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

BETWEEN:

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

Complainants

and

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

Respondents

and

The Nova Scotia Human Rights Commission

Commission

<u>REPLY</u> BRIEF SUBMITTED ON BEHALF OF THE COMPLAINANTS, BETH MACLEAN, SHEILA LIVINGSTONE AND JOSEPH DELANEY

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CONCISE OVERVIEW

1. The Respondent makes a wide range of submissions, although its primary legal submission seeks to have the Board of Inquiry reject consideration of the claim of discriminatory treatment *as between the two groups of social assistance "persons in need"*— a claim set out repeatedly in the Complaint. For litigation reasons, the Respondent would prefer that the Board turn away from the actually pleaded comparisons and focus, instead, on a different set of comparisons—ones not pleaded but which the Respondent well knows lead to a finding of no discrimination.

2. These submissions reply, in summary form, to each of the Respondent's points before concluding with some overarching submissions on the Respondent's position.

Discrimination Analysis "Requires" Comparison?

3. The position advanced through paras. 12-16 of the Respondent's Memorandum is that discrimination analysis requires a comparison between groups. The Respondent has failed to cite to the Board Supreme Court of Canada cases which make explicit that while substantive discrimination analysis may find comparator group analysis useful, it does NOT require claimants to make rigid comparisons between comparator groups.[1]

4. The Supreme Court of Canada's judgment in *Withler* rejected the preoccupation in the earlier jurisprudence with comparator groups. The Respondent cites paras 61-2 of *Withler* but not the following paragraph where, under the thematic heading "The Proper Approach to Comparison", the Court stated:

> [63] It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility

[1] *Moore* v. *British Columbia* (*Education*), 2012 SCC 61 at paras. 30-31; Quebec v. A, 2013 SCC 5 at para. 346

> required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.

5. In *Withler*, the Court also observed that a preoccupation with comparator groups had, too often short-circuited, a full discrimination analysis.[2]

6. The focus of the discrimination inquiry is not on comparator groups but "whether there is discrimination, period" (*Moore*, SCC at para. 60).

7. This is, in contrast to the Respondent's repeated insistence that comparison plays a "central role" in discrimination analysis (Respondent's Memorandum paras. 12, 15 and 16), the Supreme Court of Canada has tried to make clear that comparisons are far less important than the inquiry as to whether substantive equality has been violated; "at the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the Charter?"[3] It is noteworthy that the Respondent *nowhere* in its submissions mentions the overriding concept in human rights jurisprudence of the promotion of "substantive equality".

Distinctions in treatment between groups are present here

8. Having said all that, in the Complaint before you there is a ready comparison that is referred to throughout the individuals' Complaint. In its provision of social assistance to Nova Scotians "in need", the Province discriminates against persons who have significant disabilities and who require residential supports and services to live in the community compared with those "persons in need" who either have no disabilities or whose disabilities do not require such supports. This is argued in full in our initial brief.

[2] *Withler*, paras. 55-60

[3] *Quebec* v. *A*, 2013 SCC 5 at para. 325

What 'service' is at the core of the discriminatory treatment?

9. In the Complaint, and in the Complainants' initial Pre-hearing submissions to the Board, it was made clear that this case is about the Province's discriminatory provision of *social assistance*. Since 2001, social assistance has been provided under two parallel statues, the *Social Assistance Act* and the *Employment Support and Income Assistance Act* ("***ESIA***"). Both statutes provide assistance to people, determined on the basis of a needs test, to be "persons in need". As detailed in our initial submissions, the Province's provision of *assistance* to persons in need under the *Social Assistance Act* is far inferior to that provided to persons in need under the *ESIA*.

10. The Respondent seeks to essentialize the complaint as being about "supportive housing" in order to then go on to say that such services are most closely comparable to public housing which itself is characterized by discretion, long waiting lists and offers for housing in sometimes remote locations. Indeed, public housing in Nova Scotia is not subject to *any* legislative eligibility framework—applicants have no basis for entitlement. Seen in these terms it becomes apparent why the Respondent would seek to re-frame the Complaint in this way—it offers no basis for a discrimination claim.

11. With respect, the Respondent has failed to properly understand[4] and characterize the claimed "service" that is before the Board.

