2018 H14-0418

Nova Scotia Human Rights Board of Inquiry

BETWEEN:

Beth Maclean, Joseph Delaney, Sheila Livingstone and
Disability Rights Coalition

Complainants

and

Province of Nova Scotia

Respondents

and

Nova Scotia Human Rights Commission

Commission

BRIEF REGARDING REMEDY ON BEHALF OF THE RESPONDENT, PROVINCE OF NOVA SCOTIA

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I. INTRODUCTION

1. By agreement of the parties, this hearing has proceeded in phases representing the stages of the test for a *Human Rights Act* violation. The first phase was the determination of whether a case of *prima facie* discrimination was made out. In its March 4, 2019 decision, this Board of Inquiry found that a *prima facie* case of discrimination was made out with respect to the three individual complainants, but not with respect to the systemic complaint.

2. The second phase is the determination of whether any of the exceptions in s.6 of the *Act* apply. If no exceptions are made out, a violation of the Act is found. On review of the phase one decision, and after certain representations from counsel as to what remedies would be sought, the Province indicated that it would not put on any arguments under s.s6(f) or (i) of the *Act*. Thus, while the phase one decision did not find a violation *per se*, the Province acknowledges that there will be a finding that the *Act* was violated with respect to the three individual complaints.

3. This brief, and the hearing scheduled for September 10-12, 2019, will deal with the third phase of the decision, determining a remedy for the violation of the *Act*. The Complainants' submissions on remedy was filed on August 23, 2019. The Commission filed submissions the same day.

4. In summary, the Province's response to the Complainants' submissions on remedy is as follows:

    - The Board should not make a declaration of discrimination as a remedy; the Board's phase one decision speaks for itself as to the *prima facie* case of discrimination found.
    - The Board should not make a mandatory order as to measures the Province should take to redress the discrimination; the Province has taken significant steps in that regard and no Board order could adequately capture the contingencies involved in providing future residential support for Ms. MacLean and Mr. Delaney.
    - The Province agrees that the Board's ultimate finding of a violation of the *Act* should lead to a financial award to the Complainants, in an amount that goes beyond notional damages. However, the Complainants argue for an approach to compensation which would be unprecedented in Canadian human rights law. An award of $50,000 would be an appropriate, substantial award under Nova Scotia's human rights jurisprudence.

- With respect to Ms. Livingstone's complaint, the Province acknowledges that the Commission and the Complainants disagree as to the Board's ability to make an award to Ms. Livingstone's estate. The Province takes no position on that question but opposes the award of any damages to any person other than the three Complainants.

- There should be no systemic remedies awarded by the Board.

II. DECLARATION OF DISCRIMINATION

5. The Complainants seek a declaration of discrimination, to the effect that the Province "has violated [their] right to be free from discrimination in the provision of services on the basis of disability, contrary to section 5 of the *Human Rights Act*" for a defined period of time. The Complainants' brief submits that "a clear formal pronouncement" is in order.[1]

6. While there is no dispute that a Board of Inquiry has the power to make declarations, the cases cited by the Complainants actually demonstrate the hesitancy that tribunals have to the use of the discretion. In *McKinnon* v *Ontario (Correctional Services),*[2] the complainant had asked for a series of "declaratory orders." However, the Tribunal, after noting that the "purpose of [the legislation] is not to have us look backwards in order to punish, but to look forward in order to heal," limited itself to its simple findings of fact, and emphasized that no declaration could be made "unless each of its discrete parts was supported by the evidence."[3]

7. As noted above, it is clear that the Board will rule that there has been a violation of the *Act* in this case and award a remedy. However, this is not necessarily the case for a "clear formal pronouncement". The Board clearly anticipated that the Province would make arguments under s.6 of the *Act*.[4] In fact, the Province has chosen not to put forward any of the s.6 arguments it might have available to it, and instead to ask the Board to turn immediately to the issue of remedy. This means that the Board will find a violation of the *Act* but will not have made any specific factual determinations as to the applicability of s.6, which is a key part of the analysis under the *Act*. In

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[1] Complainants' Submissions on Remedy, at para. 95 and elsewhere.
[2] 2007 HRTO 4 ("*MacKinnon*").
[3] *Ibid*, at para. 50, 51.
[4] Board's decision on *prima facie* discrimination, at pp. 105, 106.

the words of the Tribunal in *MacKinnon, supra*, the Board has not assessed the evidence on one "discrete part" that would underlie the declaration sought.

