2014 H14-0418

Nova Scotia Human Rights Board of Inquiry

In the matter of:

Beth Maclean, Joseph Delaney and Sheila Livingstone

and

Disability Rights Coalition

and

Province of Nova Scotia
and

Nova Scotia Human Rights Commission

PRE-HEARING MEMORANDUM OF THE RESPONDENT, PROVINCE OF NOVA SCOTIA

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I. OVERVIEW

1. The case at hand is an unusual human rights claim. In many ways, the parties—Complainants and Respondent both—present the same story, of a system that requires reform in order to better meet the needs of persons with disabilities. The parties have different views, sometimes widely different, on the shape and pace of that reform, and the Respondent will note that the system has worked well for many of the people it serves. But no one before you will argue that the history of the government programs at issue, or the individual experiences of the Complainants and others, have been perfect, and no one will argue in favour of maintaining the status quo.

2. The question in this case is not, however, whether the status quo is perfect or requires reform. Reform is a given; indeed the process of reform is underway. The question is whether a Board of Inquiry under the Nova Scotia *Human Rights Act* has the jurisdiction to direct that reform, or whether that reform should remain in the hands of the Department of Community Services and the elected government to which it is responsible.

3. The jurisdiction of a Board of Inquiry is to identify and remedy discrimination. Discrimination has a specific legal meaning. Not every social problem, not even every social problem that impacts persons with disabilities, is discrimination within the meaning of the *Human Rights Act*. If it were, then a Board of Inquiry would serve a general oversight function, reviewing and reforming all government activities that benefit persons with disabilities. The role of the Board of Inquiry is, necessarily and by design, more limited than that.

4. The Respondent submits that the legitimate social problems raised by the Complainants in this case do not amount to discrimination, and therefore the Board of Inquiry ought to dismiss this complaint.

II. FACTS

5. The facts are not entirely agreed upon among the parties, and the Respondent anticipates some dispute over particular details of the Individual Complainants' histories as well as the broader system-related facts. However, for the purposes of this pre-hearing submission, the Respondent intends to focus on the disagreements of law, and leave the facts to be demonstrated at the hearing. That said, it is important to ground the complaint with a factual description of the services in question.

The Disability Support Program

6. At its core, this complaint centres around the Complainants' dissatisfaction with the provision of supportive housing for persons with disabilities in Nova Scotia. Supportive housing is provided through the Disability Support Program ("DSP"), a voluntary program that provides supportive housing options for children, youth and adults with disabilities, including intellectual disabilities, long-term mental illness and/or physical disabilities. DSP is the responsibility of the Department of Community Services ("DCS"). DCS is also responsible for Child, Youth and Family Supports, and Employment and Income Assistance Supports.

7. Services range from community-based options such as supports to participants living at home with family, living independently or in small option homes, to residential options such as Adult Residential Centres and Regional Rehabilitation Centres. It also includes vocational and

day programming. A summary of the services provided to eligible participants through DSP include:

- **Direct Family Support for Children** - Direct Family Support for Children (DFSC) and Enhanced Family Support for Children (EFSC) provide funding to enable families to support their child with a disability at home. DFSC and EFSC provide funding for the purchase of respite services to assist with scheduled breaks for family care givers. An enhanced funding component may be available for children and families who meet EFSC eligibility criteria.
- **Flex Program** - The Flex Individualized Funding program provides supports and services to adults with disabilities who live at home with their families or who live independently with support from their family or personal support network. The program provides self-directed and self-managed funding to eligible participants.
- **Adult Service Centres** - Community-based vocational day programs for adults with disabilities.
- **Alternative Family Support Program (AFS)** – provides support for persons with disabilities to live in an approved, private family home. The participants must be unrelated to the AFS provider.
- **Independent Living Support (ILS)** - provides funding for hours of support services from a Service Provider, based on the assessed needs and circumstances of an eligible participant who is semi-independent but requires support to live on their own.
- **Licensed Homes For Special Care** - provide support and supervision in homes with three or more beds. These options include:
    - **Small Options Homes (SOH)** – three to four persons are supported by qualified care providers in a community home. The home and the staffing are provided by various private service providers.
    - **Group Homes and Developmental Residences** - provide a continuum of developmental rehabilitation programs for individuals with disabilities within a 4 to 12 person residential setting.
    - **Residential Care Facilities:** provide a residential support option to typically ten or more adults with disabilities who require minimal support and supervision with routine personal-care activities, community skills and activities, and illness supervision. Individuals are provided with limited direct support and do not have major health or behavioural support needs.
    - **Adult Residential Centres ("ARC"):** provide long-term structured supports and services, typically to twenty or more adults with disabilities, to enhance their development of interpersonal, and activities of daily living skills. Approved staffing is provided at all times by on-site professional staff.

