63] Complainants' Brief at para.447(v)

64. As for the present situation, the Complainants suggest that the evidence was conflicting[64]; in fact the change in policy was clearly explained by Carole Bethune, and is reflected in Exhibit 58. The policy now severely limits the circumstances which indicate ineligibility for the DSP. Moreover, in any cases where a participant is considered to have needs beyond those reflected in the five levels of support, the case now remains open so that Care Co-ordinators can assist in addressing the issues and facilitating placement. While not entirely relating to the issue of "complex cases", it certainly relates to the change in approach to such cases described by Ms. Bethune, with cases now co-managed with the Department of Health and Wellness where necessary to prevent the "silos" problem from preventing an appropriate resolution. Both Lynn Hartwell and Dr. Scott Theriault testified to significant efforts to eradicate the "silos" problem in the past five years.[65] While the Complainants point out that complex cases may not appear on a waitlist, Ms. Bethune clarified that this is because they are not waiting for the regular suite of possible placements, but instead waiting while special arrangements are actively worked on. While she admitted there were no dedicated special funds for the complex cases on her workload (which would be difficult to budget for,) she also testified to her 100% success rate in getting the funds necessary to resolve complex cases in her caseload.[66]

Validity of the Assessment Tools

65. The Complainants assert that the Province's classification tools – the former Functional Assessment "Form B" and the current Individual Assessment and Support Plan (IASP), are invalid,

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[64] Complainants' Brief at paras 239, 240

[65] Cross-examination of Dr. Theriault, June 11, 2018; testimony of Lynn Hartwell, August 9, 2018

[66] Cross-examination of Carole Bethune, September 19, 2018

implying that the assessments of any or all of the complainants was flawed and the results, thus, unreliable. They specifically reference a 2016 presentation in which the IASP is stated to be "invalid." However, Tricia Murray gave evidence on this, and was clear that the concern raised with the IASP in that context related to use of the current assessment tool in a transformed system, and that for budget allocation, this tool is not useful. It was acknowledged by Deputy Minister Lynn Hartwell that the assessment tool is something that is discussed frequently, and the current tool serves its purpose to clarify the need people have.[67] Importantly, Deputy Minister Hartwell also confirmed that there is no perfect assessment tool out there; if there was, "everyone would be using it."[68] The question is what tool best serves the purpose as the Department moves from an inclusion model from a medical model. There are flaws in the current assessment tool for that purpose, and the Department is currently testing other tools.[69]

66. However, even is if assumed for the sake of argument that both the current and former assessment tools are "flawed" or "invalid," this does not render them discriminatory. Again, the comparative analysis comes into play and requires an adverse impact on those subject to the tool, and that this adverse impact be due to their disabilities. There is no evidence before this Board in that regard. This is in contrast to the situation in *Wonnacott v. Prince Edward Island (Department of Social Services and Seniors)*[70] in which the impugned assessment tool was determined to be discriminatory precisely because it favored individuals with physical disabilities over individuals with autism, as it awarded higher points (which corresponded with more supports) to individuals

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[67] Direct, Deputy Minister Lynn Hartwell, August 9, 2018.
[68] *Ibid.*
[69] *Ibid.*
[70] (2007), 61 CHRR D/49.

with physical disabilities, compared to the complainants who had autism, but were not otherwise physically disabled.[71]

Evidence Relating to Individual Complainants

Jim Fagan's Evidence and Reports

67. Jim Fagan is the Director of Residential Supports for RRSS. Mr. Fagan provided evidence to the Board as to whether RRSS could have supported the three individuals during their time in hospital, and in Beth's case, while at Kings. He acknowledged during his direct exam that RRSS' philosophy was that everyone could be supported to live in community and when he approached the files, it was with the philosophy in mind. In other words, there was no other answer to the question of whether RRSS could support these individuals—it was predetermined by RRSS' own philosophy to be an unequivocal yes. Unremarkably then, Mr. Fagan determined that RRSS could support the three individual complainants throughout the time of their claims.

68. Mr. Fagan discussed the process for assessing an individual for a small options home with RRSS. He noted that when looking to fill a vacancy in a home, the Admissions Committee does an initial screening of possible residents, and then a more thorough screening will occur of those who appear to be a possible fit. The individual who appears to have the best fit with the home and its residents will be selected. As has been noted by other witnesses, RRSS looks to fit the person into the home. If an individual has been referred to RRSS for an opening, RRSS determines whether to accept the person into the home. If they refuse, DCS can come back and ask whether

[71] *Ibid,* at Par. 84.

there are supports that can be put into place to create a fit; however, DCS cannot force RRSS to accept any residents into a home as it is ultimately an RRSS decision.

69. However, this is not approach that Mr. Fagan undertook in determining whether RRSS could have supported Beth, Sheila and Joey. It is clear from his report that he was considering whether RRSS could support them if the home and co-residents were "built" around these individuals. Not only is that contrary to the process that DCS and RRSS have used for decades to fill vacancies, it is highly speculative. The speculative nature of this exercise is further supported by the fact that Joey Delaney and Sheila Livingstone were actually both in RRSS homes prior to their admission to Emerald Hall, and could no longer be supported by RRSS in their homes. Additionally, Beth MacLean was considered for an RRSS home and by letter on April 26, 2014 Brenda Dixon of RRSS wrote to Mary Anne Hannas of DCS and advised that Beth would not be suitable for that home.[72]

70. This exercise is also the antithesis of the process of a true impartial expert who approaches their question with an open mind to all the possibilities. The lens through which Mr. Fagan approached this exercise was far narrower in scope. To RRSS and Mr. Fagan it was not really a question of "if" Beth, Joey and Sheila could be supported, but rather was a question of "how."

71. In addition, Mr. Fagan acknowledged on cross exam that even with creating a positive environment for clients and supporting them does not guarantee success. So, although he

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[72]JEB IX, Tab 86 p 7581.

speculates on the ability to support the individuals, it cannot be concluded unequivocally that any of the placements would have been successful.

72. In essence, Mr. Fagan's reports reflect a more specific instance of a general principle that is accepted in the Roadmap—that all individuals, with proper supports, can be supported to live in community. The Respondent does not dispute this principle, but submits that little weight should be given to the reports as though they were anything more than speculation following that principle.

Joey Delaney

73. Much is in agreement between the parties about Joey Delaney's early history and admissions to Emerald Hall. It is not in dispute that he was placed at the Dartmouth Children's Training Centre when he was about seven, and when the CTC closed, was placed into a couple of different small options homes, most recently at a home on Skeena Street. There is largely agreement on Joey's medical issues, which included severe intellectual disability, significant intestinal issues, and a cyclical mood disorder. Nor would it seem to be in dispute that his placement ended in July 2010 after he had been in Emerald Hall for almost six months. It is agreed that Joey was placed at Quest in February of 2015, but due to medical issues, was readmitted to Emerald Hall in January of 2015. However, there are several areas in Joey's history that the Respondent wishes to clarify.

74. Upon his admissions to Emerald Hall in late 2009 and into 2010, staff at his small options home were concerned for Joey's safety at home, as he was experiencing profound vocalizations, frequent screaming, and self-abusive and at time, aggressive behaviors. Tricia Murray had

ongoing conversations with RRSS staff about returning Joey to his home during this time because the goal was to return Joey to his small options home. However, the home attempted two returns – one in January of 2010, and another in March of 2010 – both of which were unsuccessful.[73] Both Ms. Murray and Suzanne MacConnell, manager of the home, attempted to contact Joey's mother at this time; neither was able to reach her.[74]

75. Joey underwent a classification assessment on June 11, 2010 and his classification changed from Developmental Residence III, to RRC.[75] While this did not preclude Joey going to a small options home, it did signify that the level of care that Joey now required had increased significantly.

76. At this time, the Emerald Hall physicians commented several times that Joey did better in a large place, rather than in the small space of a small options home. Comments such as, "[o]ne concern has been that Joey seems to enjoy being at the NS Hospital and often was not showing the same symptoms at hospital that he does at home." and that Joey, "...appears happy here he needs a big place like this" were not infrequent.[76] This was a factor in looking at possible placement options, although it was known that Joey's mother was looking for a small options home for Joey. If a facility-based option came up for Joey, it could be rejected by his mother with no repercussions.[77]

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[73] JEB X, Tab 8 see note of Jan 22, 2010 p 7796; See also Incident reports from January and March of 2015 documenting significant behavioral and injurious behaviors at JEB X, Tab 15, p 7830 – 7878
[74] Direct, Tricia Murray, June 19, 2018.
[75] Cross exam of Tricia Murray, June 20, 2018; JEB X, Tab 21 at p 7898.
[76] JEB X, T 6, page 7798, Feb 27, 2009 note.
[77] Cross exam, Tricia Murray, June 20, 2018.

77. While at Emerald Hall, Joey's health fluctuated, and as a result, so too did his behaviors. During this period, his medications were changed, he went through a period of frequent seizure activity, and was started on Electroconvulsive therapy (ECT).[78]

78. In February of 2015, when the option for a place at Quest arose for Joey, Ms. Murray contacted and was able to reach Ms. Lattie, who agreed to the placement without reservation. Ms. Murray offered to meet with Ms. Lattie regarding the move; Ms. Lattie declined.[79] Joey moved to Quest on February 26th, 2015 and initially settled in well; however, his condition began declining after a period of time and Joey was readmitted to Emerald Hall in January of 2017.

79. Mr. Fagan, upon review of Joey's information, found that Joey could be supported in a small options home from June of 2010. The proposed living arrangement for Joey would be by himself, or with one other person, with careful design of the living space to account for Joey's large vocalizations. He would have one-on-one or two-on-one staffing at all times, and staff would have to have specific training to support Joey's medical and psychiatric needs. The cost would be between $608.97 to $847.34 per day, or $222,274.05 to $309,279.10 per year for Joey. If he had a roommate with similar needs, the costs would be twice that.