8. Without the benefit of full s.6 arguments and a decision on the applicability of ss.6(f) and (i), the Board is not in a position to make any clear declaration with respect to discrimination in this case. Any such declaration could potentially be prejudicial to any similar future case, where the Province may choose to make arguments under s.6.

9. This may be a matter of semantics; it is clear that the Board will find a violation of the *Act* in this case and award a remedy on that basis. But given the unusual procedural history of this case, the Board is not well-positioned to make any more formal declaration as to the applicability of the *Act* and should instead let the decision and its findings of fact speak for itself.

III. MANDATORY ORDER

10. With respect to Ms. MacLean's and Mr. Delaney's complaints, the Complainants seek that the Province be ordered to:
    - Provide "the necessary supports and services to permit [them] to live in community," directly or through a service provider; and
    - Maintain such services even should they require in-hospital medical services.

11. However, such mandatory orders would leave no room for any contingencies which might, in the future, make it difficult or impossible to provide such supports, especially as the Complainants' needs are not static and are likely to evolve. The evidence will demonstrate that such an order is impractical and unnecessary.

12. The Board has made findings of fact with respect to the Province's ability to provide such supports in the past, and those findings will apply to the remedy phase of this hearing. However, the Board has made no findings as to the Province's ability to do so in the future and could make no such finding based on the evidence.

13. In fact, the Board's phase one decision indicates that a finding of discrimination would not be upheld in every case where an individual is not provided services and supports to live in the community, and that it is a highly fact-specific matter requiring assessment of the "adverse effects on each individual."[5] The circumstances of these two Complainants will change over time, and it is inconsistent with the Board's ruling to order a remedy that presumes otherwise. This is not simply hypothetical. The Board has specifically found, in Ms. MacLean's case, that "it would be naïve ... to exclude the possibility that she may return to some form of institutional living without thereby being denied 'meaningful access.'"[6]

14. The Board will hear evidence as to the efforts that have been made, since the beginning of the hearing and in particular since the close of evidence in the phase one case, to provide supports and services allowing Ms. MacLean and Mr. Delaney to live in the community. In each case, despite major commitments from the Province, the Complainants' own preferred service provider (RRSS) has proven unable to provide the required level of support. This is not a failure of RRSS, of the Complainants, or of any other player; it is simply a reflection of the incredible complexity of providing the supports sought. While efforts continue, the evidence will indicate that a mandatory order to provide services and supports indefinitely would prove, in the Board's own words, "naïve".

15. With respect to the specific issue of requiring services to be maintained in the face of any future hospitalization, the evidence will be that the Province's practice on that issue continues to be flexible and designed to meet the needs of each particular case. For practical reasons, supports and services cannot be continued indefinitely during a period of hospitalization. To make any such order would serve no purpose, and unduly fetter the Department's discretion in managing the complex issues involved.

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[5] *Ibid,* at p. 102.
[6] *Ibid*, at p. 96.

IV. GENERAL DAMAGES

The Complainants' argument based on wrongful imprisonment case law

16. The parties are in agreement that the remedy in this case should include an award of general damages to compensate the Complainants for the effects of the discrimination found. However, the Complainants base their claim for damages on a line of authority completely outside the realm of anti-discrimination law. The Province submits that any award in this case should be based on the principles arising out of anti-discrimination cases.

17. The starting point for the Complainants' damages claim is the case law around wrongful convictions, and the damages designed to compensate for the wrongful criminal imprisonment of innocent people convicted of crimes. The Province submits that this argument should be rejected out of hand, as this line of cases deals with substantially different principles.

18. One major point of divergence between this case and the wrongful imprisonment case law is the legal nature of the "institutionalization" in question. While the Board's phase one decision draws parallels to the Complainants' living circumstances and "incarceration" (as thoroughly highlighted in the Complainants' brief,) the circumstances are fundamentally different in a way that is relevant to the question of remedy. This Board has already clarified the legal distinction between the voluntary residential supports of the DSP and incarcerative arrangements:

> [After describing the situation of forensic patients subject to the criminal justice system] By contrast, people of the kind who are being placed before me are there, as I understand it, because their disabilities and economic circumstances dictate that they be in the care of the Province. They are, by and large, under no legal compulsion to be anywhere. The Province looks after them because they cannot look after themselves, they cannot afford to pay for the supports they need to live in the community and there is no one who can or will take them in or pay for those supports. They live where they live because, legally speaking, they have accepted the Provincial care and the placement of them the Province has made.[7]

19. Participants in the DSP voluntarily seek the support of the Department in order to have a place to live. At any time, they can choose to end their participation in DSP and rely on their families, their

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

own resources, or other forms of public assistance to live. Practically speaking, the Complainants and others may have no realistic options other than relying on the support of the DSP. But this is very different from the legal situation of someone who is forcibly incarcerated by exercise of state power.