- **Regional Rehabilitation Centres ("RRC"):** provide both rehabilitation and developmental programs, typically to twenty or more adults with disabilities, who require an intensive level of support and supervision related to complex behavioral challenges and skill development needs. Approved staffing is provided at all times by on-site professional staff.

8. The following is a breakdown of the various service options and numbers of people using each service in fiscal 2016 - 2017:

Type of Service	**Number of People**
Direct Family Support for Children	676
Flex Individualized Funding	1402
Adult Service Centres (day programs)	2000
Alternative Family Support	167
Independent Living Support	741
Small Options Homes (including homes with 1 – 4 persons, includes adults and children)	695
Group Homes & Developmental Residences	583
Residential Care Facilities	424
Adult Residential Centres	370
Regional Rehabilitation Centres	185

There are currently approximately 5,250 individuals in the DSP. The cost of the program has exceeded $300,000,000.00 per year in recent years.

III. LEGAL ANALYSIS

9. The parties agree on some aspects of the legal analysis. The Respondent takes no issue with the distinction between the prima facie and justification phases of the analysis, the three-part test for *prima facie* discrimination as set out by the Complainants, or many of the general principles of human rights law set out in the Complainants' briefs. There is also no debate that the individual complainants, and the broader community that receives similar services, are persons with disabilities and belong to a protected group under the Act. However, there are significant disagreements as to how to apply the tests for discrimination to the facts of the case.

10. As noted by the Complainants, the three-part test for a prima facie case of discrimination is set out in in *Moore*:

- Do the Complainants have a characteristic protected from discrimination under the Human Rights Act?
- Did the Complainants experience an adverse impact with respect to a service?
- Was the protected characteristic a factor in the adverse treatment?

11. There is no disagreement as to the first element of the test. However, the Respondent argues that the second and the third branch of that test are not met in this case. Before turning to that argument, it is necessary to set the context by reference to the comparative nature of discrimination itself.

Discrimination is a comparative concept

12. The analysis in the Complainants' briefs fails to fully deal with the comparative nature of discrimination. The test for discrimination, in asking whether there is an adverse impact based on a protected ground, is asking an inherently comparative question.

13. This has been reiterated by the Supreme Court of Canada throughout its anti-discrimination jurisprudence:

> "…equality is a comparative concept, the condition of which may "only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises" (*Withler* v. *Canada (Attorney General)*, 2011 SCC 12 at para 41 ("*Withler*"), quoting from *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143.)
>
> "Comparison plays a role throughout the analysis...The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1)." (*Withler* at paras.61-62)

14. Indeed, the need for comparison is built into the words of the *Human Rights Act* itself, which defines discrimination in terms 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 (s.4, emphasis added)"

15. It is true that courts and tribunals have struggled with exactly what kind of comparisons are required in each case. *Withler* and other cases have rejected the overly formalistic "mirror comparator group" approach, and the overly simplistic likeness-as-equality approach. But still, at its core, a discrimination analysis requires a comparison to be made between those who share the protected ground, and those who do not, with respect to the service in question. The Complainants' application of the test seriously underplays the need for a comparative analysis.

16. Keeping in mind the central role of the comparative analysis, we can turn to the Respondent's arguments on the test for discrimination.