12. **First**, the essence of the discrimination in this case arises from the way in which the Province provides social ***assistance*** to two separate groups of persons in need. Accordingly, all of the individual complainants refer explicitly to the violations of their rights as a result of the way in which the Respondent provides ***assistance*** to different groups of persons in need. [Complaint, paras. 39, 40 & 48(b); 77 & 88(c); 112, 113 & 126(ii)]. This point gets elaborated at length in our Pre-hearing submission. This is the benefit/service which both the *Social Assistance Act* and the *ESIA* provide. It is, therefore, entirely apt to frame the complaint as

[4] Respondent's Brief, para. 21

being about the discriminatory provision of *assistance*. That is, literally, the "service" that the legislation confers.[5]

13. **Second**, since 2001, the *Social Assistance Act* has specified that a 'person in need' is someone who "who requires financial assistance to provide for the person in a home for special care or a community based option".[6] Accordingly, it is entirely appropriate for the Complainants to particularize that an important form of social *assistance* they need (such as supportive housing), and which they claim is being discriminatorily provided is, in fact, what the *Act* provides and for which they have been found eligible. The Respondent does not address this salient point.

14. **Third**, despite the Respondent's effort to characterize the claim as being one in which the Complaints are basically seeking housing—in the bricks and mortar sense—in order to then compare the Complainants with applicants for public housing, it is readily apparent that the Complainants are fundamentally seeking the supports and services to enable them to live in the community which the *Social Assistance Act* contemplates. This is, of course, the supportive part of 'supportive housing' which the Respondent completely fails to address in its submissions. Moreover, it will be recognized that 'supportive housing' is a compendious term which emphasizes the supports and services that enable a person with disabilities to live in the community. Indeed, the evidence at the hearing will make clear that the Respondent's own employees characterize the benefits under the *Social Assistance Act's "*Disability Supports Program" in these same terms.

15. Thus, in para. 28 of her complaint, Beth MacLean states that she: "would need more money or supports than Community Services gives me now in order for me to be able to live in the community." In the following paragraph, she refers to her ability to live in the community "with support staff as required." In para 39, she states, "I feel that I am entitled to and should

[5] *Social Assistance Act*, s. 9: "the social services committee shall furnish assistance to all persons in need" and see s. 9(1) of the *ESIA*: "the Minister shall furnish assistance to all persons in need."

[6] *Social Assistance Act*, s. 4(d).

have been given the help and supports that I need to live in the community." Finally, in her remedial request, she states: that she is seeking "the means to immediately access the help and supports that I need to live in the community." (para. 48). Similar statements are to be found in the Complaints of Sheila Livingstone (paras. 77 & 88) and Joey Delaney (paras. 112, 113 and 126).

16. In conclusion, and contrary to the Respondent's submissions, the "service" at issue in this Complaint is precisely the form of "assistance" provided to persons in need under the *Social Assistance Act*.

The DSP exits pursuant to the authority of the Social Assistance Act

17. It is respectfully submitted that underlying the Respondent's flawed analysis of the claims here is its complete failure to acknowledge let alone make explicit that the DSP program exists under the authority of the *Social Assistance Act* and related regulations. This failure impedes and limits its analysis of the DSP as a legislated social assistance program.

18. This is not a contentious point. Both the DSP Policy Manual and the case law make clear that the DSP is created under the authority of the *Social Assistance Act* and regulations.[7]

19. Despite that, nowhere in its entire submissions does the Respondent acknowledge that the DSP is a social assistance program authorized and governed by the *Social Assistance Act*. Accordingly, nowhere do we see an analysis of the DSP as being provided to 'persons in need' who become entitled to assistance once found to be eligible. It is submitted that this leaves a yawning gap in the merits of its submissions.

[7] See: the DSP Policy Manual: section 1.1 and see also: *Nova Scotia* (*Community Services*) v. *Boudreau*, 2011 NSSC 126

"Social Assistance is 'different' than other government services such as education, health care or WCB"?

20. Beginning at para. 21 of its submissions, the Respondent makes a variety of submissions about why the 'service' at issue in this Complaint is somehow "different" than that which was the focus in other discrimination cases.

21. The Respondent begins by stating (para. 21) that it is unclear why the Complainants have all characterized the service at issue in this case as "social assistance" or "social services."

22. The short answer to this point is that as 'persons in need' requiring financial assistance for residential supports they fall within the scope of s. 4(d) of the *Social Assistance Act.*[8] The definition of "assistance" under the *Municipal Assistance Regulations* promulgated under the *Social Assistance Act* sets out an extremely broad range of forms of assistance ("money, goods or services…") that can be provided to qualified persons in need.[9] Simply put, for disabled persons such as the Complainants, they go to the *Social Assistance Act* for *their* social assistance.