Sheila Livingstone

80. As with Joey Delaney, much about Sheila Livingstone's history is not in dispute. Sheila's early history in various facilities and hospitals is out of scope for the complaint, and therefore not challenged. Sheila's numerous health conditions are agreed upon, and include schizophrenia,

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[78] JEB X Tab 47, p 8032; see also medical notes at Exhibits 31, 33.
[79] Direct, Tricia Murray, June 19, 2018.

cyclical mood disorder, intellectual disability, heart failure, renal failure, and several occurrences of cancer. The Respondent therefore will focus on the few years leading up to Sheila's admission to Emerald Hall and her time at Emerald Hall and Harbourside to clarify certain points.

81. At the outset, it is pertinent to note that the Complainants state that the Respondent "could obviously have compelled Ms. [Cathy] Wood [Sheila's care coordinator] to have the 'the best evidence' available for the Board ..." (at par 89). To confirm there is no onus on the Respondent at this stage to prove or disprove anything about Sheila's experience. If the Complainants were of the view that Ms. Wood was essential to provide the 'best evidence' regarding Sheila, they could have compelled her to testify.

82. Between 2001 and 2003, Sheila's health was unstable and several requests were approved for additional staff to support Sheila at her small options home.[80] In the year leading up to her admission at Emerald Hall, between July of 2003 and July of 2004, Sheila spent a total of 104 days at Emerald Hall as a result of both physical and mental health conditions.[81] The admissions likewise continued between July of 2004 and September of 2004 due to extreme behaviors.[82] By September 2004, Dr. Tomlinson felt that Sheila was not stable, was very resistant to treatment and would not be improving any time soon. As a result, in September of 2004, the funding for Sheila's small options home placement ended.

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[80] JEB XI v1, Tab 14, at p8286; see also funding approvals in in August- September 2001 at Tab 8, p8234; February 2002 at Tab 12, p 8252, and February, 2003 at Tab 14 p 8286.
[81] JEB XI, v1, T15, p 8289.
[82] JEB XI, T 6, p 8215, 8216.

83. The Complainants state at paragraph 116 that Sheila was medically discharged on April 11, 2005, and state that other than between June-November 2005, Emerald Hall staff were consistent for the remainder of Sheila's time at Emerald Hall that she could be supported outside the hospital. However, the Respondent received Emerald Hall Monthly Summaries for Sheila for the period of July 2004 to April 2011 that describe numerous incidents of irritability, crying, and screaming as a result of her medical conditions. There are also numerous incidents of Sheila being aggressive and also accusing others of being aggressive towards her.[83] In addition, her medications were adjusted frequently.[84] As discussed by Ms. Lockhart-Singer, these fluctuations in Sheila's health and resulting behaviors made placement a challenge for Sheila in that period.

84. Sheila was classified by the Department on November 23, 2011. It was observed at that time that although Sheila continued to have aggressive episodes, the frequency and intensity had decreased since the last review. She was classed ARC at that review.

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[83] These issues were noted on most of Sheila's monthly summaries. See, in particular, Book XI, Tab 16 for the following specific reports – January 2005 p8304 Behaviour noted as "cranky and moody almost every day.", April 2005 p 8310 General behavior pattern noted an "increase in crying episodes but a decrease in non-compliance.", July 2005 p 8316], August 2005,p 8318 , October 2005 p 8322 , Behavior noted as "irritable, and cranky episodes screaming in bedroom majority of month." March 2006 8330, June, 2006 8336, August 2006 p 8340 , – "Continues to be irritable at times every day. Verbal and physical aggression displayed. Daily crying / screaming episodes. Can be pleasant and cooperative otherwise.", September 2006, 8342, October, 2006 p 8344 Noted - Increased irritability with periods of aggression to staff and increased crying and accusing others of hurting her." December 2006 p8348 , March, 2007 8356 Behavior noted, "increased agitation and verbal and physical aggression to staff. Increase in prn med and med changes to address this.", July, 2007,8362 February, 2008, p 8374 "Agitated and crying continues on a daily basis. Confusion relating to time of day." May, 2008 p8380, June, 2008 p8382 , August, 2008, p 8386 "continues with agitation, aggression and confusion. Asks for van rides repeatedly when already given an answer. Often is sent to bedroom for crying, screaming, and accusing people of hurting her.", December, 2008, p 8392, February, 2009 8396 Behavior noted, "a few good days mood wise but irritable and cranky other times. Great intensity of aggression towards staff and co-clients." June 2009 p8404 , August 2009 p8408 , November, 2009, p 8414 , Behavior noted, "still experiencing frequent irritability, crying, screaming, attempted aggression to staff. Remains easily provoked and argumentative", April, 2010 p 8424 , August, 2010, p 8430 Behavior states that, "mood can be very labile daily. Often has many episodes of crankiness yelling and attempts to hit scratch staff and co-clients.", October, 2010 p 8434, April, 2011, p8438, behavior notes that, "mood continues to be very labile, almost daily bouts of irritability."

[84] Medication changes were noted frequently in the monthly summaries pp. 8292 – 8439, including – May, June July, September, November of 2006; January, March, April, July, October, 2007; January, February, July, August, November of 2008; Also in November of 2008 began ECT treatments; February, April, August, October, 2009; July, August, October, 2010.

85. The Complainants assert that Sheila was ready for discharge when the ALC form was completed on April 11, 2005, and therefore for the entire period of April, 2005 until January, 2014 (with the exception of a short period from June to November, 2005), Sheila could have lived in community. There are actually three ALC dates in Sheila's file – April 11, 2005, December 14, 2007, and November 23, 2011.[85] Ultimately, it is not clear when Sheila was finally cleared for discharge from Emerald Hall as each date would indicate that it was at that time that Sheila was stable, implying that prior to that date, she was not. None of the medical professionals who cared for Sheila during this period were called by the Complainants to clarify this.

86. Much as in Joey's case, the medical professionals involved in Sheila's care indicated that in their view Sheila would do better in a larger facility than a small options home.[86] As Ms. Lockhart-Singer testified, these comments were consistent with what was recommended to her by the medical team during discussions about Sheila; this was consistent with Dr. Sulyman, who testified that the team felt a nursing home would be the right option for Sheila.[87] Ms. Lockhart-Singer attempted numerous times to contact Sheila's family to discuss, but was unable to reach them.

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[85] JEB XI, v. 1, T 31, p 8545, 8690; v.2 T78 at p 8626.

[86] See for example, JEB XI v. 1 T32 p 8548 the Medical and Assessment Form (Form E) for Sheila on April 11, 2005, and re-signed by Dr. Tomlinson on July 6, 2007. Dr. Tomlinson states that Sheila, "does well in an institutional setting, despite chronic psychosis." See also JEB XI v.1, T13 p 8262 March 3, 2006 Medical Form E signed by Dr. Riives that stated, "Sheila prefers to live in a congregate care setting where there is always something interesting to observe. We feel she finds a small setting (small options) too personal and confining. ..." This form was re-signed by Dr. Tomlinson on December 14, 2007. As Ms. Lockhart-Singer testified, these comments were consistent with what she was told by the medical team, as care coordinators look to the medical team to provide a recommendation and family members are invited to the classification meeting and would be advised of this by the hospital.

[87] Direct testimony of Dr. Sulyman, March 3, 2018

87. Sheila went to live at Harbourside ARC in January of 2014. On cross examination, Olga advised that of all of the places that Sheila had lived, Topsail was the best, and Harbourside was the second best.

88. Mr. Fagan reviewed Sheila's file and speculated that Sheila could have been supported by RRSS from about 2004. Mr. Fagan opined that Sheila's stability did not seem to change significantly while on Emerald Hall. However, this is at odds with the monthly summaries, which note ongoing and significant behaviors, and frequent medication changes. Mr. Fagan indicated Sheila could have lived in a house with two other women with at least 2 – 3 staff on at all times. He states that staff would have to have specific training with respect to Sheila's needs. The cost would be between $463.00 and $515.61 per day, or $168,995 to $188,197 for Sheila. If there were three people in the home, the cost would increase to between 506,985.00 and $564,591.00 per year.

Beth MacLean

89. Again, the basic facts of Beth MacLean's history are not in dispute, and there is less medical evidence relevant to her claim—while she occasionally received medical care, her time in hospital was an exceptional arrangement not related to her medical needs. However, there are a number of evidentiary points which require response or clarification.

90. The evidence with respect to Beth was largely presented through documents (reviewed as they were by witnesses who had limited ability to speak to them.) There were no witnesses who had any direct knowledge of Beth's time prior to her coming to Emerald Hall in 2007, other than

Beth herself, whose evidence was quite limited in detail. The Complainants note, as they have on other issues, that the Province's main witness with respect to Beth (in addition to Denise MacDonald-Billard, who had some involvement with her file) was Carole Bethune, whose direct responsibility for Beth's case began in 2016. Indeed, given the limited areas of dispute in the evidence, the province did not call Christine Pynch out of retirement to testify; it is of course for the Complainants to provide the best evidence to demonstrate their case, not for the Respondent to provide "best evidence" in response to a case that was not made out by the Complainants. Certainly the Complainants had the option to call Ms. Pynch, just as they could have called any number of witnesses who could have testified and been cross-examined about Beth's history. Dr. Riives, for example, whose name came up extensively with respect to Beth's time at Emerald Hall, was on the Complainants' witness list but not called; they instead called Dr. Sulyman, who admitted that Beth was not her patient at Emerald Hall.