Did the Complainants experience an adverse impact with respect to a service?

17. While the Respondent does not disagree that this complaint involves the provision of benefits which amount to a "service" under the Act, it is vital to have a clear understanding of exactly what "service" is at issue.

18. The Complainants' briefs articulate the nature of the service in question in various ways. The DRC articulates the service as "social services, together with social assistance" (DRC brief at para.26); they clearly make the point that they consider the complaint to cover "all provincial social services" (DRC brief at para.27.) The Individual Complainants' brief describes the service as "social assistance/social services" (Individual Complainants' brief at para.66.) However, the broad terms "social assistance" or "social services" (terms which arguably cover a wide range of benefits) do not accurately describe the substance of the Complaint itself.

19. Even a casual reading of the Complaint makes it clear that the true subject matter of the Complaint is the provision of supportive housing. There is no other aspect of "social services" which is described in any detail in the complaint. The histories of the Individual Complainants lay out how they have (or have not) been provided supportive housing by the Province. The specific requests made of the Board of Inquiry at paragraphs 48, 88, and 126 of the Complaint are all related to supportive housing. Similarly, the DRC at paragraph 134 of the Complaint describes the alleged discrimination as the "fail[ure] to provide adequate, supportive, community-based housing for people with disabilities." At paragraph 161 of the Complaint the DRC describes the "service" as:

> "access to social assistance or other public assistance or service required in order t*o enable persons with disabilities who are in need to live in an appropriate care setting*". (emphasis added)

20. The Complaint is entirely about supportive housing. This is reflected in the Complainants' briefs as well, as they define "social assistance" or "social services" to effectively mean supportive housing. For example, the Individual Complainants' brief describes the affected persons as "persons in need who have significant disabilities and who require supportive housing" (para.78) and "people with disabilities requiring supportive housing" (para.79). The DRC similarly describes the needs at the core of the case as "supports and services to live in the community" (paras. 4, 25, 35.)

21. It is not clear why the Complainants choose to characterize the service at issue in question as "social services" or "social assistance". This Complaint, in substance and in the words of the Complainants themselves, is about supportive housing. Clearly articulating the true nature of the service in question is key to properly applying the test for discrimination.

22. The service at issue in the case—supportive housing—is different from the government services involved in other cases cited by the Complainants. For example:

- In *Moore*[1], the government service in question was public education. Public education is a service provided to all school-aged children, as of right. The case involved distinctions made between disabled and non-disabled children in the provision of that service.
- In *Martin*[2], the government service in question was workers' compensation benefits. Again, these are benefits available to all injured workers. The case involved distinctions made between injured workers with different kinds of disability.
- *Eldridge*[3] involved the medically necessary services provided by hospitals, which again are available to all citizens as of right. The case involved distinctions between deaf

[1] *Moore* v. *British Columbia (Ministry of Education)*, 2012 SCC 61; see DRC Book of Authorities
[2] *Nova Scotia (Workers' Compensation Board)* v. *Martin*, 2003 SCC 54; see DRC Book of Authorities
[3] *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 SCR 624; see DRC Book of Authorities

people, who required translation in order to access those services, and non-deaf people, who did not.

23. As noted by the Complainants, where the Province provides supportive housing it also does so on a voluntary basis. The Respondent fully recognizes that a family who needs to rely on the services of the DSP would hesitate to describe it a truly "voluntary". However, there is no legal requirement that anyone with disability live in a housing arrangement provided by the government, and none of the individual complainants were legally required to avail themselves of the services of the DSP. The context is important in contrasting cases like *First Nations Caring Society*[4], for example, which involve children who are in the mandatory care of the state.

24. In contrast to the services involved in the cases cited by the Complainants, supportive housing is not a service that the government provides to the public at large. 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.