23. It appears that it is the Respondent's failure to acknowledge the role of the *Social Assistance Act* in creating provision for the granting of "assistance" to "persons in need" that leads to its query as to why the Complainants have referred to the service in issue here as "assistance".

24. The Respondent then asserts that the social assistance being sought by the Complainants is "different" from the services at issue in *Moore* (education), *Martin* (WCB benefits) and *Eldridge* (health care benefits). Apart from the obvious (the benefits here are for poor people), the Respondent fails to make clear what the difference is or why the alleged difference is "key" to the discrimination analysis.

[8] Section 4(d) provides: "person in need" means a person who requires financial assistance to provide for the person in a home for special care or a community based option"

[9] *Municipal Assistance Regulations,* s. 1(e) [Complainants' Book of Authorities **Tab P**]

25. In para. 23, the Respondent follows by observing that the assistance at issue here is provided on a "voluntary" basis. This is an inherently ambiguous statement and it is not only unclear what is meant, but also its significance for the discrimination test. Read in context, it appears that the Respondent may simply mean that one is not legally required to apply for/receive this form of social assistance. In the real world, where reliance on social assistance is a requirement for survival, the Respondent's point is specious at best.

26. Despite claiming that the health benefits and WCB benefits are somehow "different", then social assistance, it will be seen that, like social assistance, nobody is legally required to apply for or receive health or WCB benefits. On the other hand, and despite the Respondent's apparent point, the fact that education is legally required was completely irrelevant for the Supreme Court of Canada in its discrimination analysis in *Moore*. The Respondent simply fails to articulate any legally compelling reason why the supposed "voluntariness" or not of receipt of benefits could in any way enter into a human rights discrimination analysis.

27. The Respondent then simply asserts without more (end of para. 23 of its Brief) that in the First Nations Caring Society case, the "children involved who are in the mandatory care of the state". It is unclear what the Respondent means by "mandatory care" of the state, but under child welfare legislation, children in care can be either "apprehended" or have been placed into voluntary/temporary care by their parents. But, even then, it is apparent from a review of the FNCFCS decision that the reasons for the children being in care played *no* part in the discrimination analysis.

28. More generally, not only does the Respondent fail to explain why the supposed *voluntary* nature of the benefit should be relevant in a discrimination analysis, it certainly cites no authority for the proposition.

"Social Assistance Act assistance is not a service provided to the public at large" (Respondent's Brief, para. 24)

29. In its submissions, the Province then contrasts health care, education and WCB benefits with the social assistance benefits at issue by asserting that the former are services offered to the "public at large". This is patently not the case. Health, education and WCB benefits are only offered to people who both need them and meet the statutory eligibility criteria.

30. More importantly, however, the NS *Human Rights Act* imposes NO requirement that a service be offered to "the public at large" or even "the public" for discrimination to be prohibited. Section 5(1)(a) prohibits discrimination in "the provision of provision of or access to services".

31. If it is actually the Respondent's contention that that the provision of social assistance—in whatever form (supportive housing or otherwise)—falls outside the ambit of the *Human Rights Act*'s prohibition of discrimination in the "provision of services", with respect, this contention was rejected decades ago. The fact that social assistance is only provided to impoverished "persons in need" renders it no less subject to *Human Rights Act* scrutiny. Courts have repeatedly held that the provision of social services/social assistance by governments falls within the ambit of "service" (in s. 5(1)(a) of the *Act*) and, thus, the *Human Rights Act*'s prohibition of discrimination applies to government's provision of these "services".[10] Over the years, many social assistance provisions programs and etc. have been found to violate equality rights protections (under either s. 15 of the *Charter* or statutory human rights codes) regarding the provision of services.[11]

[10] The first thorough treatment of this issue occurred in Saskatchewan (Human Rights Commission) v. Saskatchewan (Department of Social Services) (sub nom "Chambers"), 1988 CanLII 212 (SK CA) where the Sask CA applied the Saskatchewan prohibition against discrimination in the provision of services "customarily admitted or offered to the public" as covering the provision of social assistance to persons in need.

