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

PRE-HEARING BRIEF SUBMITTED ON BEHALF OF THE COMPLAINANTS, BETH MACLEAN, SHEILA LIVINGSTONE AND JOSEPH DELANEY

Vincent Calderhead
Pink Larkin
Suite 201, 1463 South Park Street
Halifax, NS B3J 3S9

Solicitor for the Complainants,
Beth MacLean, Sheila Livingstone, and Joseph Delaney

Kevin Kindred and Dorianne Mullin
Department of Justice (NS)
1690 Hollis Street, 8th Floor
Halifax, NS B3J 2L6

Solicitor for the Respondents,
The Attorney General of Nova Scotia Representing Her Majesty the Queen in Right of the Province of Nova Scotia

Claire McNeil and Donna Franey
Dalhousie Legal Aid Service
2209 Gottingen Street
Halifax, NS B3K 3B5

Solicitors for the
Disability Rights Coalition

Kymberly Franklin and Kendrick Douglas
Park Lane Terraces, 3rd Floor,
5657 Spring Garden Road
Halifax, NS B3J 3C4

Solicitors for the
Nova Scotia Human Rights Commission

TABLE OF CONTENTS

CONTENTS

I. CONCISE OVERVIEW & STATEMENT OF FACTS 1
II. STATEMENT OF FACTS 4
III. STATEMENT OF ISSUES 9
IV. CONCLUSION 21

I. CONCISE OVERVIEW & STATEMENT OF FACTS

1. On the evidence, there is no dispute between the parties that the individual complainants are persons with disabilities and are able to live in supportive, community-based housing. This was and has been the case for many years.

2. For the past decade, it appears to be undisputed that there was no health or medical reason standing in the way of any of the three complainants being able to live in supportive-housing in a community of their choice.

3. Despite their having been considered and accepted as qualified 'persons in need' under the Province's social assistance legislation, they have either languished in institutions–deprived of the opportunities of community living while suffering ongoing adverse effects of institutionalization.

4. [It is to be remembered that Complainant Sheila Livingstone died in November 2016 while living in an institution in Yarmouth, Nova Scotia—hundreds of kilometres from her family.]

5. The Province's treatment of the three complainants, as persons with disabilities requiring supportive housing, is profoundly inferior to that accorded to 'persons in need' who do not require supportive housing and, under Nova Scotia's *Human Rights Act*, is discriminatory.

Background: The legislative provision of social assistance for 'persons in need'

6. From the 19th century, Provincial legislation in Nova Scotia conferred responsibility on municipalities for the provision of social assistance to "persons in need". Beginning in the

1930s, the Province began to slowly assume responsibility for a select and limited categories of recipients.[1]

7. In the 1960s, social assistance became modernized, a defining feature of which was the statutory obligation on provinces (and municipalities) to provide financial assistance to persons qualified as 'persons in need.'

8. During the same period, and behind the provincial programs at the Federal level, was the Canada Assistance Plan ("CAP") which authorized federal cost-sharing of eligible provincial expenditures on social assistance for 'persons in need'. CAP was in place from 1966 through until April 1996. It required that assistance be provided to all 'persons in need' and, in return for CAP-compliant provision of social assistance in the provinces, the Federal Government reimbursed provinces for 50% of their social assistance costs.

9. From 1966 through 1977, assistance for all persons in need in Nova Scotia, was delivered pursuant to either Part I ('Provincial') or Part II ('Municipal') of the *Social Assistance Act* which had consolidated and replaced the earlier provincial and municipal social assistance programs.

10. In 1977, Part I of the *SAA* (i.e., 'Provincial assistance') was repealed and replaced by the *Family Benefits Act*. The latter statute categorically restricted eligibility for Family Benefits to single parents, persons with disabilities and foster parents.