25. The arguments made by the Complainants are better understood not as discrimination arguments, but as arguments that the state ought to provide a certain benefit (community-based living for persons with disabilities.) The case law confirms that government has the discretion to determine which social benefits to provide, and how to provide them. A legislative choice not to accord a particular benefit is not in-and-of-itself discriminatory. When a benefit is conferred, it cannot be conferred in a discriminatory manner; but anti-discrimination law does not require the government to confer a benefit, even where that benefit would serve the needs of a

[4] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*, 2016 CHRT 2; Individual Complainants' Book of Authorities, at Tab C.

disadvantaged group. (*Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 esp. para.41-47.)

26. The Respondent submits that, once the service at issue is clearly defined, it becomes clear that the Complainants have not experienced an adverse impact in relation to that service. The concept of "adverse impact" is itself inherently comparative; not every problem in the delivery of service to a group covered by the Human Rights Act is an "adverse impact" within the meaning of the test. This point relates to the larger argument to be made about the comparative analysis, which will be picked up below.

Was the protected characteristic a factor in the adverse treatment?

27. This is the branch of the test where the need for a comparative analysis becomes most clear. To determine whether disability was a factor in how an individual or group was treated, one has to compare and contrast the treatment of persons who have disabilities and persons who do not. However, the Individual Complainants' own analysis shows that disability is not in fact a relevant factor to explain any difference in treatment.

28. The Individual Complainants attempt to tackle the comparative question by setting up a comparison between the DSP, on the one hand, and the Employment Support and Income Assistance Program ("ESIA") on the other. However, this comparison does not support the conclusion that persons with disabilities are discriminated against.

29. ESIA has a different function and purpose from DSP. The purpose of the *Employment Support and Income Assistance Act* and its corresponding Regulations is to provide financial support and assistance to Nova Scotians in working towards self-sufficiency and independence.

Under the legislation, income assistance recipients are entitled to financial support for basic needs, certain special needs, and certain employment supports. The program, in combination with other forms of income, strives to provide residents of Nova Scotia who are in need with a level of financial assistance adequate to meet their basic needs for shelter, food, clothing, and personal care. ESIA is not a program that provides supportive housing; it merely provides financial benefits which may assist with housing. It is separate and apart from the DSP, the goal of which is to provide supportive housing options for children and adults with a range of disabilities and/or mental illnesses.

30. Crucially, ESIA is available both to Nova Scotians with disabilities **and** those without disabilities. There is nothing excluding Nova Scotians with disabilities from accessing the kind of benefits provided by ESIA, and in fact, a large percentage of persons with disabilities do so. Entitlements under ESIA are actually designed to respond to the differing needs of persons with disabilities.

31. The distinction between benefits available under ESIA and those available under DSP is not a distinction based on disability. It is a distinction based on whether the person requires financial benefits, or supportive housing. That is not a protected ground covered by the *Human Rights Act*.

32. In contrast, a much more apt comparison can be made between the supportive housing benefits available to persons with disabilities under the DSP, and the supportive housing benefits available to persons without disabilities[5] under Housing Nova Scotia. Housing Nova Scotia is the provincial government agency responsible for the administration and delivery of affordable

[5] For the sake of clarity, people with disabilities can and do also receive supporting housing through the various programs of Housing Nova Scotia.

housing solutions for low-to-modest-income Nova Scotians. Its programs go beyond the financial support model of ESIA, and involve actually providing a wide range of affordable housing options along the housing continuum.

33. The Individual Complainants, at para.76, provide a chart describing the different features of ESIA vs. DSP. The chart inaccurately claims that ESIA provides "community-based living"; ESIA does not provide any housing solutions, only financial benefits designed in part to facilitate housing. With respect to the remainder of the chart, what should be striking is that the Complainants are simply describing the difference between two kinds of benefits: financial support, and housing support. It makes sense that financial benefits can be "virtually immediate," "as of right," and facilitate choice, while providing actual housing support must necessarily involve longer waiting times, limits to capacity, and a reduced level of choice. Providing money to assist with housing expenses is simply a very different project than providing the housing solution itself.

