2020 C.A. No. 486952

# NOVA SCOTIA COURT OF APPEAL

**BETWEEN:**

Disability Rights Coalition and Beth MacLean, Olga Cain on behalf of Sheila Livingstone, Tammy Delaney on behalf of Joseph Delaney

Appellants

-and-

The Attorney General of Nova Scotia representing her Majesty the Queen in Right of the Province of Nova Scotia (including the Minister of Community Services and the Minister of Health and Wellness)

Respondent

-and-

Nova Scotia Human Rights Commission

Respondent

-and-

J. Walter Thompson, Q.C. sitting as a Board of Inquiry

Respondent

-and-

Canadian Association for Community Living, the Council of Canadians with Disabilities, and People First of Canada

Intervenors

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## FACTUM OF THE RESPONDENT: THE ATTORNEY GENERAL OF NOVA SCOTIA

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

**Counsel for the Respondent,**

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

**Counsel for the Appellants,**

**Attorney General of Nova Scotia**

**Claire McNeil**
Dalhousie Legal Aid Service
2209 Gottingen Street
Halifax, NS B3K 3B5

**Counsel for the Appellant, Disability Rights Coalition**

**J. Walter Thompson, Q.C.**
Quackenbush, Thompson Law
2571 Windsor Street
Halifax, NS B3K 5C4

**Board of Inquiry**

**MacLean, Livingstone and Delaney**

**Kymberly Franklin and Kendrick Douglas**
5657 Spring Garden Road
3rd Floor, Park Lane Terrace
PO Box 2221
Halifax, NS B3J 3C4

**Counsel for the Respondent, Nova Scotia Human Rights Commission**

**Byron Williams and Joelle Pastora Sala**
Public Interest Law Centre
200-393 Portage Avenue
Winnipeg, MB R3B 31-16

**Counsel for the Interveners**

-and-

**Sacha R. Paul**
Thompson Dorfman Sweatman LLp
1700-242 Hargrave Street
Winnipeg, MB R3C 0V1

**Counsel for the Intervenors**

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## PART I

## OVERVIEW OF THE APPEAL

1. The two appeals presently before this court (now merged as a single appeal in C.A. No. 486952) raise important, precedent-setting questions about the definition of discrimination, and the role of the *Human Rights Act*[1] in resolving complex issues of public policy.

2. In the first decision under appeal, a Board of Inquiry upheld a complaint under the *Human Rights Act* that the Province discriminated against three disabled individuals who sought residential support under the Province's Disability Support Program (DSP), because it failed to provide that residential support in the form of a Small Options Home. While factually limited to the three individual complainants, the Board's decision is explicit in setting a precedent for other DSP participants, and other fact scenarios outside the context of the DSP. In the second decision under appeal, the Board awarded remedies including $100,000 in general damages for two complainants, general damages for two relatives of another complainant, and legal costs.

3. The Attorney General of Nova Scotia representing her Majesty the Queen in Right of the Province of Nova Scotia (including the Minister of Community Services and the Minister of Health and Wellness) (the "Province,") as Cross-Appellant, argues that the Board

[1] R.S.N.S, c. 214 [Province's Book of Authorities ("BOA") at **Tab 11**]

made reviewable errors in determining that a *prima facie* case of discrimination has been made out on the evidence, and in the alternative, argues that the Board made reviewable errors in its awards of general damages and legal costs.

4. The crux of the Province's position in these appeals is that the Board failed to properly apply the test for *prima facie* discrimination under the *Human Rights Act*, and more specifically, failed to follow the direction of the Supreme Court of Canada and this Court that discrimination is fundamentally a comparative concept. This failure, if not overturned by this Court, would transform the *Human Rights Act* from a guarantee of equal treatment, into a mechanism for litigating the quality of services provided to persons with disabilities *per se*.

**PART II**

**STATEMENT OF FACTS**

The Department of Community Services and its Programs

5. Despite the voluminous testimony and documentary evidence submitted to the Board, the Province submits that there are almost no disputed facts relevant to the case. This summary will cover only the facts that the Province considered key to the legal arguments raised in its cross-appeals.

6. The Province, through its Department of Community Services ("DCS") provides voluntary support to persons with physical disabilities, intellectual disabilities, and/or mental health challenges and their families through the DSP, which delivers services pursuant to the *Social Assistance Act*[2] and the *Homes for Special Care Act*.[3] In addition to financial support which parallels the benefits available under the *Employment Support and Income Assistance Act*[4], the DSP provides a range of supportive living arrangements 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

[2] R.S.N.S, c. 432 ("SAA")
[3] R.S.N.S, c. 203
[4] S.N.S. 2000, c. 27 ("ESIA")

vocational and day programming.[5] 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

[5] DCS/DSP Program Policy, Appeal Book, Part II, Vol 3, Book 58, Tab 58.