20. The Complainants extrapolate a list of factors relevant to determining compensation in a wrongful incarceration case, and ask the Board to take the same factors into account in determining compensation here.[8] However, these factors again are designed to delineate the types of harm that come from being forcibly incarcerated in a criminal justice facility; it would be wholly inappropriate to import them into the context of voluntary living conditions.

21. In wrongful imprisonment cases analyzing these factors, the Courts have compared a prison setting with that of a person who is not involuntarily incarcerated, who can choose how and where to live, work, socialize, etc. However, given the Complainants' need for assistance with all aspects of daily living, the comparison to be drawn between the Complainants' lives in and out of Emerald Hall is more complex and difficult to parse out. In the community, the Complainants would continue to be a part of the DSP. They would live in a home with two to three other adults with whom they likely had no prior relationship. They would require assistance and supervision in all activities, including personal care needs, excursions, meals, etc.

22. The notion of remaining in an acute care hospital setting beyond one's discharge date, even for years, is not akin to the notion of involuntary confinement in a prison setting. As this Board noted in its phase one decision in reference to Joanne Pushie's evidence, none of the three were under a legal order or obligation to be at Emerald Hall.[9] This is significantly at odds with a prison setting, in which prisoners are legally confined to the prison, their every move is monitored, they live in close quarters with serious offenders, there is an ongoing threat of violence, and they risk punishment for inappropriate behavior. The evidence does not establish that the Complainants were subject to the same restrictions on their liberty as those in a prison. On the contrary, the evidence established that both Ms. Livingstone and Ms. MacLean were involved in events on the unit as well as excursions off the unit and were visited by family members regularly. Mr. Delaney

[8] See Complainants' Submissions on Remedy, 23, August, 2019 at paras. 101, 108, 120.
[9] Board's decision on *prima facie* discrimination, at p. 37.

preferred to remain on the unit rather than go on outings.[10] Nor is there evidence that the Complainants were subject to the level of scrutiny or lack of privacy as those who are incarcerated. The Complainants were not subjected to "institutional discipline" beyond behavioral response plans that were established in the Complainants' best interests to deal with aggressive or inappropriate behavior.

23. At the end of the day, the factual distinctions between this case and the cases cited by the Complainants come back largely to the voluntary nature of the placements. The Complainants bristle significantly at the suggestion that placements under the DSP are "voluntary", particularly in these three individual cases. And indeed, in looking at the circumstances, no one could reasonably suggest that any of the Complainants had appealing alternatives to accepting whatever placements were available under DSP. Nor does the Province disagree with the Board's characterization of their living arrangements as inappropriate, in particular their continued stay in hospital with no medical reason. The Board certainly felt it was appropriate to make broad descriptive comparisons to incarceration, but as a question of law relevant to determining remedy, the legal comparison is wholly inappropriate.

24. Not only are the situations factually distinct, the legal liability in question in those cases is also quite different from the liability in this case. Most of the wrongful incarceration cases cited by the Complainants involved a breach of the legal rights under ss.7-14 of the *Charter*[11] or a tort action for malicious prosecution.[12] Even the non-criminal cases cited by the Complainants involved a tort claim for forced confinement and sterilization as a "mental defective"[13] or serious neglect of a child who was a ward of the state.[14]

25. There is no basis on the facts to suggest any such liability on the Province's part in this case. If the Complainants had alleged any such liability, the matter would have been determined in a different forum, with different defences available to the Province under tort law or *Charter* principles. The

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[10] JEB X, Tab 32p. 7929; evidence of Dr. Sulyman.
[11] See for example, *Henry v. British Columbia*, 2016 BCSC 1038 ("*Henry*") as well as the various settlements described therein.
[12] See for example *Proulx c. Quebec (Procureur general)* 1997 CanLII 8342 ("*Proulx*").
[13] Per *Muir v. Alberta*, 1996 CanLII 7287.
[14] Per *H(J) v. British Columbia*, 1998 CarswellBC 2786.