34. Again, a more apt comparison is between two programs that actually provide supportive housing: DSP and Housing Nova Scotia. Each program involves significant waitlists, limited capacity (rather than benefits "as of right"), and limited choices of living circumstances. These limitations have nothing to do with whether or not the participant has a disability; they are inherent limits based on the nature of the service provided.

35. Even the Individual Complainants in their brief recognize that they are not dealing with a comparison between benefits available to persons with disabilities on the one hand, and persons without disabilities on the other. Paragraph 78 of their brief describes the comparison as between "people with significant disabilities requiring supportive housing" on the one hand, and "people

without disabilities or whose disabilities do not require supportive housing" on the other. Even in the Complainants' own words, the distinction is not the disability; it is the benefit being sought. Adding Housing Nova Scotia into the analysis allows a true picture of the relevant comparison: persons with or without disabilities seeking financial support (ESIA), and persons with or without disabilities seeking supportive housing (Housing Nova Scotia and DSP).

36. A more robust comparison, then, makes it clear that the Complaint does not involve a distinction based on disability, but rather a distinction based on the nature of the benefit sought (supportive housing.) Once this is clear, it becomes readily obvious that the test for discrimination fails. The Complainants have not suffered an adverse impact in relation to the service in question, and/or the adverse impact has nothing to do with the protected ground of disability.

The DRC's non-comparative approach to the discrimination question

37. While the Individual Complainants' analysis is based on a flawed comparative approach, the DRC's brief lacks any kind of robust comparative approach at all. The DRC's analysis seems to favour a non-comparative approach; its conclusion seems to be that the *Human Rights Act* in-and-of-itself imposes a requirement for a certain approach to providing services to persons with disabilities. The Respondent submits that this suggestion is not rooted in Canadian anti-discrimination case law, and instead draws inappropriate inferences from American case law.

38. We have cited above the Supreme Court of Canada's rulings emphasizing the comparative approach at the core of the equality analysis. The DRC only mentions comparison in stating that "the comparator group referred to in *Martin* is no longer a requirement" (para.24). This is accurate as far as it goes; subsequent cases reject the specific, formalistic "mirror

comparison" approach from the earlier case law. However, discrimination continues to be a comparative concept, and the lack of any comparative lens is a deeply flawed approach to the analysis. The DRC, in its brief, instead turns to American case law which arises from a different statutory context.

39. The DRC submits that the *Americans With Disabilities Act (ADA)* ought to provide significant guidance as to the application of the Nova Scotia *Human Rights Act*, and claims support for this proposition in Supreme Court of Canada jurisprudence. This significantly overstates the interpretive aid that can be gleaned from the *ADA*, both in general and in the specific facts of this case.

40. As noted by the DRC, the Supreme Court of Canada in *Eldridge* referenced the *ADA*. However, the Court did not cite the *ADA* as providing "important guidance in interpreting the scope of equality rights with respect to discrimination" (DRC brief at para.45.) Instead, the Court noted, with caution, that the *ADA* might have utility in fleshing out the specific entitlement to sign language interpretation that was at issue in the case:

> Some guidance can be provided, however (and I stress that it is guidance -- not authoritative pronouncement), by the experience in the United States under the *Rehabilitation Act*, 29 U.S.C. § 794 (1997), and the *Americans with Disabilities Act*, 42 U.S.C. §§ 12182-12189 (1997). Regulations enacted pursuant to those statutes require health care providers to supply appropriate auxiliary aids and services, including qualified sign language interpreters, to ensure "effective communication" with deaf persons; Code of Federal Regulations, 45 C.F.R. § 84.52(c) (1997); 28 C.F.R. § 36.303(b) and (c) (1997). [*Eldridge* at para.81]

41. Elsewhere, the Supreme Court of Canada has noted that issues decided under Canadian human rights laws might well have different outcomes than they would under the *ADA*. The Supreme Court in *Granovsky* contrasted the two regimes:

> The United States Supreme Court takes the view that such individuals cease to be disabled for the purpose of the *Americans with Disabilities Act*; see Sutton v. United Airlines, Inc., 119 S.Ct. 2139 (1999). The same result would not necessarily follow under our jurisprudence, as discussed below. [*Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, at para.36]