91. There was a great deal of discussion at the hearing as to Beth's capacity to make placement decisions. In the end, we agree with the Complainants that her capacity is ultimately a minor issue, as there is no indication that the question of her capacity actually affected any specific placement possibility. However, in terms of the broad claim that Beth could have been placed in a community-based option for her period in Maritime Hall and Emerald Hall, it is worth noting that this is not clear from the evidence. There was, at the very least, a legitimate question as to her capacity, and her parents were very clear that they would not consent to placement in the community; their experience of Beth's violence caused them concerns about the safety of this plan for Beth and for others.[88]

[88] Direct examination of Carole Bethune, September 6, 2018

92. With respect to Beth's capacity to make placement decisions, what we know is that Christine Pynch, following a review of Beth's information with the Emerald Hall team in 2012, sent paperwork to Beth's parents about being her decision-maker for purposes of placement.[89] In 2013, the case notes directly indicate that Dr. Riives considered that Beth lacked capacity to make such decisions; in subsequent discussions, her parents indicated they would not consent to a community placement.[90] A capacity assessment later in 2013 indicated that Beth had capacity to instruct counsel, but did not directly address her capacity to consent to placement.[91] In 2016, the question of such capacity continued to be unclear to the point that NSHA legal counsel requested an assessment from Dr. Sulyman, which confirmed that she had capacity.[92] With that clarified, DCS has operated on the basis that Beth is the decision-maker on placement since that time.[93]

93. Carole Bethune testified that a Care Co-ordinator would take guidance from medical professionals as to issues of capacity, and would never asses the issue independently from a medical professional. It is clear that the Care Co-ordinator looked to Emerald Hall staff to determine capacity, and followed the determinations that were made. Dr. Sulyman testified that capacity could only be determined with respect to a specific question, not globally[94]; thus, an assessment of capacity to instruct counsel cannot be taken as indicating capacity to consent to placement. She also testified that capacity is not fixed and can fluctuate[95], so one cannot assume from the fact that Beth had capacity in 2016 that she had capacity at prior points.

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[89] JEB Book IX Tab 3, p.7137
[90] JEB Book IX Tab 3, p.7136
[91] JEB Book IX Tab 78
[92] JEB Book IX Tab 98
[93] Direct examination of Carole Bethune, September 6, 2018
[94] Cross-examination of Dr. Sulyman, March 4, 2018
[95] Cross-examination of Dr. Sulyman, March 4, 2018

94. There are some aspects of Beth's history that should be put in context. For example, the Complainants discuss the time spent at Maritime Hall as spending most of her time "locked in her room". While no other testimony was called on this point, the agreed documents add important context, making it clear that, at least by 2007, it was Beth herself who insisted on the use of a locked ½ door; hospital staff were working with her to increase the time she was comfortable without the locked door, as its use was impeding her ability to transition out of the hospital.[96] Ultimately, it is difficult to assess much more than the basic details of Beth's time at Maritime Hall, as the Complainants did not call witnesses who could speak to this period with any direct knowledge.

95. The Complainants' summary of evidence also severely understates the regular and ongoing issues Beth encountered with aggressive and violent behavior. The file is replete with comments about her behavior control issues, and the evidence of violent behavior ranges from noted of Beth's parents concerns from her early life, to her placement at Kings ending due to violence towards a staff member resulting in police involvement,[97] to the incidents that led to the end of her only experience living at a small options home,[98] to continued incidents against current co-residents at CTP.[99] Beth herself frankly recognized that "I am a violent person … no one tells me that, I say that myself."[100]

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[96] JEB Book IX Tab 44, p.1 (note that this is one of the documents recently corrected in the JEB due to a production error)
[97] JEB Book IX Tab 3, p.7148
[98] Direct testimony of Carole Bethune, September 6, 2018
[99] Direct testimony of Carole Bethune, September 6, 2018; Exhibits 75, 76
[100] Testimony of Beth MacLean, March 5, 2018

96. This is not to demonize Beth or to overlook the relationship between her frustration at her living conditions and her behavior, but it is undeniable that her aggressive behavior was a factor in the difficulties she encountered both within her living environments and in finding other placements. For example, her "outbursts" were explicitly a reason why the service provider considered her not a good fit for the proposed Thomas Lane placement.[101]

97. While the Complainants suggest that Beth's focus has been exclusively on placement in small options homes, there is evidence to the contrary. For example, the record indicates that during her time at Kings Beth was upset at the prospect of leaving the Centre for a small options home.[102] Her former counsel specifically requested that she be returned to Kings (which was not possible due to her violence against staff there)[103]; Carole Bethune also testified to Beth's occasional requests to be placed at other facilities.[104] She also testified that, though there is evidence of Beth being placed on waiting lists for facilities other than small options homes, and even of Ms. Pynch recommending other options, none of this would have interfered with her consideration for any small options home placement that came up.[105]

98. Finally, as to her one actual experience residing at a small options home at Kearney Lake Road, the evidence is clear that this did not go well; while no one from KLR testified, Ms. Bethune joined the Complainants' own witnesses in acknowledging that the service provider might have avoided the breakdown by handling the situation differently. However, she also testified as to her comfort with that service provider's ability to handle complex cases, and to the significant work

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[101] JEB Book IX, Tab 88.
[102] JEB Book IX, Tab 6, p.7190
[103] JEB Book IX, Tab 37
[104] Testimony of Carole Bethune, September 6, 2018 and September 18, 2018
[105] Re-examination of Carole Bethune, September 19, 2018

that went into preparing both KLR and Beth for that placement. Beth herself consented to the placement, apparently without reviewing the matter with her advocate Ms. Pushie or with Mr. Calderhead, despite Ms. Bethune's encouragement to do so (and her failed attempts to contact Mr. Calderhead herself.) Again, without suggesting that Beth is blameworthy in the events, nonetheless her issues with behavioral control led to police involvement and a breakdown of the placement. If nothing else, this goes to show that the involvement of third party service providers, who ultimately decide on whether a placement should be offered and when it should be ended, further complicates the already difficult work of providing residential supports.

99. Mr. Fagan opined that Beth could have been supported to live in community with RRSS from the time she was 18 in 1990. His opinion was due, in part, to the positive behavioral approaches RRSS has used with other individuals with similar challenges. The proposal for Beth was to create a home for Beth with one or two other women, with two to four staff on, depending on the time of day; staff would have specific training to support Beth's medical and psychiatric needs. The daily cost for this was estimated to be between $608.97 - $847.34. If Beth has two roommates, the cost to run this home would be $1,826.91 - $2,542.02 or $666,822.15 - $927,837.30 annually.

IV. ARGUMENT

Residential supports under DSP are not mandatory under the relevant statutory scheme

100. Before analyzing the Complainants' discrimination claim on its own terms, it is necessary to clarify one legal argument made in their Brief which does not, strictly speaking, go to the issue

of discrimination. The Complainants appear to make the argument that the Respondent is legally required to provide access to residential supports immediately and as-of-right, not under the *Human Rights Act*, but under the terms of the *Social Assistance Act* itself.

101. The Complainants construe the Respondent's position as being that these services are instead "discretionary". While this word gets used to describe non-entitlement-based programs, it has a sense of arbitrariness to it; it would be more precise to say that the services are not as-of-right, or that their availability is subject to limits. Certainly, however, it is correct that the Respondent does not consider residential supports under DSP to be an as-of-right benefit. The Complainants' Brief challenges this as a violation of the *Social Assistance Act*. In other words, it contends that the failure to provide the precise services requested by the Complainants in this case is a breach of the Respondent's legal obligations, short of any discrimination analysis.[106]

102. The Respondent's objections to this are several. First and foremost, 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 entitlement under the Act are the purview of the Assistance Appeal Board, a specialized body whose role 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 lawif it were to consider the question raised by the Complainants here.

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[106] The Complainants allude to this argument throughout their Brief, and appear to state it most clearly at paras.477-488.

103. Regardless, the Complainants' interpretation is simply wrong on the face of the Act. The Act does create an obligation to provide "assistance", but that does not translate into a mandatory requirement to provide all possible forms of assistance immediately and as of right. The definition of "assistance" under the Regulations is broad:

> 1 (e) "assistance" means the provision of money, goods or services to a person in need, including
>
> > (i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,
> >
> > (ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements, funeral and burial expenses and comforts allowances. The Director may approve other items of special requirement he deems essential to the well being of the recipient,
> >
> > (iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,
> >
> > (iv) care in homes for special care,
> >
> > (v) social services, including family counselling, homemakers, home care and home nursing services,
> >
> > (vi) rehabilitation services. [107]

104. As argued further elsewhere in this Brief, all qualified DSP participants are entitled to financial assistance under the Act, immediately and as of right. Thus, the Province discharges its obligation to provide "assistance". It stretches logic to argue that every applicant is entitled to everything else that fits the definition of assistance in the same way as they are entitled to financial assistance. This is contrary to all of the evidence at the hearing as to the operation of the Disability Support Program, right up to Deputy Minister Lynn Hartwell, who testified that the Department considered financial supports, which exists under ESIA and DSP, to be an "entitlement program,"

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[107] *Municipal Assistance Regulations*, N.S. Reg. 76/81 (as amended), s.1.

but that the residential services of DSP were not mandated by statute. An interpretation which runs so radically different from the current practice of the Department, with massive financial implications for the Department, should not be left up to a Board of Inquiry which has a different mandate entirely.

105. Moreover, this interpretation of the *Social Assistance Act* would have absurd consequences. It would mean that the Province, today, has an obligation to provide any DSP applicant with "care in homes for special care" immediately and as of right. As the Board has heard, "homes for special care" is a defined term which covers everything from RRCs to Small Options Homes of three or more residents. There are community-based options open to DSP participants which do not meet the definition of "homes for special care"; the Province would be mandated to overlook those options and focus on its larger options. In all likelihood this would increase the use of RRCs and ARCs, the largest of the homes for special care with the most capacity to take on such a massive increase in numbers. This would run counter both the Province's and the Complainants' vision for transformation of the DSP.

106. The Complainants attempt to support their position with case law interpreting the *ESIA Act* and *Social Assistance Act*. However, the cases cited deal with entitlement to financial assistance; they do not stand for the proposition that all forms of "assistance" under the *Act*(s) must be provided as of right. They do not stand for that proposition even within the limited realm of financial assistance; for example, the Supreme Court in *Woodard* v. *Lynch* finds:

> The framework for providing municipal assistance to persons in need is not so rigid that if a person is eligible, he gets all the basic requirements forthwith. The city can decide who is eligible for full benefits and who is not.[108]

[108] *Woodard* v. *Lynch* (1983), 64 N.S.R. (2d) 429 (S.C.)