Complainants cannot, through the back door, claim a remedy for a very different kind of legal claim than the one they have actually established.

26. Instead, in this case, the Complainants claimed discrimination. The Board has determined that, in not making placements available that were suited to the Complainants' individual needs, and by not facilitating their discharge from hospital into an appropriate placement, the Province has failed to provide them meaningful access to services and supports, and thus discriminated. None of the cases cited by the Complainants grapple with the idea of "institutionalization" as a form of discrimination under human rights legislation (or under s.15 of the *Charter*.) It would be inappropriate to import the remedial principles from an entirely different area of law into the anti-discrimination context.

General damages under anti-discrimination law

27. Turning to the jurisprudence on damages under human rights law, there is little controversy on the basic principles. Damages are not designed to be punitive, but to represent actual compensation for the injury to dignity, feelings, and self-respect that result from discrimination. Damages should reflect the seriousness of the discriminatory conduct.

28. The Complainants also note that general damages can have the effect of specific and general deterrence—essentially, creating a disincentive to the Respondent, to avoid future discrimination. However, in this case, the Province submits that both specific and general deterrence should play little role in determining the scope of damages.

29. With respect to specific deterrence, the Board will hear evidence as to the continuing efforts the Province has made with respect to placements for Ms. MacLean and Mr. Delaney. It will be clear that the Province has committed serious financial resources to that end, and though efforts are ongoing, no successful placement has been developed due to factors largely outside the Province's control (such as the behaviour and evolving needs of the individuals and the limitations faced by service providers.) An award of damages would play little or no role in facilitating the process of developing placements, as the Province's commitment to that end is already substantial.

30. With respect to general deterrence, the Board has already heard evidence as to the Province's efforts to transform the delivery of service under DSP. Those efforts continue, recognizing that the cost and complexity of reform will continue to be factors. The Board did not make a finding of systemic discrimination, and so should be cautious about any attempt to bring in an indirect systemic remedy through the individual damage awards in these cases. In the circumstances, there is no basis to determine that an increased award of damages would somehow increase the pace of reform.

31. There are also general principles at play that go to limiting an award of damages. Damages are compensatory, and causation must be established between the discrimination and the injury being compensated. The goal is to design an award that would put the Complainants in the position they would have been in but for the discrimination. The Board has made significant findings as to the impact on the individuals of the Province's limited provision of residential supports and services. However, there is some degree of speculation involved in trying to assess what the Complainants' circumstances would have been but for those limitations.

32. Moreover, in cases involving government social policy, tribunals have taken into account the complex balancing of interests governments engage in, and the potentially adverse "chilling effect" that the threat of unlimited liability has on government in exercising its power.[15] Tribunals have drawn from constitutional cases in finding that:

> The potentially vast scale of liability would interfere in another way with the proper functioning of government. If the government were liable in damages to all persons affected by action subsequently declared to be constitutionally inadequate, large sums of public funds would be diverted from public programs and institutions to private individuals as redress for past acts of government. . . .This cost rises exponentially if the same benefit were extended to other similarly situated families, a point discussed below.[16]

33. As noted by the Supreme Court in the above excerpt from *Wynberg*, *supra*, part of this calculation is the potential precedent-setting nature of any award. That is particularly relevant in this case, where the Board's phase one decision expressly leaves open the possibility of future claims, and

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[15] *Hogan v. Ontario (Minister of Health & Long-Term Care)*, 2006 HRTO 32 ("*Hogan*") at para 157.
[16] *Ibid,* at para. 165, citing, *Wynberg v. Ontario*, (2006), 40 CCLT (3d) 176, ("*Wynberg*") at para. 197.

the DRC is actively soliciting other claimants to bring human rights complaints of their own (**see Appendix A.**) This triggers the concern expressed by the Supreme Court in *Wynberg*, *supra*, that large damage awards actually slow the evolution of social programs by drawing funds away from public programs and institutions.

Application to this case

34. Despite focusing on wrongful conviction damages, the Complainants do also draw on some human rights case law in arguing for damages. Those cases, however, can be distinguished from this case both on the evidence of injury, and the severity of the conduct involved:

- *AB* v *Joe Singer Shoes*[17] (where general damages were $200,000) involved an employee subjected to nearly twenty years of intense workplace sexual harassment, up to and including forced sexual intercourse, as well as threats exploiting her vulnerability as an immigrant and new mother. The complainant's injuries included anxiety, depression, and an inability to sleep due to nightmares.