42. Human rights tribunals have also determined that the Canadian approach to disability rights "differs sharply" from the *ADA* (*Morris* v. *BC Rail*, 2003 BCHRT 14 at para.212) and that "little helpful guidance" could be derived from American case law due to the "quite different statutory contexts" (*Gichuru* v. *The Law Society of British Columbia (No. 4)*, 2009 BCHRT 360 at para.401). A Board of Inquiry under the Nova Scotia *Human Rights Act* has similarly refused to follow case law under the *ADA* due to the wide differences in context (*Snow v. Cape Breton-Victoria Regional School Board*, 2006 NSHRC 6 at para.57).

43. The DRC suggests that the *ADA* is "substantially the same" as the Nova Scotia *Human Rights Act* on the relevant issues (DRC brief at 42). In fact, the *ADA* has dramatically different wording that is directly relevant to the outcome of *Olmstead*[6], the sole *ADA* case cited by the DRC. As reviewed in *Olmstead*, the language of the *ADA* directly and explicitly says that excessive reliance on institutionalization is a form of discrimination against persons with disabilities:

> "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem" (quote from the *ADA*, cited by *Olmstead* at 588)
>
> "discrimination against individuals with disabilities persists in such critical areas as ... institutionalization" (quote from the *ADA*, cited by *Olmstead* at 588)
>
> "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, ... failure to make modifications to existing

[6] *Olmstead* v. *L.C. (by Zimring, guardian ad litem)*, 527 US 581 (1999)

> facilities and practices, ... [and] segregation" (quote from the *ADA*, cited by *Olmstead* at 589)
>
> "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities" [defined as] "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." (quote from Regulations under the *ADA*, cited by *Olmstead* at 592)

44. The DRC states that the majority of the US Supreme Court "affirmed the conclusions of the US Attorney-General" that the unjustified placement of disabled persons in institutions amounts to discrimination. (DRC brief at para.46). In fact, in the passage cited, the Court is noting that this definition of discrimination is set out in the Regulations themselves (which are issued by the Attorney-General). The Court is not agreeing with an argument in this passage; it is interpreting the statutory language in front of it.

45. The legislative context of the *Olmstead* case, then, varies significantly from the case at hand. The US Supreme Court was considering the applicability of legislation that expressly stated that undue institutionalization was a form of discrimination. It was not necessary in that case to apply the general test for discrimination, which would have required a comparative analysis (as argued by the dissent in the case.) The majority could bypass the normal, comparative definition of discrimination we would apply in Canada, by pointing to the specific statutory wording that covered exactly the question in front of it. (See for example p.598 of *Olmstead*, where the Court rejects the State's argument about the comparative analysis because "Congress had a more comprehensive view of the concept of discrimination advanced in the *ADA*.")

46. The US Congress, in the *ADA*, made a specific legislative choice to include a right to be supported in community-based settings under the general anti-discrimination right in the ADA. There has been no similar legislative choice in Nova Scotia. The social problem of institutionalization, and the complex process of de-institutionalization, remain questions outside the scope of our anti-discrimination laws. Indeed, this likely explains why *Olmstead* itself, which is nearly twenty years old[7], has received almost no attention in the Canadian jurisprudence—it arises from a vastly different statutory context.

47. Canadian anti-discrimination cases, on the other hand, have rejected the notion that equality imposes any presumption as to the specific kind of services that must be provided to the benefit of persons with disabilities. The DRC refers to *Eaton*[8], and particularly to statements from Arbour JA (as she then was) at the Court of Appeal level in that case. Arbour JA made comments on isolation and integration of persons with disabilities, which the DRC says are unaffected by the fact that her finding of discrimination in that case was overturned by the Supreme Court of Canada (DRC brief at para.53). It should be noted, however, that Arbour JA found that Charter required a presumption in favour of integration in the provision of services to persons with disabilities, just as the Complainants say the *Human Rights Act* requires a presumption in favour of living in the community.