[11] For a sampling of social assistance cases involving equality rights violations, see: *Chambers* (*supra*) (human rights), *Silano* v. *BC*, [1987] B.C.J. No. 1591 (s. 15 of the *Charter*), Reference re Family Benefits, [1986] N.S.J. No. 403 (NSCA) (s. 15 of the *Charter*); *Ontario* (*Director, Disability Support Program*) v. *Tranchemontagne*, 2010 ONCA 593 (human rights); *Carrigan* v. *Department of Community Services* (1997), 157 NSR (2d) 307 (NSCA) (note: after the NSCA judgment, the Minister of Community Services repealed the impugned regulation); R v. Rehberg, [1994] N.S.J. No. 35 (NSSC) (s. 15 of the *Charter*); Falkiner v. Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services) 212 D.L.R. (4th) 633 (Ont CA) (s. 15 of the *Charter*)

32. The Respondent then asserts:

> "The government of Nova Scotia does not guarantee its citizens access to housing, in the way it does access to health care, public education, and other benefits. This is important in understanding what kinds of distinctions amount to discrimination in the context of this service." (para. 24) (emphasis added)

33. The Respondent may be arguing that while education, health care and "other benefits" Complainants are statutorily conferred, there is no statutory right to housing for anyone in Nova Scotia.

34. In reply, whether or not there is a stand-alone right to housing, is NOT the claim that is before the Board of Inquiry. Rather, this is a complaint that in its provision of social assistance to "persons in need" in Nova Scotia, the Province discriminates against the complainants and other persons with disabilities in the way that such assistance is provided (especially re the immediate right to assistance when found to be 'in need' and in the community of one's choice). Accordingly, the meaning and legal significance of the Respondent's subsequent statement is unclear:

> This is important in understanding what kinds of distinctions amount to discrimination in the context of this service.

35. The Respondent then claims that what the Complainants are seeking is a state-conferred benefit to supportive housing for persons with disabilities. This is not what we are seeking and no such claim is found in our clearly explained Complaint and/or our Pre-Hearing Brief. Indeed, the Respondent has pointed to no such claim in any of our pleadings. With respect, and to use an anachronistic term, the Respondent is making a "straw man argument"; it purports to have refuted an argument that we simply have not made.

Is disability a factor in the adverse treatment?

36. The Respondent criticizes the Complainants position that the Province discriminates against "persons in need" who are eligible for social assistance under the *Social Assistance Act* compared to those eligible for social assistance under the *ESIA*. It claims that the purposes and target groups of the two social assistance statutes are, to some extent, different. (Respondent's Brief at paras. 29 *et seq*.) Thus, the Respondent lists:

a. *ESIA* has a different function and purpose:
   - *ESIA* recipients are entitled to financial assistance for their basic needs, certain special need and certain employment supports: the program—combined with other forms of income—aims to provide person in need with their basic needs for food, clothing and personal care. It does not provide supportive housing, providing financial assistance with which to acquire housing.

-in contrast, the Respondent claims-

   - The goal of the *Social Assistance Act*'s DSP is the 'provision of supportive housing for children and adults' for persons with a range of disabilities.

-further-

   - Social assistance under the *ESIA* is available to all persons in need—regardless of their level of disability.

37. With respect, the Respondent confuses the *form* of the benefits for their essential nature and purpose. Again, this appears to stem from its failure to acknowledge that the DSP is simply a social assistance program under the *Social Assistance Act*. Social assistance benefits under both statutes are a) only provided to "persons in need", b) on the basis of a needs test and provide allowances to meet basic and special needs.

38. In addition, the evidence at the hearing will make clear that purpose and range of benefits of the DSP far exceeds the mere "provision of supportive housing". It includes a very wide range of special needs benefits: support services including child care, day time activities and educational programming, employment supports, house repair allowances, and transportation allowances. Many DSP participants are employed and rely in earnings incentives.

39. In many respects, the allowances under both statutory programs are identical and mirror each other.

40. Having said that, the current *Social Assistance Act* program is clearly *intended* to respond to the differential needs of persons with significant disabilities. In short, it many respects, it is *intended* to be an accommodative program responding to persons in need with significant disabilities.

41. Thus, while the Respondent may be suggesting that "the Complainants can apply for and be eligible for *ESIA* benefits", this would be patent formal equality—providing identical treatment to people with dramatically different needs.

42. Moreover, it must be remembered that for decades from the 1960s through to 2001, persons in need (i.e., persons with disabilities requiring residential supports, persons with a range of or without disabilities were assisted under the **same** social assistance statute and regulations, the *Social Assistance Act* and *Municipal Assistance Regulations*. The Respondent makes no effort to address this reality—i.e., there was not even a nominally different legislative scheme available to attempt a distinction.

43. The conclusion is inescapable, social assistance under both the *ESIA* and the *Social Assistance Ac*t are needs-based social assistance programs for persons in need.