- *O.P.T.* v. *Presteve Foods Ltd.*[18] also involved workplace sexual harassment and assault including forced sexual intercourse, aggravated by the particular vulnerability of the employees at the hands of their employer given that they were temporary foreign workers. The Tribunal reviewed other cases of serious sexual harassment, in which awards ranged from $35,000-$50,000. It awarded one complainant $50,000, in line with that case law. The other complainant was awarded $150,000, in light of the seriousness of the repeated incidents of forced sexual intercourse, which went far beyond any precedented case.

- *YZ* v *Halifax Reginal Municipality*,[19] involved an employee who was described as being "terrorized" by race-based harassment, in a poisoned work environment that included threats and violence. The impact on the employee's mental health was extreme; he was disabled from

[17] 2010 HRTO 1053.
[18] 2015 HRTO 675
[19] (7th May, 2019) Kentville, Bd No. 51000-30-H05-1860 (NSHRC) ("*YZ*")

ever working in the future, unable to leave the house, and attempted suicide. General damages were assessed at $80,000.

35. The Complainants, admittedly, cite *YZ, supra,* as an example of "more recent" Nova Scotia awards adopting a "trend towards higher damages". *YZ, supra,* appears to be the highest award of general damages ever made by a Board of Inquiry in Nova Scotia. Before *YZ, supra*, the previous high-water mark for general damages was $35,000 in *Wakeham v. Nova Scotia (Department of Environment),*[20] a case that was actually overturned by the Court of Appeal on other grounds. Prior to *Wakeham, supra*, the highest award was $25,000 in *Willow v. Halifax Regional School Board et al.*[21] a case in which a teacher suffered from the stigma of false accusations of sexual impropriety with a student. The award comprised $5,000 for each of the five years in which the discriminatory treatment continued. As recently as 2017, a Board of Inquiry has found that *Willow, supra,* was part of the "upper end in the range of $15,000 to $25,000.[22]

36. In *Willow, supra*, the present Board Chair commented that "[t]ribunals are often invited to inflate the damage awards above the range which has been established, but the invitation has regularly been refused."[23] The policy reasons for this refusal include the fact that "money, beyond a certain amount, cannot answer for the hurt suffered by someone who is the victim of discrimination", as well as the difficulty in comparing the seriousness of one case of discrimination to another.[24]

37. In adopting a limited approach to damages, the Board in *Willow, supra,* also recognized the need to make the award consistent with what other tribunals have awarded; consistency itself is an important policy driver in human rights awards. This has been clearly stated by the Supreme Court of Prince Edward Island:

> "We must be realistic and consider whether any award bears a reasonable relationship to other awards for similar discrimination."[25]

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[20] 2017 CanLII 50786 (NS HRC) ("*Wakeham*"); overturned at 2018 NSCA 86.
[21] 2006 NSHRC 2 ("*Willow*").
[22] *Yuille* v *Nova Scotia Health Authority*, 2017 CanLII 17201 ("*Yuille*") at para 158.
[23] *Willow*, supra, at para. 123.
[24] *Ibid*, at para. 124.
[25] *YZ* at para.3, citing *MacTavish v Prince Edward Island*, 2009 PESC 18 at para. 49.

38. In assessing this case against human rights precedents, the Board should look in particular at the degree of the injury to be compensated, and the seriousness of the misconduct giving rise to the violation.

39. In terms of the degree of injury, it should be noted that in the high-water mark cases cited by the Complainants, there was evidence of serious mental trauma as a result of the discriminatory treatment. The burden is on the Complainants to provide evidence of the injury; however, the Complainants' submissions do not indicate any of the specific kinds of impacts that explain the high awards in the high-water mark cases.