11. *All* other poor people, ('persons in need') continued to qualify for assistance under the *Social Assistance Act*. Indeed, people with significant disabilities, who were 'persons in need'

[1] These included widows, seniors and disabled persons. A useful, if partial, summary of the development of social assistance legislation is also to be found at the beginning of the Appeal Division's reasons for decision in *Reference re Family Benefits Act* (N.S.), [1986] NSJ 403 (NSSC AD).

and who required residential supports, were assisted (since at least as far back as the 1960s) and continue to be assisted under the *Social Assistance Act*.[2]

12. The Province began taking over full responsibility for not only financing but also delivery of all social assistance in 1995 which process was complete by April 1, 1998. Until then, the Province's role under the *SAA* was to enact and supervise the regulated framework for the municipal programs as well as providing the bulk of the financing required by municipalities in their provision of assistance.

13. A final legislative development took place in 2001, as a result of which social assistance for **all** persons in need in Nova Scotia is now provided under one (or both) of two parallel social assistance statutes:

a. the *Employment Support and Income Assistance Act* ("*ESIA*") or,
b. the *Social Assistance Act* ("SAA").

14. The *ESIA* program is the social assistance program used by most persons in need in Nova Scotia. When the *ESIA* was introduced in 2001, the *SAA* was simultaneously amended so that the scope of its coverage was narrowed and the definition of "person in need" was now restricted to a person "who requires financial assistance to provide for the person in a home for special care or a community based option."[3]

15. Indeed, some persons in need with disabilities move back and forth between the two programs as their circumstances change.

16. Finally, the appeal regime within the two parallel social assistance programs is also formally entwined; all appeals under the *Social Assistance Act* are dealt with pursuant to the appeal regime set out in the *ESIA*.[4]

---

[2] The *Act* is the framework legislation which is applicable to and governs the Respondent's Disability Support Program (see the DSP Policy Manual, "Policy Statement" 1.1).
[3] *SAA*, section 4(d).
[4] *SAA*, s. 19

The Discrimination Claim

17. The equality-rights violation driving the individuals' human rights Complaint is founded on the different, no, dramatically inferior treatment ***and*** outcomes accorded to many persons (including the Complainants) with disabilities who apply and qualify for supportive housing under the *SAA* (i.e., are 'persons in need'), compared to that accorded to qualified applicants (i.e., 'persons in need') under the *ESIA*.

18. Thus, in contrast to the treatment and outcomes enjoyed by 'persons in need' under the *ESIA*, the Province has discriminated by failing to provide the Complainants[5]—as qualified 'persons in need' with disabilities requiring supportive housing and eligible for assistance under the *Social Assistance Act*—the same right to receive assistance i) immediately, ii) as of right and iii) in the community of their choice as ESIA recipients.

II. STATEMENT OF FACTS

19. The Complainants do not intend to provide an extensive summary of the facts at this juncture. It is, however, submitted that the evidence regarding each of the Complainants will track the factual allegations set out in the Complaint. Events since the filing of the complaint in August 2014 have been ones that all parties have been made aware of. Indeed, it is anticipated that the broad chronology and living circumstances for each of the Complainants will not be the subject of significant dispute on the central issues.

Beth Maclean

20. As a young child Beth lived at home until the age of 12 when her parents were unable to meet her needs and, being without further available options, Beth was sent to live at a variety of institutions during her childhood: Bonnie Lea Farm (near Bridgewater), the NS Youth Training Centre in Truro, the Youth Wing at the NS Hospital for 5-6 months. Then, in July 1986, at age 14, Beth was sent to the Kings Residential Rehabilitation Centre ("KRRC" or "Kings") in Waterville,

[5] And, obviously, many hundreds of others.

Nova Scotia even though its own rules were to only accept adults. This is the institution which counsel and the Board of Inquiry recently visited.

21. Beth remained at Kings until October 2000. That month, after what was seen as impatience at being forced to live at the RRC, there was a breakdown at the KRRC. She was then transferred to the NS Psychiatric Hospital where all parties agreed that Beth would only remain for one year pending the arrangement of a suitable living situation. That was in October 2000—17 and a half years ago.