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 behavioral 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.[6]

7. In describing the services as "voluntary," we mean that individuals eligible for services through DSP have the choice (or if they lack the legal capacity, their decision-maker has the choice) to accept or reject any placement offered by DSP. This includes the three Complainants at the Board, all of whom were legally permitted to leave whatever placements or other living circumstances they were in throughout the time covered by the Complaint; this is in contrast to (for example) individuals subject to an Adult Protection order or who are incarcerated, who lack any such choice.[7]

8. For a participant to be eligible for the adult programs of the DSP, they must be 19 years old or older; they must have an intellectual disability, a long-term mental illness, physical disability, or an acquired brain injury.[8] There is also a financial eligibility component.

[6] Decision of the Chair of the NS Human Rights Commission Board of Inquiry (on Prima Facie Discrimination) dated March 4, 2019, Appeal Book, Part I, Vol 1, Book 1, Tab 2, ("March 4th Decision"), at pp. 116-117.
[7] Transcript of Lisa Fullerton, Appeal Book Part 1, Vol 2, Book 27 at pp.9025-9029 and Book 28 at p.9030.
[8] DCS/DSP Program Policy, Appeal Book, Part II, Vol 3, Book 58, Tab 58, at pp.19138-19139; Transcript of Lynn Hartwell, Appeal Book, Part II, Vol. 2, Book 22, Tab 33, at p. 7057-7058, lines 20 - 4.

9. Historically, the Province licensed and regulated larger facilities, whereas the various municipalities were responsible for the establishment, placement, and monitoring of community-based options, on a cost-share basis with the Province. DCS assumed responsibility for the delivery of all social services in the Province as of April 1, 1998. Therefore, the DSP in its current form is largely an amalgamation of the programs of the municipalities throughout Nova Scotia.[9]

10. Services provided through the DSP (and its predecessor programs) have historically relied on large institutional facilities. Over time, the common views and best practices have changed, and consensus is now that it is preferable to provide supports to live "in the community" rather than in large facilities. Small Option Homes—generally defined as a supported home shared by 3-4 DSP participants, in a residential neighbourhood—are one form of community-based residential support, though not the only form. While there was much evidence at the hearing as to this history and the reasons for the current consensus in favour of community-based living, there is in fact little dispute between the parties on this point.

11. It is also not disputed that, between approximately 1998 and 2016, the Province limited its investment in the construction of new Small Options Homes to very specific circumstances such as the replacement of existing facilities. This limitation on new Small Options Homes, after a period of extensive development of new homes, came to be referred to as a "moratorium". This limitation partially explains why this option for

[9] Report of the Review of Small Options in Nova Scotia, Appeal Book Part II, Vol. 3, Tab 6 at p. 11379-11380.

placement was not available for all who preferred it. Throughout this time period however, community-based living options other than Small Options Homes continued to be developed.[10]

12. Beginning in approximately 2014, DCS began a process to transform the way disability support is provided to those who need assistance. It was described by one witness as a, "…foundational rethinking of what is the role of a social services department in Nova Scotia, what should it be, what should the entire paradigm of support look like…"[11] The goal of transformation is to focus on people's lives, beyond focusing on the number of beds and the number of placements, and to create a robust suite of supports to assist people.[12]

13. As of January 2018, there were approximately 5,400 participants in the DSP.[13] The cost of the program has exceeded $300,000,000.00 per year in recent years.[14] The following is a breakdown of people using each service in the fiscal 2016 – 2017 year:[15]

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[10] Transcript of Lynn Hartwell, Appeal Book, Part II, Vol. 2, Book 22, Tab 33, at pp. 7061- 7072.
[11] *Ibid*, at p. 7031, lines 4 – 11.
[12] *Ibid*, at p. 7033, lines 12 – 22.
[13] Transcript of Lynn Hartwell, Appeal Book Part II, Vol. 2, Book 22, Tab 33, at page 7036.
[14] Community Services Accountability Reports 2014-2015, Appeal Book Part II, Vol. 3, Book 43, Tab 25 at page 14304; Community Services Accountability Report, 2016-2017 Appeal Book Part II, Vol. 3, Book 43, Tab 26, at page 14348.
[15] March 4th Decision, Appeal Book, Part I, Vol 1, Book 1, Tab 2, at p. 118.