44. Despite the fact that the current *Social Assistance Act* program is *intended* to be an accommodative program for persons with severe disabilities, it is flawed and these flaws are the basis for the discriminatory treatment:

a. Years-long wait lists for *Social Assistance Act* recipients compared to immediate eligibility under the *ESIA*;
b. The wait lists have resulted in needless and harmful institutionalization of persons found eligible as persons in need while depriving them of the benefits of living in communities near families and friends.
c. The right to assistance in the community of one's choice under the *ESIA* as opposed to the frequent 'placement' in remote locations under the DSP.
d. The treatment of eligibility for assistance as a matter of discretion under the DSP rather than an entitlement as of right under the *ESIA*.

The basis of the distinction in treatment between Social Assistance Act and ESIA social assistance

45. The Respondent asserts that there is no link between the difference in treatment. (Brief paras. 27 *et seq*.); the distinction is "based on whether the person requires financial benefits or supportive housing. This is not a protected ground covered by the *Human Rights Act*." (Brief paras. 31).

46. With respect this characterization entirely fails to take account of ***who*** experiences the adverse/unintended effects listed above; ***who*** is adversely impacted by the distinctions which the Respondent sets out above. If the question is asked ***who*** are the people adversely effected by the Respondent's version of the distinction, the answer is immediately determined, it is entirely and exclusively people with severe disabilities. Bearing in mind and applying the definition of "discrimination" in s. 4 of the *Act*, it is plain that the Respondent's distinction above "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".

47. It is submitted that this element of the test is easily proven; "disability" is plainly a factor in terms of describing the group adversely effected by the distinction.

The Respondent's Attempt to have the Board not Consider the comparison pleaded (Respondent's brief para. 34 et seq)

48. In its submissions, the Respondent repeatedly urges the Board to find the Claimants comparisons inapt and, instead, it offers different comparators which, unsurprisingly, it goes on to conclude are non-discriminatory. (Respondent's Memorandum paras. 32, 34, 35 and 36)

49. This litigation technique by government respondents is, by this point, familiar to courts and scholarly commentators. Thus, Professor Hogg, characterizes the dynamic in the following way:

> These cases demonstrate that the definition of the comparator group is critical to the outcome of s. 15 cases. The claimant will compare himself to a group that is better treated than him (*Martin*). The responding government will suggest a different comparator group that either receives worse treatment or the same treatment (*Hodge*) or that does not exist (*Auton*).[12]

50. The Supreme Court of Canada has stated that the comparator group chosen by the claimant should be "the natural starting point".[13]

51. Accordingly, much of the Respondent's submissions is taken up with attempts to a) re-frame the Complainants' characterization of the services at issue and, b) from there, urge comparators that lead to a discrimination dead-end.

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[12] Peter Hogg, *Constitutional Law of Canada,* 5th ed. Vol. 2, "Equality" at page 55-36.4

[13] *Law* v. *Canada* (*Minister of Employment and Immigration*), [1999] 1 S.C.R. 497at para. 58, *per* Iacobucci J: "When identifying the relevant comparator, the natural starting point is to consider the claimant's view. It is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge. However, the claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups. Clearly a court cannot, *ex proprio motu*, evaluate a ground of discrimination not pleaded by the parties and in relation to which no evidence has been adduced: see *Symes*, supra, at p. 762. However, within the scope of the ground or grounds pleaded, I would not close the door on the power of a court to refine the comparison presented by the claimant where warranted." See also *Lovelace* v. *Ontario* 2000 SCC 37: "Generally, the claimant chooses the relevant comparator, however, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant".

52. It is submitted that the Board ought to reject the Respondent's attempt to detour the Complaints in its submissions around alternative comparator groups.

Olmstead and the US Supreme Court

53. While the Individual Complainants have not made submissions regarding *Olmstead*, they support the DRC's reliance on and applicability of this authority from a preeminent judicial body. We support the DRC's contention that there is, implicit in the *Olmstead* analysis, a comparison at play. That is, institutionalization i.e., removal from society is a distinction, an exclusion from the body of society as a whole. Bringing an end to institutionalization is simply ending marginalization and exclusion. It is a step toward substantive equality for persons with disabilities.

CONCLUSION

54. It is submitted that all of the requisite elements of a *prima facie* discrimination case have easily been met and the matter should proceed to Phase Two of this Inquiry.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Halifax, Nova Scotia, this 2nd day of February, 2018

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