22. With the exception of a three-week period in December 2016, Beth has lived there, or in the institution called the Community Transition Program in Lower Sackville, ever since, even though everyone involved in her life – professional health care staff at the hospital, and social workers employed by the Department of Community Services – agrees that she does not need to be there, that, like everyone else, she is able to live with supports in the community.

23. In fact, it is actually harmful, both physically and psychologically, to Beth's health for her to remain in a locked unit in the hospital or the Community Transition Program ("CTP") when there is no medical or legal need for her to be there. All professionals involved would prefer that she lives elsewhere.

24. Beth MacLean is only forced to live in a locked unit in an institution because the Province has chosen not to make adequate accommodation (in both the human rights sense and shelter sense) for Beth and many others like her. In the meantime, she remains warehoused, much to her detriment.

25. As a result of this life of institutionalization, Beth has not only been prevented by the Respondent from living a full and normal life but has been harmed by decades of institutionalization.

26. Beth’s medical diagnoses have varied over the years but include i) intellectual development delay and ii) Mild Mental Retardation and Mood Disorder.

Sheila Livingstone

27. Sheila Livingstone was born into a Pictou County family in 1947. She was a person with needs arising from a ‘dual diagnosis’; dementia and schizophrenia.

28. As a young child, her needs were significant. She was refused admission to school and, when she was 12 and her family reached out for help, the Province had her sent to the Children’s’ Training Centre in Truro, Nova Scotia. In 1963, at age 16, she was transferred by the Province to the Halifax Mental Hospital. And, from there, it was one institution after another.

29. Finally, in May 1986 at the age of almost 39, Sheila was transferred out of an institutional setting and into a small options home in the community managed by the Regional Residential Services Society (“RRSS”), where the cost of her care was paid by the Province. Sheila lived successfully in RRSS managed homes in the Halifax/Dartmouth area from May 1986 until July 2004—a period of **18 years**.

30. However, in 2004, she had another temporary admission to Emerald Hall as her mental health had taken a turn for the worse. While in hospital, the Province withdrew Sheila’s funding to live at RRSS. As a result, she lost her community-based housing.

31. Because, she had nowhere to live, no offer of an alternative placements, since 2004 she ended up living, needlessly and wastefully, in the locked ward of Emerald Hall even though there was no legal or medical need for her to be there.

32. By early 2014, assaults by violent patients on Sheila at Emerald Hall had become semi-regular. Sheila was seen by staff and her sister with black eyes. Complaints were made to Hospital management.

33. A month before the first version of the human rights complaint was formally filed (in February 2014), the Province transferred Sheila to an institution in Yarmouth. Her sister, Olga Cain, was told that there were no closer places where Sheila could be accommodated. This was far from ideal but, in the hope that she would no longer be a sitting duck for further assaults in Emerald Hall, her sister reluctantly agreed to allow the transfer.

34. It was a 5-6 hours drive from Olga Cain's home in Truro to Yarmouth, not to mention the cost of a couple of hundred dollars in fuel, food and motel expenses for what amounted to a two-day trip. Once Sheila was transferred, Ms. Cain was able to see her once or twice per year compared to the five or six times per year that she had been seeing her when she was closer.

35. More importantly, it was Sheila herself who was then far from family whom she had rarely seen prior to her death.

36. In February 2015, Sheila's sister, and Substitute Decision Maker, Olga Cain asked the Department of Community Services to arrange a small option home placement for her in the Halifax area where she'd be closer to better services—and her sister. Apart from being put on a wait list for a small option placement in the HRM area, nothing happened.

37. In November 2016, Ms. Livingstone died—many hundreds of kilometres away from her sister Olga who'd received a phone call the night before to inform her that her sister was gravely ill.