48. This is precisely the basis on which the Supreme Court overturned Arbour JA, finding that anti-discrimination law does not require such a presumption and that, given the varied and

[7] The US Supreme Court dealt with only the threshold question of discrimination in its 1999 decision in *Olmstead*, leaving open the issues of defenses and remedy. The Georgia government settled the underlying claim in 2009, with the current goal being full implementation of the settlement by June 2018. See https://dbhdd.georgia.gov/ada-settlement-agreement.

[8] *Eaton* v. *Brant County Board of Education,* [1997] 1 S.C.R. 241; see DRC Book of Authorities.

complex needs of persons with disabilities, such a presumption would "encumber" decisions about the best interests of the person being served. (*Eaton* at paras.78-79.)

49. In summary, in relying on American case law and arguing that the *Human Rights Act* imposes a presumption in favour of community-living approaches, the DRC fails to demonstrate that the test for discrimination, which requires a comparative analysis, has been met in this case.

Application to the provision of government services to persons with disabilities

50. As argued above, the Complainants do not successfully make out a *prima facie* case of discrimination. Whatever social problems are legitimately raised by the Complainants do not fit within the specific and limited jurisdiction of this Board of Inquiry to address. The test for discrimination has not been met; any necessary reform must be left in the hands of government and not directed under the *Human Rights Act*.

51. The Complainants' briefs argue this case mainly based on first principles, as does the Respondent's argument above. However, there is a body of anti-discrimination case law specifically in the context of provincial disability support programs, which supports the Respondent's arguments. The Human Rights Tribunal of Ontario, in particular, has in several cases commented on the limited jurisdiction of human rights bodies in this area.

52. For instance, in *Wood* v. *Director, Ontario Disability Support Program*, 2010 HRTO 1979, the Complainant challenged certain aspects of the income-testing model under the *Ontario Disability Support Program Act.* The Tribunal dismissed the complaint on the basis that it did not involve differential treatment on a ground prohibited by the *Code*:

> The Tribunal does not have the power to remedy general claims of unfairness in the delivery of government programs, programs that are benefits for people with disabilities. Rather, an applicant must show that there is discrimination based upon a prohibited ground within the meaning of the Code. (para.4)
>
> All persons receiving ODSP are, by definition, persons with disabilities. To show that he has been discriminated against … the applicant must identify a way in which the standard he challenges … has a differential impact on him as compared with persons with other disabilities or without disabilities. He has not done so. The applicant has not shown differential treatment on the ground of disability and therefore has not shown discrimination within the meaning of the Code. (para.7)

53. In *Glover v. Ontario (Community and Social Services)*, 2010 HRTO 2412, the complaint focused on the difficulties involved in navigating the disability support system and the lack of assistance provided to help the Complainant understand her eligibility. While expressing sympathy for the Complainant, the Tribunal held that there was no discrimination:

> The fact that the applicant is a person with a disability who was unsatisfied with the operation of the disability support program, found its rules difficult to know or understand, and disagreed with decisions of ODSP administrators does not on its face disclose a case of discrimination. There is nothing in the applicant's pleading that could lead to inferring a discriminatory intent or effect on the part of the respondents. (para.19)

54. In *Northey v. MacKinnon*, 2014 HRTO 1836, the Complainant alleged delays in providing him benefits under the ODSP and generally abusive treatment by the government officials involved. The Tribunal dismissed the complaint at the preliminary stage, finding that it was "plain and obvious that the applicant's claims in the Application fall outside the Tribunal's jurisdiction under the Code" (para.5):

> The Tribunal does not have jurisdiction over cases of general unfairness that is unconnected to a ground protected under the Code. It is plain and obvious that the applicant is dissatisfied with the way the respondents have handled his ODSP claim. However, there is nothing in the Application that suggests that they treated the applicant any differently because of his disability or as a reprisal for enforcing his rights under the Code. (para.6)