40. In terms of the seriousness of the Province's conduct, the Board has certainly made findings criticizing the Province's inaction in providing more suitable living arrangements for the Complainants, and those findings are not challenged here. However, the Board also specifically resisted characterizing the Province's conduct as malicious or motivated by discriminatory intent:

> All of the individuals who testified, including specifically the Deputy Minister, Lynn Hartwell, gave every appearance to me of the utmost respect and the most positive attitudes towards the disabled. I saw quite the reverse of any "systemic ableism". Most, if not all, have devoted their lives to the support of the disabled and to their successful integration as full members of the community.[26]

41. While the Province's inaction in these cases is rightly criticized, the various players attempted to make caring decisions as best as possible in the circumstances and with limited resources. In fact, both Ms. Livingstone and Mr. Delaney were appropriately admitted to Emerald Hall for the treatment and stabilization of their mental health, not through any ill will, and the arrangement with Ms. MacLean was intended to keep her out of the criminal justice system, and then move her from Maritime Hall to Emerald Hall where she might be better served. This is not to justify the Province's inaction or challenge the Board's findings in its phase one decision. However, it is difficult to draw parallels here to the high-water mark cases, which each involve situations of repeated and malicious harassment and even assault of the complainants.

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[26] Board's decision on *prima facie* discrimination, at page 60.

42. A lack of malice or negative intent has influenced other Boards of Inquiry in determining damage awards. In *Yuille, supra*, the Chair noted that "[h]ad there been any malice shown by any of the individuals, I might have been inclined to increase the award"[27]. Instead, he set damages at $15,000, the "mid-to-high end of the range."[28]

43. The Province submits that a logical approach to setting damages would be to recognize that this is a serious and precedent-setting finding of discrimination, and that, given the evidence of the effect of inappropriate placements, a significant damage award in the human rights context is merited. "Significant" ought to be taken in light of other serious Nova Scotian cases with significant damage awards, such as *Willow, supra*, and *Johnson* v. *Halifax Regional Police Service*[29] (a precedent-setting systemic racism case where damages of $10,000 were awarded.) The Province accepts that this remedy will also be designed to send a message about its inaction in finding placements for the Complainants, and that as a result it is not inappropriate to award damages beyond what even those precedents contemplate. On the other hand, the evidence does not support a comparison to *YZ, supra*, the highest award of general damages in Nova Scotia, in terms of the severity of injury or the seriousness of the misconduct.

44. In all of the circumstances, the Province submits that an award of $50,000 for each Complainant would be appropriate in the circumstances. It should be noted that this would amount to the highest award of human rights damages in Nova Scotia other than the *YZ, supra,* case.

V. *THE IMPLICATIONS OF SHEILA LIVINGSTONE'S DEATH ON THE CLAIM*

Sheila Livingstone's Estate Receiving Damages

45. The Province acknowledges that the HRC's position on the estate of Sheila Livingstone is that her estate is not entitled to be awarded damages for the breach found to Sheila Livingstone. The Province takes no position on this issue; for the Board's convenience, however, the Province has set out below the relevant caselaw related to estates pursuing equality claims.

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[27] *Yuille, supra* note 11,at para. 165.
[28] *Yuille, supra* note 11, at para. 167.
[29] (2003), 48 C.H.R.R. D/307.

46. In *Hislop v. Canada (Attorney General),*[30] the Supreme Court of Canada determined that estates do not have standing to commence s. 15 *Charter* claims, and that s. 15 rights die with an individual. It noted two exceptions – situations in which a claimant dies after a hearing but before the judgement is rendered, and those situations in which claimants die after a judgement that is on appeal. In coming to this conclusion, the Supreme Court stated:

> In our opinion, the government's submissions have merit. In the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term "individual" in s. 15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence s. 15(1) *Charter* claims. In this sense, it may be said that s. 15 rights die with the individual.[31]

47. In *Viner v. Hudson Bay Company*[32], the Nova Scotia Board of Inquiry considered the question of whether it had jurisdiction over a claim in which the Complainant died after her claim was filed, but before the commencement of the hearing. In that case, the Board Chair, relying on *Hislop, supra*, held that an Estate does not have the right to continue the claim for damages under the *Act*.[33] However, because the HRC was a separate party to the complaint, the Board did hold that it had jurisdiction to continue with the complaint to determine whether there had been a breach of the *Act* with the HRC and the Respondent continuing as parties.

48. British Columbia has considered this question in the context of a human rights complaint in *Columbia* v. *Gregoire*.[34] The BC Court of Appeal heard an appeal from a mother who had filed a human rights complaint on behalf of her son; he died before the complaint was heard. The Court held that it lost jurisdiction to hear the complaint when the person whose substantive rights that were alleged to have been breached, has died.