Joey Delaney

38. Joseph Delaney was born on September 10, 1972 in Dartmouth Nova Scotia.

39. Because of his health situation, Joey's mother, Ms. Susan Latte, asked the Province for assistance to help her care for Joey. The only offer that was forthcoming was for Joey to move away from home and for him to be sent to the Dartmouth Children's Training Centre where he spent most of his childhood.

40. However, beginning in 1998, when the Dartmouth Children's Training Centre Children was closed, Joey began residing in the community, in small option homes operated by Regional Residential Services Society ("RRSS") and funded by the Respondent Province. With the exception of a stay at Emerald Hall (from December 2008 to March 2009), Joey lived in community-based small-option homes funded by DCS for approximately 12 years, until he was admitted to Emerald Hall due to health complications in January 2010.

41. Despite the fact that Joey's health had stabilized within a few months and, by the agreement of all, he was ready for discharge, the Respondent failed to offer supports for him to return to the community.

42. Accordingly, Joey remained in Emerald Hall for another five years—being transferred to the "Quest" institution in March of 2015. Joey remained at Quest—awaiting an offer of a community based living situation—but this failed to happen.

43. Quest discharged Joey back to Emerald Hall in January 2017. The institution stated that he had become more agitated in a way that it had been unable to address and increasingly verbal "which was disturbing to other clients."

44. Within a few months of re-admission to Emerald Hall, Joey's bowel problems had been properly assessed and treated, leaving him ready for discharge into the community.

45. As of the present date, Joey continues to 'live' in Emerald Hall.

III. STATEMENT OF ISSUES

Prima Facie Case

46. By agreement of all parties and the Board of Inquiry, this phase of the Board of Inquiry is restricted to a determination of whether, at the conclusion of the evidence introduced by the parties, the Board determines that a *prima facie* case has been established.

47. By the same token, evidence and issues of justification, defence, undue hardship including financial costs etc. (under section 6 of the *Human Rights Act*) are explicitly to be left for consideration until Phase Two of the Inquiry—assuming that the Board determines that a *prima facie* case has been established.

48. As stated in *Quebec* v. *Bombardier* (SCC 2015):

> [64] … the use of the expression "*prima facie* discrimination" can be explained quite simply on the basis of the two-step test for complaints of discrimination under the Charter. This expression concerns only the three elements that must be proven by the plaintiff at the first step. If no justification is established by the defendant, proof of these three elements on a balance of probabilities will be sufficient for the tribunal to find that s. 10 of the Charter has been violated. If, on the other hand, the defendant succeeds in justifying his or her decision or conduct, there will have been no violation, not even if prima facie discrimination is found to have occurred. In practical terms, this means that the defendant can either present evidence to refute the allegation of prima facie discrimination, put forward a defence justifying the discrimination, or do both.

Application of the *Human Rights Act* to the Respondent AGNS

49. The *Human Rights Act*'s non-discrimination provisions and the attendant accommodation obligations it creates are expressly binding on the Province.[6]

---

[6] *Human Rights Act*, s. 21

The Respondent's *Human Rights Act* obligations regarding the Complainants applied throughout the period 1986 through 1995

50. It will be appreciated that, in the case of Beth MacLean, the complaint dates from 1986 when "physical disability or mental disability" was included in the *Human Rights Act*.

51. It may be that the Respondent Province will seek to argue that because municipalities had responsibility for community-based supportive housing during the period 1986-1995, the Province cannot be held liable for *Human Rights Act* violations during that time.

52. However, in the period 1986 through to the formal assumption by the Province of responsibility for the actual provision of community-based options for persons with disabilities (1995), the Province played two profoundly significant roles.

53. First, it enacted the legislative regime (i.e., the *SAA* and *Municipal Assistance Regulations*) which not only authorized but required the provision of municipally delivered housing for people with disabilities.[7]

54. Second, pursuant to the legislative scheme, the Respondent Province actually paid the bulk of the cost of social assistance offered by municipalities during this period to persons in need requiring supportive housing.[8]

55. In short, the Respondent played a very active role in facilitating, regulating and supporting the municipalities actions for 'person's in need' during this period.