107. Likewise, *Halifax (City)* v. *Carvery*[109] finds that entitlement to emergency benefits can be considered discretionary without being in violation of the Act. None of these cases is particularly helpful with respect to entitlement to residential supports under the DSP, but they certainly do not stand for the broad position that all forms of assistance under the Acts are mandatory and as of right.

108. The Complainants, to bolster their claim that the Province is legally mandated to provide small options homes for all DSP participants, cite s.36 of the *Constitution Act, 1982* for the proposition that failure to do so is a "breach of its constitutional commitment". This creative interpretation of s.36 runs contrary to the constitutional text itself, and the caselaw considering it. The wording of s.36 itself states that it does not limit provincial legislatures "with respect to the exercise of their legislative authority". [110] Case law confirms that s.36 is a commitment between federal and provincial governments about equalization payments. If it is justiciable at all, it is justiciable as between one level of government to another; the Constitution does not "encompass

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[109] (1993), 123 NSR (2d) 83 (C.A.)

[110] The text reads:

> 36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
>
> (a) promoting equal opportunities for the well-being of Canadians;
>
> (b) furthering economic development to reduce disparity in opportunities; and
>
> (c) providing essential public services of reasonable quality to all Canadians.
>
> (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

a state guarantee of minimum and constitutionally enforceable standards of living," and s. 36 "cannot reasonably be construed to establish such an enforceable right."[111]

109. With respect, it is not entirely clear that the Complainants truly mean to argue that the *Social Assistance Act* today, properly interpreted, requires that residential services be provided. If they did, then one would have expected this case to originate as an appeal to the Assistance Appeal Board, which in that case would clearly have jurisdiction to rule on the Complainants' entitlements. The Complaint itself does not raise this argument, and in fact the DRC's Complaint runs counter to this argument by seeking "the development and enactment of legislation which creates a legally enforceable right for people with disabilities to community-based, supportive housing".[112] There would be no need to seek that legislative reform if the *Social Assistance Act* already provides that as a guarantee today.

110. The Respondent submits that this Board of Inquiry has no jurisdiction to find the Province in violation of its obligations under the *Social Assistance Act*, which the Complainants' argument would require. Even if it did have such jurisdiction, the Complainants have not demonstrated such a violation; the consequences of such a ruling would be monumental and run contrary to case law and existing Department practice.

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[111] *Cape Breton (Regional Municipality)* v. *Nova Scotia (Attorney General)*, 2009 NSCA 44 at para.61. The Complainants also suggest that the dissenting opinion in *Saskatchewan Federation of Labour* v. *Saskatchewan*, 2015 SCC 4 supports their interpretation, and does not on this point dissent from the majority opinion (Complainants' Brief at fn.523.) Whatever one makes of the dissent's comments about s.36, they are part of the dissent's arguments about the interpretation of s.2(d) of the Charter, which is precisely the argument rejected by the majority in that case.

[112] Complaint at para.180.

What is discrimination?

Test for discrimination

111. The Respondent, in its Pre-Hearing Memorandum, made submissions as to the test for *prima facie* discrimination and its application to this case, and its argument has not materially changed. While trying to avoid repetitiveness, however, it is useful to restate those arguments now that the evidence has been heard and the Complainants' final arguments on the point have been made.

112. The most recent authorities on the meaning of discrimination under the *Human Rights Act* have actually come down since this hearing began in early 2018. First and foremost among those authorities is the Nova Scotia Court of Appeal's decision in *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31 ("*Skinner*"). While the *Skinner* case involved a private sector employer and benefits plan, it involved an analysis broadly similar to that required in the present case. The Complainant was entitled to benefits under a benefits plan, but the plan excluded the specific type of benefit sought by the Complainant (in that case, coverage for medical cannabis under a health benefits plan.) The Court of Appeal had to apply the concept of discrimination in the context of a benefits plan that clearly applied to the Complainant, but did not meet his particular needs.

113. The Court in *Skinner* sets out some basic principles relevant to the interpretation of human rights legislation. This includes the needs for a purposive interpretation, though with an important caveat:

> [31] Human rights legislation enjoys a quasi-constitutional status and is interpreted in accordance with *Charter* values. It should be given a liberal interpretation to ensure the remedial goals of the legislation are best achieved. *However, this does not permit interpretations inconsistent with the legislation.* [references omitted, emphasis added.]

114. Thus, the wording of the legislation itself is the ultimate authority, even given the *Human Rights Act*'s broad and aspirational purpose. Discrimination is, of course, defined in s.4 of the *Act:*

> 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.

115. The Court in *Skinner* then sets out the test for discrimination, as articulated by the Supreme Court of Canada in *Moore*. This test is not in dispute between the parties in this case.

> [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.
>
> 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. [references omitted]

116. Importantly, the Court recognizes that a discrimination analysis is inherently a comparative analysis. While acknowledging that the Supreme Court has "cautioned against a rigid use of 'mirror' comparator groups," the Court goes on to say:

> ... differential treatment based on an enumerated ground endures, as does some kind of comparison which is inherent in "differential" treatment. [paras. 50-51][113]

117. Another recent appellate-level human rights decision in the disability field also emphasizes the central role of the comparative analysis. In *King* v. *Govt. of P.E.I. et al*, 2018 PECA 3 ("*King*"), a complainant with profoundly disabling schizophrenia challenged the PEI Disability Support Program, which excluded long-term mental illness from the definition of "disability".[114] A human rights panel upheld the Complaint, and was overturned on judicial review by the Supreme Court; the Court of Appeal then restored the panel decision.

118. The failure to apply a comparative analysis was the overriding error in *King*. The Supreme Court instead focused on the question of whether the complainant had needs that were not met by other government programs. The Court of Appeal characterized the comparative analysis as "mandatory":

> [45] An individual experiences discrimination when he or she receives differential treatment on the basis of a protected characteristic as opposed to personal merit. It is discriminatory to withhold or limit access to opportunities, benefits and advantages available to other members of society based on a prohibited ground. Locating the appropriate comparator is necessary in identifying differential treatment and the grounds of the distinction. ...

119. These recent appellate cases reiterate the argument made by the Respondent in its Pre-Hearing Brief, based on *Withler* and other cases, that discrimination is fundamentally a comparative concept.[115]

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[113] See also para.107, where the Court summarizes with approval the reasoning in *El Jamal v. Ontario (Minister of Health and Long-Term Care)*, 2011 HRTO 1952: "the Tribunal pointed out that a discrimination analysis is always a comparative one and will only be established where an applicant proves that he or she was treated differently based on a human rights related ground."

[114] This exclusion does not occur in the Nova Scotia DSP.

[115] Respondent's Pre-Hearing Brief, pp.7-8.

120. The Court in *Skinner* also picks up from the *Moore* case the importance of clearly identifying the services at issue, which is inherently tied to doing the proper comparative analysis.[116] The characterization of the service or benefit at issue is in turn relevant to identifying the distinction being made, and assessing whether the distinction is "based on" an impugned characteristic.

121. The decision in *Skinner* shows the close relationship between the comparative analysis, the identification of services, and the distinction based on an enumerated ground, as the Board in *Skinner* made errors that permeated the whole analysis. The Board "skipped" the comparative aspect of the analysis[117], and started instead by identifying the purpose of the benefits plan. They then took an expansive view of the purpose of the plan, finding that the "service" or "benefit" it provided was the broad, flexible "medically-required prescription drugs"[118], or more broadly, "pain relief,"[119] rather than simply the specific drugs covered under the plan. Once that erroneous characterization of the service was made, the Board naturally determined that Mr. Skinner was denied this service "based on" his disability, which required medical cannabis to adequately treat his pain.[120]

122. The Court of Appeal found that these errors led the Board to ignore the real distinctions behind Mr. Skinner's claim. Properly analyzed, the Court found, the "distinctions" were not "based

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[116] *Skinner* at para.46: "Likewise, in *Moore*, the Supreme Court referred to identifying what services were at play in order to find an appropriate comparator ... The service and comparator group were related. The service was education generally and the comparator group meant all public school students."
[117] At para.47.
[118] At para.59.
[119] At para.65.
[120] At paras. 58, 59.

on" Mr. Skinner's disability, but rather based on whether the drug was approved by Health Canada.[121]

123. The Court also identifies a flaw in the Board's reasoning which is particularly relevant to this case. The Board assumed that because Mr. Skinner had a disability which entitled him to coverage under the plan, any limitations on his entitlements were also "based on" his disability.

> [97] ... Absent disability, Mr. Skinner is not entitled to any medication. That disability does not thereby become a means for indefinite extension of benefits, the denial of which is automatically discriminatory. As *Meiorin*, *Elk Valley*, and *Bombardier* exemplify, the mere existence of a protected characteristic does not in itself establish a connection.

124. In other words, comparing Mr. Skinner to a non-disabled person showed that there was no discrimination at play. A non-disabled person had no entitlement to coverage; Mr. Skinner did. Beyond that point, the benefit to which Mr. Skinner was entitled could be limited, without those limits amounting to discrimination "based on" his disability.

125. In their pre-hearing submissions, the Complainants argued that the test for discrimination either does not require a comparative analysis, or that the need for a comparative approach is satisfied by the broad acknowledgement that persons with disabilities face social disadvantages compared to those without disabilities.[122] They suggest that the goal of "substantive equality" is more important than undertaking a sound comparative analysis.[123] These claims are not explicitly repeated in the Complainants' post-hearing Brief, and it is not clear whether they continue to argue that no comparative analysis is needed. However, after *Skinner*, it should be clear that the test for

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[121] At para.60.
[122] Cf. Individual Complainants' pre-hearing reply Brief at paras.3-7, DRC pre-hearing reply Brief at pp.1-4.
[123] Individual Complainants' pre-hearing reply Brief at para.7.

discrimination in fact hinges on doing a proper comparative analysis; the failure to make a proper comparison, and therefore properly determine that a distinction has been made based on the ground of disability, is precisely the grounds on which the Court of Appeal overturned the Board of Inquiry in that case. If the Complainants are in fact continuing to downplay to key function of the comparative analysis, then they are inviting this Board to make precisely the error cautioned against in *Skinner*.[124]

Not providing a particular service is not discrimination

126. Human rights law in Canada confirms that governments have the discretion to determine which social benefits to provide, and how to provide them. A legislative choice not to provide a particular benefit, or to limit the scope of the benefit provided, is not discriminatory. When the government does provide a benefit, it cannot do so in a way that makes unjustified distinctions based on enumerated grounds; but anti-discrimination does not require the government to provide a particular benefit, or to provide it in a particular way, even where that benefit would serve the needs of a disadvantaged group.