| 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 |

Other Relevant DCS Programs

14. In addition to DSP, DCS is also responsible for administering and funding the Employment Support and Income Assistance ("ESIA") Program. ESIA is a program of last resort intended to provide Nova Scotians with funding for shelter, a personal

allowance, and certain approved special needs.[16] In recent years, there have been approximately 26,000 cases per year, consisting of approximately 39,000 individuals; expenditures for payments have been in the range of $230,000,000.00 in recent years.[17]

15. Housing Nova Scotia is a crown corporation that was at the time of the hearing also under the purview of the Minister of Community Services (though it has, since May 2019, fallen under the auspices of a new Department of Municipal Affairs and Housing.) Its mandate is to provide affordable, safe, and adequate housing to Nova Scotians in need.[18] There are a number of programs within Housing Nova Scotia, some of which focus on allowing low income homeowners to remain in their homes, whereas others provide rental units to low income Nova Scotians.[19] The choices of public housing are limited, and are not guaranteed to be in the neighbourhoods and communities the individual prefers.[20] A non-disabled Nova Scotian seeking governmental support in establishing housing (beyond the financial shelter allowance available to all Nova Scotians under ESIA) would, if qualified based on income, be put on a waitlist for an eventual spot in public housing.[21] The waitlist to access Housing Nova Scotia's programs, at the time of the hearing, stood at approximately 3,400 households.[22] The length of time that applicants must wait is dependent on the area in which the applicant lives, and the program applied for. Specifically, with respect to the rental units, the average wait time

[16] Transcript of Denise MacDonald-Billard, Appeal Book, Part II, Volume 2, Book 18, Tab 28, at pp.5664-5665.
[17] *Ibid*, at pp.5652, 5654.
[18] Transcript of Neil MacDonald, Appeal Book, Part II, Vol. 2, Book 19, Tab 29, p. 5885.
[19] *Ibid*, at p.5893, lines 7 – 21.
[20] *Ibid*, at p.5925, lines 6 – 25.
[21] *Ibid*, at p.5904-5905, 5926-5934.
[22] *Ibid*, at p.5927 lines 12-17.

varies from no wait time for certain buildings, to over ten years for other buildings, with an average wait time of 2.7 years.[23]

The Human Rights Complaints

16. In August of 2014, three individual complainants – Beth MacLean, Joey Delaney (by his mother Susan Lattie); and Sheila Livingstone (by her sister, Olga Cain) (collectively, the "Individual Appellants") – filed human rights complaints alleging that the Province discriminated against them in not providing them with "appropriate assistance which [they] need in order to live in the community."[24] The Disability Rights Coalition also filed a human rights complaint alleging that the Province discriminates against all persons with disabilities in Nova Scotia in failing to "develop, implement and provide appropriate options for community living for persons with disabilities," including the opportunity to choose where to live and with whom, access to in-home residential support services, and other community services and facilities.[25]

17. The three Individual Appellants are all individuals with intellectual disabilities who voluntarily sought supportive housing through the DSP, whose preferred placement was in a Small Options Home, and who were (at least for a significant length of time) not offered such placements. Those are characteristics shared with many participants in the DSP.

[23] *Ibid* at p.5904-5905; p.5908; p.5921, lines 1-2; p.5922 at lines 4 – 22.
[24] Complaint Under the Human Rights Act, received by the Human Rights Commission on August 1, 2014, Appeal Book, Part I, Volume 1, Book 1, Tab 1, ("Complaint") at p.7.
[25] *Ibid*, pp.25-26.

18. The three Complainants also shared the somewhat more unique history of being resident in Emerald Hall—an acute health care facility for individuals with mental health concerns as well as intellectual disabilities—for long durations that were not justified by their health care needs.