[7] See, the *Social Assistance Act* and *Municipal Assistance Regulations*.

[8] See, *Social Assistance* Act, S.N.S. 1970, c. 16, s. 32 and, for example, how the funding role played by the Federal government in support of First Nations assistance programs was seen as sufficient to engage the obligations on Canada under the *Canadian Human Rights Act* in *First Nations Child and Family Caring Society of Canada et al.* v. *Attorney General of Canada*, 2016 CHRT 2 (paras. 42-46)

The Remedial Purpose of Human Rights Legislation

56. It is a mistake to regard the purpose of human rights protections as restricted to the prevention of discrimination. Their dual purpose includes the *active promotion* of equality.

57. In *Robichaud*, the Supreme Court of Canada stated clearly that in considering human rights claims, it must be remembered that:

> ...the Act is directed to redressing socially undesirable conditions quite apart from the reason for their existence.
>
> -and-
>
> ... the central purpose of a human rights Act is remedial – to eradicate anti-social conditions without regard to the motives or intention of those who cause them.[9]

58. Later in *Robichaud* (p. 94), Justice LaForest reiterated that the "Act is concerned with **effects** of discrimination rather than its **causes** (or motivations)". (Emphasis in original).

59. In a human rights case from Ontario about discriminatory social welfare legislation and programming, the Supreme Court of Canada stated that human rights legislation, which has quasi-constitutional status, is often the:

> "final refuge of the disadvantaged and the disenfranchised" and the "last protection of the most vulnerable members of society".[10]

The Test for *Prima Facie Discrimination*

60. A complainant has the burden of establishing a *prima facie* case. The three-part test was articulated by Abella J. for a unanimous Supreme Court of Canada in *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 ("*Moore*"), para 33:

---

[9] *Robichaud* v. *The Queen* [1987], 2 SCR 84 at D.L.R. (4th) 57 (S.C.C.) at 90-1.
[10] *Tranchemontagne* v. *Ontario* (*Director, Disability Support Program*), 2006 SCC 14 at para. 49

> …to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.
> [emphasis added][11]

61. In Nova Scotia, the leading case on statutory human rights discrimination is *IAFF, Local 268 v. Adekayode*, 2016 NSCA 6 ("*Adekayode*"). In that case, Fichaud J. A. confirmed that the test as articulated by Abella J. in *Moore* governs (para 61).

62. In the present case, the complainants will prove *prima facie* discrimination by showing:

i) They are people with disabilities and were in receipt of social assistance, protected by s. 5(1)(o) and (t) of the *Human Rights Act*;

ii) They experience unreasonable wait-times and/or unnecessary institutionalization in obtaining assistance under the *SAA*, and/or the adverse effects of those disadvantages; and

iii) Their disabilities are a factor in these disadvantages

Application of the tests in *Moore* to this case

Step 1: They have a characteristic protected from discrimination under the NS *Human Rights Act Code*

63. During the relevant periods in the complaint, all three individual complainants had both mental and physical disabilities. In addition, during all relevant times, all three complainants have been in receipt of social assistance.

64. Indeed, all persons who qualify for the DSP program (as did the three individual Complainants) must have either: i) an intellectual disability, ii) long term mental illness resulting in function difficulties or a physical disability resulting in function difficulties.

[11] This three-part test for statutory human rights discrimination has been recently reiterated by the Supreme Court of Canada (*Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, para 24).

65. It is submitted that this element will not be in dispute.

Step 2: They experience(d) an adverse impact with respect to the service.

66. As stated repeatedly in the individuals' Complaint, the 'service' in question in this complaint is 'social assistance/social services' as provided by the Respondent and, in particular, the Department of Community Services.

The Province's provision of social services (including social assistance) are 'services' within the meaning of s. 5(1)(a) of the Human Rights Act

67. Many courts and human rights tribunals have found that a government's provision of social services/social assistance 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 these "services".