49. By contrast, in *Morrison v. Ontario Speed Skating Assn,*[35] the Ontario Human Rights Tribunal held that, in a situation in which the claim alleges a breach of the Ontario *Human Rights Code* against

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[30] 2007 SCC 10 ("*Hislop*").
[31] *Ibid*, at par. 73.
[32] 2012 CarswellNS 1075 ("*Viner*").
[33] Ibid, at par. 27.
[34] 2005 BCCA 585.
[35] 2010 HRTO 1058.

a private actor, a claimant's rights do not necessarily abate upon the death of the Claimant. This reasoning was also followed in *Estate of Pinder Roy v. Walmart*.[36]

Awarding damages to those other than the Individual Complainants

50. In its submissions, the HRC proposes that damages be awarded to Ms. Livingstone's sister, Olga Cain, in her own right for harms visited upon her. While it is acknowledged that the Board has broad remedial discretion, this is not a situation in which it would be appropriate to extend an award of monetary damages to a non-party relative of the complainants.

51. Firstly, the Complainants have not sought damages on behalf of non-complainant relatives, as was the case in *YZ, supra*, for example. Such damages were not alluded to in either the Complaint, or the Complainants' brief. The proposal by the Human Rights Commission singles out Ms. Cain for an award of damages; however, there is no evidence of any disproportionate injury suffered by Ms. Cain compared to any other family member of any of the Complainants. With respect, the Commission seems to suggest an award to Ms. Cain as an indirect way to make up for its position that Ms. Livingstone's estate is not entitled to damages. If the Board determines that an estate is not entitled to damages (on which the Province takes no position), then it would be inappropriate to award damages to Ms. Cain as a "work-around" to that legal limitation on the Board's jurisdiction.

52. Secondly, in legal terms, extending the right to damages in similar claims of denials of meaningful access to the DSP requires this Board to consider the issue of remoteness as it relates to the non-parties. As noted in *Hogan, supra*:

> Assessing damages is an exercise in fairness for the complainant and the respondent. The limiting principles protect the respondent's interest: avoid imposing on the respondent unexpected and unlimited liability. A complainant must show, that more likely than not, the respondent's conduct caused the harm he or she has suffered. The respondent is required to pay only damages that are reasonably foreseeable. The assessor must apply these limiting principles to distil an award of damages that is fair and appropriate in all the circumstances.[37]

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[36] 2010 HRTO 1517.

[37] *Hogan, supra* note 14, at para. 160.

53. It is submitted that it was not reasonably foreseeable that harm would come to non-party relatives by the Complainants' participation in and access to the DSP. Ms. Cain would have the same or similar standing vis-à-vis the Complainants as many others, such as Ms. Livingstone's other siblings, Ms. Livingstone's nieces and nephews, as well as Ms. Tammy Delaney, and/or Beth MacLean's parents; the Board has not been given evidence to support foreseeable harm to any of those individuals.

54. More generally, this would create a right to standing for the relatives of those individuals claiming not to have received meaningful access to claim damages. The precedential value of this would be both significant and costly for the Province because, as noted above, this Board has left open the possibility for all individuals involved in the DSP to make a claim for damages, and the DRC has been soliciting individuals to make human rights complaints.

VI. SYSTEMIC REMEDIES

55. The Complainants argue in their submissions in favour of what can only be characterized as systemic remedies.[38] After an exchange between counsel, counsel for the Complainants informed the Board via email on August 28, 2019, that the Complainants would not pursue that portion of their request for remedies. By email the same day, the Province put on record its position that, given the positions taken by the parties in planning stages of this remedial hearing and given Mr. Calderhead's email, it would be procedurally unfair to the Province for the hearing to deal with any form of remedy other than remedies specific to the three individual Complainants.

56. In fact, any consideration of a systemic remedy would require significant evidence from the Province and may require the Province to revisit its position on putting on arguments under s.6 of the *Act*. Given all of the above, the Province reiterates its position that any remedy in this case should be limited to individual remedies.

[38] Complainants' Submissions on Remedy, at pages 51 – 54.

VII. CONCLUSION

57. In response to the Complainants' requests for relief, the Respondents, respectfully request the following:

Declaration

The Respondent acknowledges that the Board will make a finding of discrimination contrary to s. 4 of the Act. Beyond that, however, it is submitted that it would not be appropriate for the Board to make a "declaration" or "declaratory order" that the Province has discriminated as requested by the Complainants.