- In the cases of Sheila Livingstone and Joey Delaney, each were resident in Small Options Homes but had health needs that required hospitalization at Emerald Hall. After some time passed, their Small Options Home placements were no longer suitable, and no suitable placements were available, which led to them remaining in Emerald Hall for years beyond what was medically necessary.[26]

- In the case of Beth MacLean, incidents of violence involving criminal charges led to the end of her placement at a large institutional facility, and no other placement met her needs. The Province arranged for her to reside in Maritime Hall (another health care facility) and then Emerald Hall, as she could not return to her earlier placement. This arrangement was never medically necessary, and was intended to be temporary, but due to a lack of other suitable placements, continued from 2000-2015.[27]

19. The Complaint was referred to a hearing before Board Chair Walter Thompson. Prior to the hearing, the parties agreed to bifurcate the hearing corresponding to the two parts of a discrimination analysis: first, the Board would determine whether a case for *prima facie*

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[26] March 4th Decision, Appeal Book, Part I, Vol 1, Book 1, Tab 2, at pp. 65-68; 70-71.
[27] *Ibid*. at p. 62.

discrimination had been made out, and if so, the Board would subsequently deal with the question of whether any exceptions under the Act applied. The "Phase 1" case was heard over forty days of hearing between February and November 2018, with evidence from twenty-eight witnesses in total from all Complainants and seven witnesses from the Province. The Board issued a decision on March 4th, 2019 dismissing the DRC's systemic complaint, but upholding finding that *prima facie* discrimination was made out with respect to the three individual complaints.

20. Because the Board's findings were limited to the individuals and the systemic complaint was dismissed, the Province opted to forego a "Phase 2" hearing on exceptions under the Act, and the parties proceeded to a hearing on remedy from September 10-12, and September 16, 2019. The Board issued a decision on Remedy on December 4th, 2019, in which it ordered that the Province continue its efforts to place the two remaining individuals, with a retention of jurisdiction to "push the placement"[28] of the two individual complainants if necessary. It ordered general damages of $100,000.00 to each of the two Individual Appellants, $10,000.00 to each of a sister and a niece of the deceased Appellant, and $120,000.00 in legal costs.

[28] Decision of the Chair of the Nova Scotia Human Rights Commission Board of Inquiry (on Remedy), dated December 4, 2019, Appeal Book, Part I, Volume 1, Book 1, Tab 13 ("December 4th Decision") at p.207.

## PART III

## LIST OF ISSUES

21. As a result of the merger of the two matters, there is significant overlap in the Province's grounds for Cross-Appeal in each matter. It would be efficient to instead break down the issues in terms of the two decisions actually under appeal.

22. With respect to the Cross-Appeals of the March 4, 2019 Decision, the Province raised six grounds for Cross-Appeal, all of which relate to errors in the definition and application of the definition of discrimination. The first four issues could be collapsed into one legal question as follows:

1. Did the Board commit a reviewable error of law in defining and applying the definition of discrimination, by:
    a. failing to apply the three-part test from *Moore* v *British Columbia (Education)*, [2012] 3 SCR 360;
    b. failing to apply a comparative analysis;
    c. misapplying the concept of "meaningful access"; and/or
    d. failing to consider, or properly distinguish, prior relevant jurisprudence?

23. The next ground for Cross-Appeal raises a different issue, which ultimately also goes to the finding of discrimination:

2. Did the Board commit a reviewable error by failing to consider and/or give weight to the witnesses of the Respondent—and more specifically, the testimony of Neil MacDonald which was relevant to the comparative analysis?

24. The Province's Notices of Cross-Appeal also raise an issue as to the Board's interpretation of the ESIA and SAA. On further review, the Province has decided not to

argue this as a ground of cross-appeal, though the issue may become relevant in response to the issues raised by the various Appellants.

25. With respect to the Cross-Appeal of the December 4, 2019 decision on remedy, the Province raises two grounds for Cross-Appeal. The issues raised are:

1. Did the Board commit a reviewable error by awarding costs without jurisdiction to do so?

2. Did the Board commit a reviewable error in its award(s) of general damages by setting an amount(s) inconsistent with the principles governing general damages under the Act?

## PART IV

## STANDARD OF REVIEW OF EACH ISSUE

**Standard of Review Generally**

26. With the release of *Canada (Minister of Citizenship and Immigration v. Vavilov)*[29], ("*Vavilov*") and its companion cases[30], the Supreme Court of Canada ushered in a new era with respect to the analysis of standards of review of administrative decisions. The Court established that the presumption is that of reasonableness, albeit with two important exceptions. The first exception, which is relevant to the within appeal, are those situations in which the legislature has established a statutory right of appeal. The standard of review in these situations is the same as an appeal from a court's decision; that is, errors of law are reviewed on a standard of correctness, and errors of fact, or mixed law and fact, are reviewed on a standard of palpable and overriding error.[31]

27. The Supreme Court stated that appellate standards are to be established based on the nature of the question, and the Court's previous jurisprudence on standards of review. More specifically, the Court noted:

> It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative

[29] 2019 SCC 65. [BOA at **Tab 6**]
[30] *Bell Canada v. Canada (Attorney General),* 2019 SCC 66; and *Canada Post v. Canadian Union of Postal Workers*, 2019 SCC 67.
[31] *Vavilov* at para. 17. [BOA at **Tab 6**]

> decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen* v. *Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable).[32]

28. In the *Human Rights Act*, the legislature has established a limited right of appeal on a question of law, pursuant to s. 36(1):

> Appeal
> 36 (1) Any party to a hearing before a board of inquiry may appeal from the decision or order of the board to the Nova Scotia Court of Appeal on a question of law in accordance with the rules of court.