The Province's Two Social Assistance Programs

68. Since at least the mid-1960s, Nova Scotia has had two, often inter-twined, social assistance systems. Thus,

a. 1966-1977

Social Assistance Act

i. *SAA* Part I (Provincial Assistance)

ii. *SAA* Part II (Municipal Assistance)

NOTE: Recipients of 'Provincial Assistance' also relied on Municipal Assistance to provide for their Special Needs assistance for which there was no provision under Provincial Assistance.

b. 1977-2001

Social Assistance Act (*Municipal Assistance*)

Family Benefits Act (Provincially legislated and delivered social assistance)

NOTE: *SAA* (Municipal Assistance) recipients were any 'persons in need'—regardless of whether they had a disability. Applicants for 'Family Benefits' relied on Municipal Assistance while awaiting the processing of their Family Benefits applications as well as to provide for their Special Needs.

c. 2001—present

Social Assistance Act (*SAA*)

Employment Support and Income Assistance Act (*ESIA*)

NOTE: *SAA* recipients are 'persons in need' whose disabilities mean that they require social assistance to provide for them in a home for special care or a community based option. *ESIA* recipients require social assistance but, whether or not they have disabilities, do not require supportive housing.

69. As the survey above makes clear, since the mid-1960s, Nova Scotia has often had two parallel social assistance programs; from 1966 to 1977, one statute effectively had two programs (Provincial and Municipal); from 1977 to 2001, two separate statutes provided social assistance to different but overlapping groups and, 2001 to present: two separate statutes provided social assistance to two groups whose needs overlap in some ways.

Nova Scotia's Current Social Assistance Programs

The Disability Support Program[12]

70. The Disability Support Program ("DSP") is the Respondent's current social assistance program intended to respond to the needs of 'persons in need' with disabilities who require supportive housing. Like its predecessor programs, the DSP is authorized under the *Social Assistance Act*.

[12] Over the years, the Disability Support Program ("DSP") has had a variety of names. Thus, between 1995 and 2002, it was called the Community Supports for Adults program ("CSA"). From 2002 until 2013, it was known as the Supports for Persons with Disabilities Program ("SPD") before taking on its most recent name in 2013.

The Income Assistance Program

71. The Income Assistance ("IA") program is intended to provide social assistance to all 'persons in need' in Nova Scotia. 'Persons in need' who have significant disabilities and who require supportive housing are encouraged to apply for the DSP as its is intended to better respond to their needs.

Discrimination under s. 4 of the Human Rights Act and the provision of social services

72. Section 4 of the *Human Rights Act* relies on the wording for 'discrimination' from the Supreme Court of Canada's *Charter* s. 15 case in *Andrews* which it codifies:

> …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.

73. Combining a summary of the first test from *Moore* with the statutory definition in s. 4 of the *Act*, we can say that discrimination arises when: a *distinction* (whether intentional or not) 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 others.'

The Respondent Discriminates against SAA Recipients in comparison with ESIA Recipients of Social Assistance

74. The two parallel social assistance programs have many overarching aspects in common. Thus, under the respective legislation, both statutory social assistance programs have as their foundation a 'needs test' for people who meet all other eligibility qualifications. That is, a 'budget deficit' calculation is applied in the determination of financial eligibility; an applicant's financial resources (chargeable income and assets) are compared with fixed allowances and applicants/recipients are provided assistance in the amount of the budget deficit.

Distinctions

75. However, there are some stark contrasts in the way that assistance is actually provided/withheld under the DSP compared to the IA program that constitute the discriminatory distinctions in this case. These relate to the form, location and delay/withholding of social assistance under the DSP (and its predecessor programs) compared to the IA social assistance programs.