127. The leading case on this point is the Supreme Court of Canada's decision in *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)*, 2004 SCC 78 ("*Auton*"). That case involved a challenge to BC's Medicare system, which funded many medical procedures but excluded others, including an experimental autism treatment. The petitioners, who sought

[124] It should be noted that the claimants in *Skinner* also argued that the Supreme Court of Canada was turning away from a comparative approach to discrimination, which argument was rejected by the Court.

coverage for the treatment, claimed that they were being deprived of the benefit of "funding for all medically required treatment".

128. The Court found, however, that this misidentified the benefit in question, as the province did not provide the benefit of "funding for all medically-required treatment". Despite the relevant legislation using the term "medically necessary", this did not amount to an undertaking to fund all such treatment. The legislative scheme only provided funding for what it deemed "core benefits," and left the funding of non-core benefits to the Province's discretion. The Province did not discriminate, either by failing to fund all "medically relevant" treatment, or by exercising its discretion in funding some treatments and not others. The plan was, by its very nature, a partial plan.[125]

129. The frequently-cited passage from the case is highly relevant to the case at bar:

> [41] ...This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.

130. The Court's attention to clearly defining the benefit in question explains the different outcome in *Auton* and in cases like *Moore* and *Eldridge*, which dealt with services (education and hospital access) provided by government on a comprehensive basis. Where a service is held out as available to all, it is discriminatory not to accommodate disabled people compared to non-disabled people in accessing that service. Where, on the other hand, a government provides a service on a

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[125] *Auton* at para. 43

non-universal basis, like funding for non-core medical treatments, it is not discriminatory for government to provide the service in a partial way.

131. While the Nova Scotia Court of Appeal did not cite *Auton* on this point in the *Skinner* case, the reasoning is quite similar. Both the private health plan in *Skinner* and the public health plan in *Auton* were intended for the benefit of the sick or disabled, but neither was intended to cover all of those medical needs. While the limits of the plans did in each case mean some disabled people were deprived of benefits, this did not amount to a distinction based on disability. The fact that some disabled people's needs were met under the plan did not mean that the failure to meet every need was discriminatory.

132. *Auton* has been cited specifically in support of a finding that "neither people with developmental disabilities nor people with physical disabilities have a right to government-funded long-term group-living residential facilities in their own communities". In *Brock* v. *Ontario (Human Rights Commission),* (2009) 245 O.A.C. 235 (ONSCDC) ("*Brock*"), the claimant had a medical condition which resulted in severe physical disabilities. The Province had a program for residential supports for those with developmental disabilities, available in the claimant's community; the claimant argued that the lack of such programs for physical disabilities amounted to discrimination. The Commission decided not to refer the case to Tribunal, and that decision was judicially reviewed by a 3-judge panel of the Ontario Divisional Court, which upheld the decision.

133. The Court in *Brock* accepted the Commission's finding that the benefit sought by the complainant—support to live in the community of his choice—was not assured to anyone, even to

those with developmental disabilities who had qualified for support. Thus, there was no distinction made on the basis of the claimant's disability. The Court found this conclusion consistent with *Auton*.

134. This principle aligns with the findings in other human rights complaints addressing issues with the Disability Supports Programs in Ontario and Prince Edward Island. These are reviewed in the Respondent's pre-hearing submissions.[126] As the Complainants do not address these cases, the Respondent will not repeat those submissions at length. However, the bottom line of each case is that the government has the discretion to provide a Disability Support Program which has caps, gaps, and limitations, that "does not promise that all needs will be met,"[127] without amounting to discrimination in the legal sense. Claims of "general unfairness" in the program, while they may have major significance for the players involved, do not engage the jurisdiction of the Human Rights Act because the disadvantages are based on the limits of the program, and not based on the person's disability. It is worth noting that these are the only cases cited by any party to this matter which deal directly with discrimination claims in the context of the limitations of a Disability Support Program.

135. The New Brunswick Court of Queen's Bench in *PNB* v. *NB Human Rights Comm.*, 2009 NBQB 47 ("*PNB*") applied *Auton* in circumstances even more closely aligned with this case. There, a human rights complaint was brought by a family on behalf of their son who had severe autism, alleging discrimination because the son "was institutionalized at [a large facility] instead of being placed in a community placement," and also because he was subsequently transferred to

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[126] Respondent's pre-hearing Brief, paras. 50-58 ; cases in Respondent's pre-hearing Book of Authorities, Tabs 8-12.
[127] *Wonnacott et al.* v.*PEI*, (2007) 61 CHRR D/49 at para.109.

a facility in Maine rather than remaining in his home community.[128] The Province successfully challenged the Commission's preliminary finding that a *prima facie* case of discrimination had been made out. The case was decided on a procedural fairness basis, but the Court addressed flaws in the Commission's analysis, specifically its "failure to perform a differential analysis."[129]

136. The Court found that the logic of *Auton*, though a Charter case, applied in the human rights context as well, citing the passage quoted above. The Court found that the discrimination analysis required a comparative assessment, which was not done. Ultimately, by failing to do a comparative analysis and instead focussing on the quality and location of the service provided, the Commission was addressing issues that fell outside the scope of human rights legislation: "The question to be addressed is not one of quality but of discrimination."[130]

137. The Canadian caselaw is clear that human rights obligations do not require the government to provide a social benefit, or to extend a non-universal benefit to cover every need related to disability. Where the government does provide such a benefit, it is not required to ensure that its programs are unlimited or meet every unmet need. The choice to provide a social benefit program that is not universal and does not meet all needs is not discrimination within the meaning of the *Human Rights Act*.

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[128] *PNB* at 17.
[129] *PNB* at 35.
[130] *PNB* at 37.

Approaches to discrimination from outside Canadian law

138. The Complainants, in their pre-hearing submissions, turned to American law and international law to augment their arguments about the definition of discrimination. While these arguments are not made as directly in the post-hearing Brief, the Respondent wishes to address them nonetheless.

139. In pre-hearing submissions, the Complainants relied on the United States Supreme Court decision in *Olmstead*. The Respondent submits that *Olmstead* has no bearing on Canadian human rights law, because the Court's finding was based on the specific language of the *Americans with Disabilities Act* (*"ADA"*). That statute expressly deems institutionalization to be discrimination, bypassing the comparative analysis which is fundamental to Canadian human rights law.

140. The Complainants do not repeat that argument in their Brief, and refer to *Olmstead* only for its recognition of the harms of inappropriate institutionalization. Thus, the Respondent will not review its arguments in detail here. However, in light of the *Skinner* decision, we note that the "starting point" for defining discrimination is the wording of the Act, and that arguments about the broader purpose of the legislation are still limited by the actual text.[131] The *Americans with Disabilities Act* explicitly sets out a level of services for people with disabilities, and failing to meet that level is deemed to be discrimination. The *Human Rights Act*, in contrast, uses words like "distinction ... based on a characteristic" and explicitly contrasts a claimant to "others" or "other individuals or classes of individuals", which according to *Skinner* means "some kind of

[131] *Skinner* at paras.31-32.

comparison is inherent".[132] This fundamental difference in analysis may explain why nearly twenty years later, no Canadian decision has adopted the reasoning in *Olmstead* in making a finding of discrimination.

141. The Complainants also refer to the UN *Convention on the Rights of Persons with Disabilities* (the "Convention"). Again, the post-hearing Brief largely relies on the arguments in the pre-hearing submissions on this point. The Respondent notes that, at the hearing, counsel for the DRC suggested that a more in-depth argument would be made about the Convention, including the concept of progressive realization and the limitations on that concept.[133] Indeed, the Chair made comments to the effect that he anticipated being asked to rule that the Province was in violation of the Convention. Those arguments have not been made, and so the Respondent has no case to which to respond.

142. The Board has only Lynn Hartwell's evidence (not argument) on this point, that her understanding of the Convention was that the commitment to reduce reliance on institutionalization was intended to be achieved progressively over time.[134] The Board also has evidence, cited in the Complainants' Brief, that a UN body has expressed "concern" about people with disabilities remaining "in detention" due to a lack of community-based housing. This concern is shared by the Province, which is one of the reasons behind the transformation of the Disability Supports Program. However, a "concern" is not a finding of violation.

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[132] *Skinner* at para.51.
[133] Cross-examination of Lynn Hartwell, August 10, 2018
[134] Examination of Lynn Hartwell, August 9, 2018

143. The Complainants rightly note that international treaties like the Convention are cited by Canadian courts when interpreting ambiguous legislation. Thus, in *Sparks* v *Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82, a provision of the ESIA had several possible interpretations, and international law was referred to as one of several principles of statutory interpretation to resolve the ambiguity. That principle is non-controversial. However, Canadian law gives only this limited relevance to international treaties; they can serve as interpretive aids, but treaty obligations are not directly imported into Canadian law. As noted by the Alberta Court of Appeal,

> ...the notion that courts prefer to avoid conflict between domestic legislation and international treaty obligations is a canon of construction which involves no direct importation of international law into the domestic field.[135]

144. The concept of "discrimination" under the *Human Rights Act* is not ambiguous; it is defined directly in the statute, and in a plethora of cases. There is no need to turn to international law to resolve the definition of discrimination in this case, let alone to import all of the commitments made in the Convention as though failure to live up to those commitments were "discrimination" under the Act. The Complainants do not cite, nor did the Respondent in its research locate, any decision citing the Convention as relevant to defining "discrimination" under the provisions of human rights legislation, let alone suggesting that the aspirational provisions of the Convention were actually incorporated into the anti-discrimination protections of human rights legislation.