55. In *C.B. v. Ontario (Community and Social Services)*, 2016 HRTO 1409, the complaint focussed on the fact that retroactive benefits under the ODSP were not available to an applicant

who only realized her eligibility later in life. The Tribunal again dismissed the complaint at a preliminary stage:

> [8] The Tribunal has consistently held that it does not have the jurisdiction to address general allegations of unfairness unrelated to the Code. Many experiences of unfairness, which are not defined as discrimination in the legal sense, can leave a person with significant financial and emotional damage. However, the Tribunal's jurisdiction is limited to claims of discrimination under the Code. Discrimination under the Code generally involves an allegation of adverse treatment because of one or more of the grounds listed in the Code. Adverse treatment is not discriminatory in the legal sense unless there is evidence or proof that one or more of the personal characteristics listed in the Code were a factor in the treatment the applicant experienced.
>
> …
>
> [10] Even if I accept the applicant's allegations as true, there is no reasonable prospect that she will be able to advance evidence to establish, on a balance of probabilities, that she was adversely treated because of a ground of discrimination under the Code. While I understand how difficult it must have been for the applicant's parents to find out, when she turned 18 years old, about benefits that she could have been eligible for throughout her life, the applicant's disability was not a factor in the way the respondent treated her.
>
> …
>
> [12] The applicant was refused retroactive funding that is not available to anyone. In having been refused retroactive benefits, the applicant has not shown or alleged that she was subjected to differential treatment compared with others with different disabilities or abilities. She has also not shown that the respondent, in denying retroactive funding, established a distinction based on any other grounds under the Code.
>
> [13] The allegations are simply general allegations of unfairness.

56. In contrast, in *Wonnacott et al. v. PEI*, (2007) 61 CHRR D/49 discrimination was found to exist *within* the PEI DSP program based on assessing physical vs. mental disabilities, and in income-testing the parents of participants who were under 18 years old, although not those over 18 years old. These distinctions within the DSP program were found to be differential treatment on the basis of mental disability and age respectively *within the program*, and discrimination was found. In other words, the program drew distinctions **within it** that disproportionately impacted participants under 18 years of age as compared to those over 18. That is unlike the situation in

this case, in which the Complainants impugn the entirety of the DSP program by comparing it to a separate and distinct program.

57. However, also relevant is that the Panel dismissed that aspect of the complaint that alleged that lifetime caps on funding were discriminatory, finding:

> 109 In summary, the Panel finds after careful consideration as follows. The DSP Program does not promise that all needs will be met. The Program is intended to assist disabled Islanders. Finite resources require that limits be set, and Legislators are entitled to deference in allotting finite resources to vulnerable groups. We find no discriminatory purpose in the capping of the amount available monthly for supports and services.

58. While the instant complaint involves a larger and more systemic critique of the system than has been addressed in other human rights cases, at the core the same principles are at play. Allegations of inadequate benefits for persons with disabilities, of poor treatment of individual recipients, or of general unfairness in the system are not allegations of discrimination, and do not amount to a violation of the *Human Rights Act*.

CONCLUSION

59. The Respondent submits that, taking into account the true nature of the service in question and the need for a robust comparative analysis, the elements for a *prima facie* case of discrimination have not been met. At the core of the issue is not a distinction between Nova Scotians with disabilities and Nova Scotians without disabilities, but a distinction between Nova Scotians who require financial assistance and those who require supportive housing, whether or not they have any disability. This is not a distinction that amounts to discrimination under the *Human Rights Act*.

60. The Complainants raise some legitimate and meaningful complaints about the way that the Province provides housing support to persons with disabilities, and advocate strongly for reform. The Province agrees with the need for reform, and continues to implement changes designed to better serve Nova Scotians. However, the *Human Rights Act* does not provide a Board of Inquiry the jurisdiction to review every way in which the Province might improve services to persons with disabilities. This Board of Inquiry is empowered only to respond to cases of discrimination, and in this case, discrimination has not been demonstrated.

All of which is respectfully submitted.

The 29th day of January, 2018.

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