76. For convenience, the following table sets out the Complainants' experienced distinctions/adverse impacts as a result of the Respondent's provision of/failure to provide the *service* of social assistance:

Distinctions	IA persons in need	The Complainants (DSP persons in need)
Form	Community-based living	Institutionalization or no/limited service
Timing	Virtually Immediate	Years long wait-lists
Entitlement	Assistance as of right	Discretion rather than as of right assistance
Location & Circs.	Assistance in the community of choice	Diminished autonomy re community *location* & with whom going to live & living circumstances

77. As set out in the Complaint, the evidence will establish that the three complaints were subject to the adverse distinctions listed above:

a. They were all effectively forced to live in locked institutions of one form or other rather than being able to enjoy the benefits, advantages and participation in community-based living.

b. Having qualified for assistance, they were all placed on many years long wait lists rather than being offered social assistance soon after being found eligible.

c. Despite having qualified as 'persons in need' for the DSP, the Complainants, nonetheless had their eligibility for assistance treated as a matter of discretion rather than entitlement as provided under the IA program.

d. Having qualified as 'persons in need', the Complainants were not offered assistance in the community of their choice (see, for example, the experience of Sheila Livingstone, having only been offered a way out of Emerald Hall by a placement in Yarmouth.)

78. These stark differences/disadvantages between the experiences of the Complainants (and the many hundreds of others) under DSP and IA programs is, on reflection, a difference in treatment and outcomes in the way the Province treats people with significant disabilities requiring supportive housing, on the one hand, and, on the other, the way it treats people without disabilities or whose disabilities do not require supportive housing.

79. The net result has been that in its provision of social assistance, the Province has responded to the Complainants' differential needs as people with disabilities requiring supportive housing in a discriminatory way. By failing to recognize and respond to the Complainants' differential needs in its provision of assistance, the Province has denied them substantive equality. Simply put, it has treated people with disabilities–and their right to equality–as of lesser importance than the rights of others. Indeed, in its reliance on institutions, its confirms the stereotypical treatment of persons with disabilities.

First Nations Child and Family Caring Society of Canada et al. v. *Canada*[13]

80. The '*Caring Society*' case bears several remarkable similarities to the present case. Not only is it a major systemic challenge to a flawed government social assistance/service program, but, as in the present case, it involved the Human Rights tribunal scrutinizing the inferior treatment and outcomes accorded to an historically disadvantaged group.

[13] 2016 CHRT 2

81. In 'Caring Society' it will be recalled that the CHRT found that indigenous children and families, a group protected under the *Canadian Human Rights Act*, had been discriminated against in the provision of social welfare services. Substituting "race and national or ethnic origin" with "physical disability or mental disability" and "source of income" leaves the dramatically inferior treatment accorded to a historically marginalized group appearing substantively similar.

82. As in *Moore* (SCC), human rights-compliant social assistance programs, specifically for persons with disabilities requiring supportive housing, involve the provision of accommodative services that responds to those differential needs. It is accommodative assistance (such as exists, *in theory*, in parts of the Disability Support Program) that would allow the Complainants to exercise their clearly stated choices to live in the community. However, in its implementation of the *Social Assistance Act* obligations, the Province has failed to do so for the Complainants and for hundreds of others.

Supreme Court of Canada on the historic disadvantage of persons with Disabilities in Canada

83. The submissions regarding the disadvantage visited upon the complainants in this case echoes the observations by the Supreme Court of Canada concerning the plight of persons with disabilities in Canadian society.

84. Thus, in *Via Rail Canada* (SCC 2007), the Court observed:

> "[o]ne of the greatest obstacles confronting disabled Canadians is the fact that virtually all major public and private institutions in Canadian society were originally designed on the implicit premise that they are intended to serve able-bodied persons, not the 10 to 15 percent of the public who have disabilities".[14]

85. Similarly, the former Chief Justice of Canada commented in the *Gosselin* case that the values underlying the equality rights guarantee were oriented around inclusion:

---

[14] See *VIA Rail Canada Inc. v. Canadian Transportation Agency,* 2007 SCC 15 at para. 181.