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[135] *R v Myette*, 2013 ABCA 371 at 34

Have the Complainants demonstrated a *prima facie* case of discrimination in this case?

145. With that legal background on the definition and application of discrimination set out, the Respondent now turns to the question in front of the Board: have the Complainants discharged their burden to prove a *prima facie* case of discrimination in this case? The Respondent will first set out its arguments as to the application of the discrimination test in this case broadly, and then will respond to the specific allegations of discrimination summarized by the Complainants at pp.183-184 of their Brief.

146. A discrimination analysis follows the three-part test from *Moore*, adopted in *Skinner*:

> [33] ...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.

147. There is no dispute between the parties that the individual complainants, and the general population served by the DSP, share the characteristic of disability, and thus meet the first branch of the test. The Complaint also refers "source of income" as an "intersecting" ground of discrimination.[136] No cases are cited on "source of income" and it is not clear to the Respondent how this inclusion of this ground affects the arguments set out by the Complainants. However, for the sake of the first branch of the test, it is not disputed that the individual complainants and the general population served by the DSP share the characteristic of "source of income," since they have the DSP as a source of income.

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[136] Complainants' Brief at para.419.

148. The dispute in the case lies in the second two branches of the test: whether there has been an "adverse impact with respect to the service" and whether "the protected characteristic was a factor in the adverse impact". As demonstrated by the analysis in *Skinner*, these questions are closely related and require a comparative analysis. To apply the test in this case, the Board will have to determine what is "the service" at issue, whether there was an "adverse impact with respect to" that service, and whether "the protected characteristic was a factor" in that impact.

Defining "the service"

149. The Complainants rightly note that there is a dispute between the parties as to what "the service" at issue is. This issue is laid out in the pre-hearing Briefs, but the Complainants expand on their argument in the post-hearing Brief. The Respondent stands by its original argument on this question, but will expand on its comments as well[137].

150. The Supreme Court has made it clear how crucial it is to have a clear and accurate definition of the service at issue in order to properly apply the concept of discrimination. In *Moore*, the government characterized the service at issue as "special education" in order to narrow the scope of the comparative analysis; the Court found that the service was in fact simply "education," which meant that the comparison should be drawn between disabled and non-disabled students, all of whom had a right to access the service. Conversely, in *Auton* and in *Skinner*, the complainants

[137] The Complainants claim at para.407 of their Brief that the Respondent's position on this is "unclear," and they seem to be reserving the right to make fuller arguments on this point in their reply Brief. The Respondent's position on this point has not changed. As a matter of natural justice, it would be inappropriate for the Complainants to introduce new arguments on this point in their reply Brief, when the Respondent will be unable to respond.

offered a broad interpretation of "the service" at issue ("funding for medically required treatment" in *Auton*, "medically required prescription drugs" or "pain relief" in *Skinner*.) In each case the Court reject the complainant's proposed articulation of the service, as it did not ground the appropriate comparison. The definition of the "service" is closely linked to the proper comparative analysis.[138]

151. The Complainants' argument, like the arguments in *Auton* and *Skinner*, hinges on their characterization of the "service" in question. As in those cases, the Complainants argue that the "service" is something broad and general, so that they can make a comparison which supports the discrimination analysis they prefer. Here, the Complainants characterize the service as "social assistance". This is an inappropriate definition of the services for two reasons: (1) the affected population have had no adverse impact in their receipt of "social assistance" generally, and (2) "social assistance" does not capture the essence of the issue raised in this case.

152. First, the affected individuals have had no adverse impact with respect to their receipt of "social assistance" defined generally. The Complainants correctly set out the statutory basis for the provision of DSP services under the *Social Assistance Act*, including its historical and current relationship to the *ESIA Act*. For the Complainants' argument to hold, "social assistance" must mean the entire broad range of supports available under both of these Acts. This is what allows them to ground the argument in a comparison of DSP recipients to ESIA recipients.

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[138] *Skinner* at para.46.

153. However, if we accept that the broad range of services defined as "assistance" under both Acts can broadly be called "social assistance," it becomes clear that the DSP program includes different forms of "social assistance," and not all forms of social assistance operate the same way. Under the *ESIA Act*, "assistance" is defined as follows:

> 3 (a) "assistance" means the provision of money, goods or services to a person in need for
>
> (i) basic needs, including food, clothing, shelter, fuel, utilities and personal requirements,
>
> (ii) special needs,
>
> (iii) employment services;

154. The corresponding definition under the *Social Assistance Act*[139], however, duplicates and then expands beyond that list:

> 1 (e) "assistance" means the provision of money, goods or services to a person in need, including
>
> (i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,
>
> (ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements, funeral and burial expenses and comforts allowances. The Director may approve other items of special requirement he deems essential to the well being of the recipient,
>
> (iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,
>
> (iv) care in homes for special care,
>
> (v) social services, including family counselling, homemakers, home care and home nursing services,
>
> (vi) rehabilitation services.

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[139] Found in the Regulations under the Act: *Municipal Assistance Regulations*, N.S. Reg. 76/81 (as amended), s.1.

155. As a starting point, then, 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.

156. Even more importantly, if that is the basis for the comparison, it is simply not true to say that DSP participants are adversely affected in accessing "social assistance" compared to ESIA recipients. As reviewed by Denise MacDonald-Billard and other witnesses, DSP participants receive financial supports that mirror ESIA benefits. While the evidence at the hearing has focused on the residential supports which form the bulk of the DSP, one cannot lose sight of the financial supports which are part of the DSP over-and-above those residential supports.

157. This is clear from Exhibit 58, the current DSP Policy Manual, and in particular the Financial Eligibility Policy which is the third component of that manual. Section 5.7 of the Financial Eligibility Policy sets out the specific financial benefits for which DSP participants are eligible, depending on their residential circumstances. Thus, a DSP participant living in their own home or with family is entitled to a Personal Allowance, a Boarding Rate or Shelter Allowance, a Comfort Allowance, and Special Needs (Section 5.7.2). These financial entitlements mirror those received by an ESIA recipient, except for the comfort allowance, which is unique to DSP recipients[140], and are available immediately and as of right, in the same manner as ESIA benefits.

[140] With the exception that Special Needs are defined *more exponsively* under the DSP than under ESIA (see Exhibit 58, Basic and Special Needs Policy).

158. The financial supports change for a DSP participant actually living in a residential option under DSP, as some of the basic needs are incorporated into the per diem rate which supports the residential option; however, such participants are still entitled to the Comfort Allowance and Special Needs components of financial assistance, available immediately and as of right (Section 5.7.1). Even with respect to the Individual Complainants, the record is clear that Beth MacLean and Sheila Livingstone received financial supports under the DSP even when considered ineligible for residential supports.[141]

159. The end result of this comparison is that ESIA and DSP participants are able to receive the same forms of financial assistance, immediately and as of right. The only differences relate to whether the DSP participant is living in a residential option under the DSP; i.e., the only differences relate to the aspects of DSP that are unique to DSP, and not comparable to ESIA. As a result, it is misleading to refer to "social assistance" as the service for the sake of the comparative analysis. As a blanket term, "social assistance" refers to a variety of benefits, some of which are directly comparable to ESIA and others of which are not. Any comparison based on "social assistance" as the service would inherently be a flawed and misleading comparison.

160. A second and related reason not to use "social assistance" as the service for the purpose of this discrimination analysis is that "social assistance" does not actually capture what is at the heart of the Complaint before the Board. As noted in the Respondent's pre-hearing submission, the language of the Complaint and the Complainants' pre-hearing submissions makes it clear that the "service" in question is residential or housing supports.[142] Despite their insistence on describing

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[141] Cf. JEB Book IX Tab 3; JEB Book XI Tab 6.

[142] Respondent's pre-hearing submissions at paras.19-20.

the service differently, even in their post-hearing submissions the Complainants clearly are describing a complaint about supportive housing specifically, and not "social assistance" broadly. Their Brief is replete with references to the limitations, delay in accessing, and barriers to accessing "residential supports," not simply "social assistance" generally. Tellingly, when it comes to the comparative analysis, they invite the Board to draw comparisons between DSP participants on the one hand, and persons "who either have no disabilities or, if they do, are not ones that require residential supports"[143] on the other. Even the Complainants cannot clearly articulate their discrimination claim without acknowledging that the comparison is between people who seek residential supports and people who do not.

161. Thus, in defining the service at issue here, the Board must follow *Auton* and *Skinner* in rejecting the Complainants' characterization of the service as "social assistance," which is designed to draw a flawed comparative analysis and tilt the test in favour of their discrimination argument. The Board must instead look to the true service which is at the heart of the Complaint. On an analysis of the facts, and indeed on an analysis of the Complainants' own rhetoric, the service at issue is clearly residential support.

Adverse impact

162. On the one hand, it would be impossible to deny that the historical and current limitations of the DSP result in negative outcomes for those who are unable to obtain the kind of support that allows them to live good lives in a supportive community of their choice. Indeed, while many individuals have been well-served by the program, the Roadmap identifies problems with the DSP

[143] Complainants' Brief at para.436. See also paragraphs 436, 474, 477, 478, 486, 489, 541.

that can result in negative outcomes for clients served. For example, the shortfalls in providing individualized supports are characterized in the Roadmap as "all too often disempowering or stigmatizing to those seeking a modicum of assistance to live in dignity and to be active citizens", and the reliance on large congregate living facilities is recognized as producing "less than quality outcomes for persons with disabilities".[144] Certainly with resect to all three individual complainants, a more perfect DSP might have better enabled each to move more quickly out of Emerald Hall, for example, and thus avoided the negative affects on their lives that come from remaining hospitalized beyond what was medically necessary.

163. However, not every negative outcome grounds a discrimination argument. Certainly, for example, the claimants in *Auton* and in *Skinner* suffered negative financial and potentially negative health outcomes as a result of their particular medical needs not being funded under the relevant plans; nonetheless, no discrimination was found. Even the adverse effects part of the discrimination test must bear some comparative analysis, or else any limitation on a benefit would amount to discrimination.