Mandatory Order

The Province has already committed to working with RRSS to provide Mr. Delaney and Ms. MacLean with a supports and services to live in the community. In fashioning a living situation for each of them, there is a need to maintain flexibility and consider contingencies. A mandatory order would be too limiting. Therefore, it is requested that no mandatory order be made.

Damages

As stated, the Respondent recognizes that damages be payable and should be an amount beyond a nominal amount. An award of $50,000 for each Complainant would be appropriate. This would make this amount almost the equivalent to the highest general damages award ever ordered in Nova Scotia, that of *YZ, supra.*

The Province takes no position on whether the estate of Ms. Livingstone is entitled to a damage award but opposes any damage award to Ms. Cain or any other family member of the Complainants.

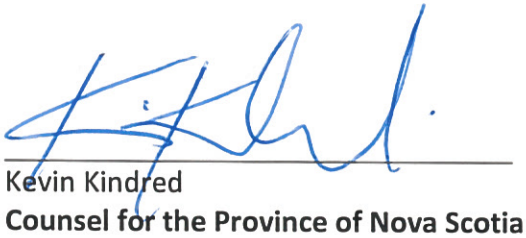
Systemic Remedies

The Province opposes any award of systemic remedies in this case.

All of which is respectfully submitted.

DATED at Halifax, Nova Scotia, this 6th day of September 2019.

Dorianne Mullin
Counsel for the Province of Nova Scotia



Kevin Kindred
Counsel for the Province of Nova Scotia

APPENDIX A

Disability Rights Coalition of Nova Scotia

Nova Scotia Disability Rights are Human Rights

File Your Own Human Rights Complaint

If you or someone you know has a disability and is unable to access the supports and services you need to live in the community, you can file a human rights complaint against the Province of Nova Scotia.

If you are living in an institution (a hospital, Regional Rehabilitation Center, Adult Residential Center or Residential Care Facility), don't want to be there, and want to live in the community, you can file a human rights complaint against the Province of Nova Scotia.

Disability Rights Coalition on Facebook

In the recent Human Rights Board of Inquiry decision, the Board ruled that the Province of Nova Scotia is under an obligation to provide meaningful access to live in the community to people with disabilities.

Filing a human rights complaint ***bhbjotuui f Qspwjodf pgOpwb Tdpujb*** is a way for individuals and/or their families to have their right to live in and be included in community ***sftqfdufe.***

The Board stated that the Human Rights Commission would look at human rights claims and assess them in terms of whether the person with a disability was getting 'meaningful access' to live in the community from people with disabilities on a case by case, individual basis.

This means that ***boz joejwjevbm*** who believes that their rights are being violated can bring their own human rights complaint to have their rights respected. This includes all persons with disabilities who are either unnecessarily institutionalized or on years-long wait lists while waiting for the Department of Community Services to offer them a suitable living situation of their own in the community.

There are some **1,500** people on the Department of Community Services wait list for its Disability Supports Program.

So, if you or a loved one are unnecessarily institutionalised and/or on a wait-list for supports and services, and interested in filing a human rights complaint, contact the ***ui f Opwb Tdpujb l vn bo Sjhi ut Dpn n jttjpo***

Tell the Nova Scotia Human Rights Commission that you want to:

1. File a human rights complaint against the Province of Nova Scotia (this would include both the Departments of Community Services and the Health and Wellness which are both involved).
2. Tell your story in your complaint; including what your needs are, your current living situation, how long you have been waiting, how it has affected you, and what you are seeking by way of a community-based situation.

Filing a human rights complaint:

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A complaint should be filed at any of the Nova Scotia Human Rights Commission's offices:
https://humanrights.novascotia.ca/contact-us

Call toll-free in Nova Scotia: 1-877-269-7699

The Commission has three offices around the Province:

Halifax Office

5657 Spring Garden Road
Park Lane Terrace
3rd Fl., Suite 305

Telephone: 902-424-4111
Fax: 902-424-0596

Mailing Address:
PO Box 2221
Halifax, NS
B3J 3C4

Sydney Office

Provincial Building
360 Prince Street
Sydney, NS
B1P 5L1

Phone: 902-563-2142
Fax: 902-563-5613

Digby Office

84 Warwick St.

Mailing address:
PO Box 1029
Digby, NS
B0V 1A0

Phone: 902-245-4791

Challenges

"Hard things are put in our way, not to stop us, but to call out our courage and strength." — **Unknown**

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