> The aspect of human dignity targeted by s. 15(1) is the right of each person to participate fully in society and to be treated as an equal member, regardless of irrelevant personal characteristics, or characteristics attributed to the individual based on his or her membership in a particular group without regard to the individual's actual circumstances.[15]

International human rights law and legislative interpretation

86. The Supreme Court of Canada has often stated that courts should have regard to relevant international human rights and constitutional norms when interpreting legislation. Courts should interpret and apply legislation in a way that renders the provision consistent with international human rights law and the *Constitution*. Regarding international human rights law, the Supreme Court recently stated:

> As a matter of statutory interpretation, legislation is presumed to comply with Canada's international obligations, and courts should avoid interpretations that would violate those obligations.[16]

International Human Rights Law Supports the Complainants' position

87. As a party to the *International Covenant on Civil and Political Rights*, Canada is under an obligation to ensure that everyone in Canada is provided the benefit of the rights. Moreover, prior to Canada's ratification of the *International Covenant on Civil and Political Rights* (*"ICCPR"*) in 1976, the Province of Nova Scotia, along with the other provinces and territories, not only endorsed Canada's accession to the treaty but "undertook to adopt the measures necessary for the implementation of the Covenants in the areas under their jurisdiction."[17] Canada's

[15] *Gosselin* v. *Quebec* (*Attorney General*), 2002 SCC 84 at para. 20

[16] *R. v. Appulonappa*, 2015 SCC 59 at para. 40. See also the recent judgment of the NS Court of Appeal in *Sparks* v. *Department of Community Services*, 2017 NSCA 82 at paras. 50-52 and 60 where the Court of Appeal placed heavy reliance on international human rights law in the interpretation of legislation.

[17] See Canada's First Report to the CESCR, UN Doc. No.: E/1978/8/Add.32 at page 5

compliance with its treaty obligations is subject to periodic review by the United Nations Human Rights Committee.[18]

88. In the course of its 2005 review of Canada's compliance, the UN Human Rights Committee actually referred to the issue that is before the Board of Inquiry in the course of its Concluding Observations while referencing the *intersecting* concerns impacting the 'right to liberty and security of person' (article 9 of the *ICCPR*) <u>and</u> the right to be free from discrimination (article 26 of the *ICCPR*):

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

89. In short, the kinds of practices then prevalent in Nova Scotia, and still widely in place today for hundreds of Nova Scotians, was actually chosen for emphasis by a prominent United Nations human rights treaty body in **2005**. The issue under litigation here had actually risen—by 2005—to an international human rights concern. It is submitted that the non-discrimination provisions in our *Human Rights Act* ought to be interpreted and applied in a manner consistently with the observations and recommendations of this preeminent international human rights body.

[18] *International Covenant on Civil and Political Rights ("ICCPR")*, Can. T.S. 1976 No. 47, articles 9 and 26

Step 3: The protected characteristic must only have been 'a factor' in the adverse treatment

90. The Supreme Court of Canada has recently confirmed that the prohibited ground of discrimination must only have been 'a factor' in the Complainants' adverse treatment.[19]

91. Here, the Complainants are not relying on evidence of the Respondent's ill intentions toward people with disabilities but, of course, that is not a required element of discrimination. Rather it will be sufficient if a disadvantageous distinction adversely impacts people with disabilities.

92. In answer to the question, 'who is it who is subject to these adverse impacts, the answer is: it is poor persons in need requiring supportive housing who are subject to these disadvantageous distinctions compared to IA persons in need. That is, it is people who are eligible and qualify for the DSP program under the *Social Assistance Act*.

IV. CONCLUSION

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Halifax, Nova Scotia, this 15th day of January, 2018

____

Vincent Calderhead
PINK LARKIN
Solicitor for the Complainants
Beth MacLean, Sheila Livingstone and Joseph Delaney

These submissions are dedicated to the memory of our colleague Prof. Dianne Pothier.

[19] *Stewart v. Elk Valley Coal* (*supra*) at paras. 45 and 46.