164. DSP participants suffer negative outcomes, for example, compared to what they might experience under a more perfect version of the DSP program. However, compared to the supports available to persons without disabilities, the impacts on DSP individuals take on an entirely different context. Outside the DSP, there is no guarantee of residential support for Nova Scotians of low income; there is simply income assistance, which provides a modest financial contribution to the individual's self-directed efforts to find shelter. People who are not supported by DSP can,

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[144] JEB Book VI Vol A Tab 32, pp.2854-2855

unfortunately, face very challenging living conditions. Again, with respect to the individual Complainants' time at Emerald Hall, a non-DSP participant without a residence in community would not remain hospitalized after it was no longer medically necessary; they would be discharged to their own means without any residential support at all.

165. This is not, by any means, to understate the disadvantages experienced by the individual Complainants and others as they seek support to live in the community. Those disadvantages are real, and the transformation projects at DCS are designed to help ameliorate them. However, for the purposes of analysing a discrimination claim, it is not at all clear that those disadvantages amount to adverse impacts within the meaning of the test.

Was disability a factor in the adverse treatment?

166. This is the stage of the test which most clearly requires a comparative analysis; to determine whether disability was a factor in the adverse treatment, one must necessarily compare the situations of disabled and non-disabled persons (or persons with different disabilities) with respect to the service in question.

167. The Complainants appear in their Brief to accept that a comparative approach is necessary at this stage of the analysis, and propose a comparison between DSP recipients and "persons who are also dependent on social assistance but who either have no disabilities or, if they do, are not ones that require residential supports".[145] In their view, this means that the required comparison is

[145] Complainants' Brief at para.2

between ESIA benefits, which they characterize as being available immediately, as of right, and in the applicant's community of choice, and benefits under the DSP, which they characterize as being waitlisted, discretionary, and not guaranteed to be in the community of choice.

168. For the reasons set out above in defining the service, this comparison is deeply flawed. It does not describe the difference between people with disabilities and those without; it describes the difference between financial supports (which are available under ESIA and DSP) and residential supports (which are only available under DSP.) To put the comparison in the Complainants' terms, there is no meaningful distinction between persons receiving DSP benefits and "persons who are also dependent on social assistance but who either have no disabilities or, if they do, are not ones that require residential supports". All such individuals are provided financial supports immediately, as of right, and in the applicant's community of choice. The only distinction is that DSP participants are *additionally* entitled to residential supports, which are not a component of ESIA. Arguments about whether those residential supports are flawed or imperfect are not discrimination arguments; they are in the nature of "general unfairness" arguments,[146] or questions of "quality,"[147] without a comparative component, which have been recognized as falling outside the discrimination analysis.

169. This faulty comparison flows from the Complainants' mischaracterization of the service as "social assistance". Instead, as the Respondent has argued all along, the service at question is residential support; the Board should be looking to compare the experiences of persons with

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[146] See Respondent's pre-hearing Brief at paras.52-58.
[147] *PNB* at 37.

disabilities and those without disabilities when it comes to accessing government-provided residential support.

170. Residential support, unlike education or Medical Services Insurance, is not a service that the government provides to all Nova Scotians as of right.[148] The vast majority of Nova Scotians, even those of low income, provide for their housing themselves without looking to government for support (beyond the financial allowance for shelter provided under both ESIA and DSP). Government supports in the area of housing are, by their very nature, limited and non-comprehensive; there is no regulated "right to housing" in this or any other Canadian jurisdiction. In fact, many Canadians live in housing situations which are less ideal than they would choose, whether that means living with others, living in neighbourhoods or communities that are not their preference, or not having the quality of housing they would aspire to. Governments work to improve the lives of all citizens, including allowing them to improve their housing circumstances, but it is simply not accurate to assume that non-disabled persons are able to live in circumstances that suit all of their needs and are entirely of their choosing.

171. The Complainants, in their pre-hearing submissions, purport that it should make no difference whether the service in question is a general and comprehensive benefit, like general education in the *Moore* case, workers compensation benefits in *Martin,* or hospital services in the *Eldridge* case.[149] However, in each of those cases, the comprehensiveness of the benefit was key

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[148] Though not strictly applicable to the reasoning of this case, it is worth noting that Canadian courts have held that there is no free-standing right to housing under the *Charter*: *Tanudjaja* v. *Canada (Attorney General)*, 2014 ONCA 852 ("*Tonudjaja*").

[149] Individual Complainants' pre-hearing reply Brief at para.24, referring to *Nova Scotia (Workers' Compensation Baard) v. Martin*, 2003 SCC 54; *Moore* v. *British Columbia (Educotion)*, 2012 SCC 61; and *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 SCR 624

to the comparison drawn by the Court. In *Moore*, for example, the Court repeatedly describes the benefit in question as "the general education services *available to all of British Columbia's students*".[150] This is fundamental to the Court's determination that a distinction was made based on disability; if Jeffrey Moore had not been disabled, he would have had unimpeded access to the service. If a DSP participant, on the other hand, were not disabled, they would have no guaranteed right to government residential supports.

172. Further to this point, Professor Hogg in *Constitutional Law of Canada* points to the comprehensiveness of the benefit as exactly explaining the different outcomes in cases like *Auton* and those like *Martin*:

> In *Auton*, the health care plan did not purport to be comprehensive in its funding of even medically necessary services if they were not provided by physicians. In *Martin*, the workers' compensation scheme did purport to provide comprehensive coverage for all work-related injuries (for which the tort action was barred). In a scheme that is supposed to be comprehensive, it is natural to make the comparison between those who are denied benefits and those who are granted benefits. The comparison is less persuasive (and the consequences more costly) where the scheme is not comprehensive and the claimant group is only one of a number of groups from whom benefits are withheld.[151]

173. The Respondent's position is that, to truly understand the situation of disabled versus non-disabled Nova Scotians when it comes to the "service" of residential supports, one should compare the DSP program to the programs offered by Housing Nova Scotia.

174. Neil MacDonald's testimony outlined those programs, and was not meaningfully challenged on cross-examination. A non-disabled[152] Nova Scotian seeking governmental support

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[150] *Moore* at para.28, emphasis added. See also paras. 32, 34.

[151] Peter W Hogg, *Constitutional Law of Canada* 5th ed Supplemented (Toronto: Carswell, 2016), ch 55 at 55-36.4

[152] For the sake of this analysis, we overlook the nuance that disabled Nova Scotians are also eligible for supports and programs from Housing Nova Scotia.

in establishing housing (beyond the financial shelter allowance available to all Nova Scotians under ESIA and DSP) would, if qualified based on income, be put on a waitlist for an eventual spot in public housing. The choices are limited, and are not guaranteed to be in the neighbourhoods and communities the individual prefers. The housing itself meets basic standards of quality, but may not reflect an individual's chosen ideal housing. A person may face a difficult choice between a less ideal option available immediately, or a more preferred option that has a longer waiting list. Time on the waitlist varies depending on availability at the person's preferred option, with some options available nearly immediately, and other options having a waitlist of as long as ten years. The waitlist is driven by the limited capacity in the public housing system; only so many places are available. The average time spent on the waitlist is 2.7 years, which is quite close to the average waitlist time of 2.94 years for DCS residential supports. [153]

175. The Complainants, in their Brief, point to distinctions between the DSP and Housing Nova Scotia in order to undermine this comparison. Of course, the two programs are not identical, and are designed to meet different needs; but the comparison is in terms of the service offered, not every individual feature of the programs. Specifically, the Complainants make the following distinctions:

- the income-testing for Housing Nova Scotia operates differently; [154]
- Housing Nova Scotia provides "bricks and mortar" housing, while DSP funds arrangements with service providers for housing and rarely own the property directly; [155]
- DSP's residential supports go beyond providing a place to live, and include programming and services within that residential environment. [156]

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[153] Testimony of Neil MacDonald, June 19, 2018.
[154] Complainants' Brief at paras.334-337.
[155] Complainants' Brief at paras.173, 339.
[156] Complainants' Brief at para.339.

176. None of these factors undermine the comparison as to the service being offered, which is residential support. For the community served by DSP, that support extends beyond a place to live, and includes programming and services to make that living arrangement successful. But the goal is the same: to provide Nova Scotians who qualify based on income with an opportunity to be housed, with all the limitations which come along with that goal. [157]

177. Thus, the residential services provided by government to Nova Scotians without disabilities share the same broad limitations identified with the DSP: limited choice, not provided as-of-right, limited capacity in the system, wait times to obtain service, and no guarantee that the support provided will be optimal compared to the person's preferred living circumstances. This is, by no means, a reason not to seek continuing reform of DSP's residential supports; the status quo is not good enough, and the government is committed to improving it. But it does mean that the problems with the status quo, while significant, are not discriminatory in a comparison between people with and without disabilities. Indeed, the Complainants have recognized that, if the proper comparison for the analysis is between DSP and public housing, then there is no basis for a discrimination claim. [158]

178. While the Respondent's evidence and pre-hearing argument focused on a comparison with public housing, the Chair has already taken judicial notice of another apt comparison, between DSP residential support and the Long-Term Care (nursing homes) system administered by the

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[157] The Complainants also argue that the services of Housing Nova Scotia are not mandated by statute and the non-provision of service is not subject to any appeal. While this is true of Housing Nova Scotia, it is also true of the residential supports of DSP. This larger argument is dealt with elsewhere in this Brief.

[158] Individual Complainants' pre-hearing reply Brief, para.10.

Department of Health and Wellness. That system involves government-funded living facilities for a vulnerable population, and is well-known to involve limited capacity, limited choices, possible relocation out of community of choice, and long waits for service. Again, as there was little or no evidence at the hearing about the Long-Term Care system, the Respondent makes only limited arguments on this point, but even the well-known uncontroversial facts about that system demonstrate the appropriateness of the comparison.

Summary of argument on *prima facie* discrimination

179. In summary, the Complainants have not discharged the burden of proving *prima facie* discrimination in this case. Properly analysed, the service in question is residential support, rather than the broad and multi-faceted concept of "social assistance". Any adverse affects as a result of the limited way in which the government provides residential supports under the DSP are based on the inherent limits of the program, and not based on the grounds of disability. Anti-discrimination law does not require the government to provide a particular social benefit, or when it does so, to provide it in a comprehensive way which meets all needs. In comparing the way that the government provides residential supports to disabled and non-disabled Nova Scotians, there are no meaningful distinctions in principle which would ground a *prima facie* case of discrimination.

Responding to the Complainants' allegations

180. A challenge in responding to this claim has been the broad and vast nature of the evidence, and the difficulty in pinning down with specificity what aspects of DCS' provision of services are

alleged to be discriminatory. However, the Complainants at pp.183-184 of their Brief provide a summary of the specific (albeit broad) allegations of discrimination. The Respondent takes this as the Complainants' definitive summary of their allegations of discrimination. Against the background of the discrimination analysis set out above, the Respondent will offer a brief response to each allegation in the Complainants' summary.

Failing to take into account and accommodate Beth MacLean's needs for "financial assistance" under the Social Assistance Act from 1986 until January 2018.

Failing to take into account and accommodate Sheila Livingstone's needs for "financial assistance" under the Social Assistance Act from 2004 until her death in October 2016.

Failing to take into account and accommodate Joey Delaney's needs for "financial assistance" under the Social Assistance Act from 2010 until January 2018.

181. To a large extent, arguments about the individual claimants are subsumed into the general arguments made above, and summarized below. The Respondent submits that none of the Complainants' general allegations of *prima facie* discrimination has merit; it follows that the same allegations are without merit in these three particular instances.

182. The Respondent denies the characterization that the individual claimants' needs for "financial assistance" were not met. As explained above, the three individual complainants, like all DSP participants, received financial supports in the same manner that ESIA participants receive financial supports. The issues raised by the complaint go only to whether they received the additional residential supports, which are available only under DSP and have no ESIA equivalent.

183. The Respondent submits that it has not been demonstrated that any of the individual complainants suffered an adverse effect compared to the situation faced by a non-disabled person seeking residential supports from government. The Complainants have undeniably shown that these three individuals experienced disadvantages that might not have occurred under a more perfect version of the DSP; however, the questions raised go to the quality or general fairness of the program, not to any discrimination in the service.

184. Accordingly, the Respondent submits that no *prima facie* case of discrimination has been made out under the *Human Rights Act* with respect to any of the three individual complainants.

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.***

185. This is the most general and far-reaching of the allegations made in the Complaint. For this claim to be successful, the Board would need to determine that the concept of "discrimination" requires adherence to a specific model of delivering residential supports to the community served by the DSP, define with specificity the parameters of that model, and find the Respondent has failed to meet those parameters. The Ontario Court of Appeal, in *Tanudjaja*, found that the impossibility of judicially setting and monitoring such a standard was a reason to find the idea of a "right to housing" non-justiciable.

186. This approach to the question of discrimination runs contrary to Canadian anti-discrimination law. *Auton* and other cases establish that a government is not obligated to provide any particular social service, or if it does, to do so comprehensively. Only when a government does undertake to provide a comprehensive service, and draws inappropriate distinctions in doing, does a discrimination analysis come into play. Cases following this approach to discrimination have found that questions about the quality or limitations of a program do not raise issues of discrimination. That line of argument has help up in human rights challenges to DSP programs, including (in *Brock* and the *PNB*) cases which alleged a right for disabled persons to residential supports outside of the congregate care setting. The Complainants cite no Canadian anti-discrimination case law supporting their claim that reliance on congregate care is discriminatory; in fact, the Canadian human rights case law supports just the opposite conclusion.

187. The Respondent submits that the Complainants have not discharged the burden of demonstrating that offering residential supports under the DSP in large congregate care settings meets the test for *prima facie* discrimination. They have not provided any comparative analysis showing that any adverse impacts are "based on" the grounds of disability, as opposed to simply the limitations of the support itself.

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.

188. DCS fully acknowledges that there is a waitlist, and that it is far from ideal for persons with disabilities to live in inappropriate settings. Be that as it may, the reality of waiting for supportive housing, while not ideal, does not run afoul of human rights legislation.

189. The waitlist forms a significant portion of the Complainants' arguments largely due to the comparison drawn to ESIA, and its lack of a waitlist. The inappropriateness of ESIA as a comparator has already been reviewed. The Complainants claim that DCS discriminates against individuals with disabilities versus those who do not have disabilities, or whose disabilities do not require supportive housing. However, the inappropriateness of ESIA as a comparator is inherent in the phrase "or those with disabilities who do not require supportive housing." The distinction here is not one based on disability, as there are individuals in ESIA with disabilities; rather, the distinction is based on the benefit sought – those seeking funding for basic shelter (per ESIA) versus supportive housing (per DSP).

190. The DSP waitlist is composed of people seeking housing immediately, and those seeking housing in the future. Some are already supported by DSP others are not. Some, although on the waitlist for a period, may only be ready to move around the time that a placement comes up. This was the situation for Wendy Lill's son, who, Ms. Lill testified, was ready to leave home around the time that a place came up for him.[159] Thus, not everyone on the waitlist are "languishing" as the Complainants imply.

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[159] Direct examination of Wendy Lill, June 7, 2018

191. Furthermore, many other publicly funded services in Nova Scotia have delays, including subsidized housing with Housing Nova Scotia. The similarity of the "service" here, subsidized housing and supportive housing, render this a much more apt comparison. One can also take notice of other publicly-funded services that have waitlists – the wait for admission to a nursing home, which was referenced in this hearing, the waitlist for a family physician, the waitlist for medical tests and procedures. While one might surmise that being on a waitlist for an important service could have adverse consequences, without a nexus between the waitlist and the disability, which the Complainants have not shown here, much as in *Skinner*, the claim must fail.

*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.*

192. As already set out, the Province does not dispute that DSP participants do wait for the majority of DSP programs, with the exception of Flex at home, and that this is particularly true for residential support options. The Province also does not dispute that it is far from ideal the have an individual living in a situation in which they are over or under served, or that is otherwise inappropriate.

193. However, the determinative question for this Board is whether this situation results in discrimination. The Respondent's position has not varied from the beginning of this hearing, that if this were a public inquiry, or the Board Chair were the Minister of the Department, the questions before him might be broad, encompassing a determination of the problems within the DSP program and concerns about delay. However, that is not the function of this Board. Here, the mandate is limited to a determination of whether the delay results in discrimination, and on that question, the Board is bound by *Skinner*. The discrimination analysis requires that the disability be the reason for the delay in services. In Mr. Skinner's case, his disability was not the reason for the denial of coverage, as the rule limited medication coverage to those approved by Health Canada. In this case, the delay is not related to the person's disability, but rather is a function of a complex system that DCS is moving to transform.

*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*

194. The same argument made above with respect to offering care in large congregate facilities also applies to offering care in the participant's community of choice. In offering a program of residential supports to persons with disabilities, the government is not required under human rights law to do so in a comprehensive way, or to be held to any particular standard of service. Notably, the Court in *PNB* specifically overturned a finding that failure to provide residential supports in the community of choice was *prima facie* discriminatory. For the reasons set out above, the

Respondent submits that the Complainants have not discharged their burden of demonstrating *prima facie* discrimination.

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

195. The Complainants have asserted that the assessment tools used to assess individuals for supports, both past and present, are invalid and as a result, this is discriminatory. There are two difficulties with this assertion.

196. First, the tool has been used to assess all DSP applicants, and the Complainants have not presented evidence on how there is a distinction or denial based on disability among DSP participants, and therefore how this is discriminatory. As argued above, the Respondent is not required under human rights law to provide any particular social benefit, or to do so comprehensively. Arguments about how the Province determines eligibility or level of support within the program go to the quality of the program or its internal limits, not to questions of discrimination.

197. The second issue is that the appropriate forum for an appeal based on assessment is through the Social Assistance Appeal Board, not a human rights Board of Inquiry. Within that, there is a significant timeliness issue, as any denial should have been appealed in a timely manner, or at the very least, raised as a human rights complaint within 12 months. For example, Beth and Sheila's "unclassifiable" determination occurred years ago, and therefore would be barred by the time limit in the Act.

*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.*

198. As argued above, the Complainants are simply in error in their argument that the *Social Assistance Act* requires residential supports to be provided on an as-of-right basis; in any event the Respondent argues that this Board of Inquiry has no jurisdiction to make such a finding.

199. However, this allegation says something slightly different. It alleges that, assuming the province is not bound to provide the services as-of-right under the *Social Assistance Act*, it is in fact bound to do so under the *Human Rights Act*. Presuming, then, that the province have the legal discretion to provide residential supports in a limited and non-comprehensive way, the Complainants argue that it is still discriminatory to do so.

200. This argument reduces in essence to a restatement of the allegations above as to the limited nature of the residential supports provided under DSP. For the same reasons set out above, the Respondent argues that it is not required under human rights law to provide any particular social benefit or to do so in a comprehensive way. The Complainants have failed to make out a *prima facie* case of discrimination.

V. CLOSING

201. This Board of Inquiry has been presented with a great deal of evidence indicating the need for reform to the way the Province provides residential supports to persons with disabilities. The

Respondent does not disagree. Reform is a necessity, and is underway. Although the model of care for individuals in facilities has evolved, the continued reliance on large congregate care facilities, very much a model of the past, is not appropriate for the present or the future.

202. This Board, however, is not tasked with planning and implementing that reform. Its mandate is not to assess the quality or general fairness of this or other government social programs. This Board's mandate is to apply the concept of discrimination under the *Human Right Act*. While there is no question that problems with the system have been identified, resolving problems with the delivery of social services is the work of government. An intervention under the *Human Rights Act* is only justified if the government discriminates in doing so. Whatever merit there may be to the issues highlighted by the Complaint, the human rights case law makes it clear that the issues raised to not meet the test for discrimination.

203. Accordingly, the Respondent submits that this Complaint must be dismissed at Phase I, as the Complainants have not discharged the burden of showing a *prima facie* case of discrimination.

All of which is respectfully submitted.

The 22nd day of October, 2018.

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