29. In establishing this limited right of appeal, the legislature has sent the requisite "clear signal" to the courts that decisions of the human rights tribunal are to be reviewed on an appellate standard, with pure or extricable issues of law attracting a standard of correctness, and issues of mixed fact and law attracting the standard of palpable and overriding error.[33]

30. It is acknowledged that this approach to the standard of review of human rights Board of Inquiry decisions is at variance with this Court's approach in appeals that pre-dated *Vavilov*. In its pre-*Vavilov* decisions, this Court has ruled that the standard of review to be applied to appeals from human right tribunals' decisions is that of reasonableness.[34] The Supreme Court addressed this variance in its decision, noting that the Supreme Court has

[32] *Ibid* at para. 37.
[33] *Ibid.*, at para. 37.
[34] See for example the overview on standards of review provided by this Court in *Canadian Elevator Industry Trust Fund v. Skinner,* 2018 NSCA 31 ("*Skinner*"), at paras. 26-31. [BOA at **Tab 7**]

revisited precedents that had proved to be complex and unworkable.[35] The Supreme Court, in determining that the standard is to be the same as an appellate review, noted that a legislature's choice to provide for a right of appeal is a clear signal that it intended to ascribe an appellate role to the reviewing courts, and this is consistent with appeals in the criminal, and commercial contexts.[36] This is very consciously a departure from the standard of review that this Court applied pre-*Vavilov*.

## Standard of Review of Each Issue

### Province's Cross Appeal of the March 4th Decision

31. With respect to the first question - whether the Board committed a reviewable error of law in failing to apply the *Moore* test, failing to apply a comparative analysis, misapplying the concept of meaningful access, and failing to consider relevant jurisprudence (set out above as Issue 1 with respect to the March 4th Decision) - this is a clear extricable legal issue and therefore the standard of review, based on *Vavilov*, is that of correctness.

32. With respect to the second question (set out above as Issue 2 with respect to the March 4th Decision) – whether the Board committed a reviewable error by failing to consider and/or give weight to the witnesses of the Respondent (most notably, the testimony of Neil

[35] *Vavilov* at para. 19, 20. [BOA **Tab 6**]
[36] *Ibid.,* at para. 39, 44.

MacDonald – given that this is a question of mixed fact and law, the standard of review is that of palpable and overriding error.

Cross Appeal of December 4$^{th}$ Remedy Decision

33. With respect to the first issue – whether the Board awarded costs where there was no jurisdiction to do so pursuant to the *Human Rights Act* and its Regulations – questions of the limits of a tribunal's authority are questions of law to be reviewed on a standard of correctness.

34. With respect to the second issue – whether the Board ordered general damages in an amount at variance with the principles governing general damages under the *Human Rights Act* – some deference is called for. Appellate Courts will only interfere with assessments of damages if there is no evidence on which the trier of fact could have reached the conclusion it did; the trier proceeded on an incorrect principle; or the amount reached was wholly erroneous.[37]

[37] Sopinka, John et al. *Sopinka and Gelowitz on the Conduct of an Appeal*, LexisNexis Canada Inc.: Toronto, 2018, at pp. 116-117, citing *Woelk v. Halvorson*, [1980] SCJ No. 82. [BOA at **Tab 21**]

## PART V

## ARGUMENT

**<u>Issues from Cross-Appeals of the March 4th Decision on *prima facie* discrimination</u>**

<u>The appropriate approach to the discrimination analysis</u>:

35. The fundamental task before the Board was to assess whether the Province discriminated against the Complainants in violation of s.5 of the *Human Rights Act*. "Discrimination" is the key concept through which the Act promotes equality, and is defined in s.4:

> 4. For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

36. The frequently-cited test for discrimination under the Act comes from the Supreme Court of Canada's decision in *Moore v. British Columbia (Education)*,[38]:

> [33] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show:
>
> [1] that they have a characteristic protected from discrimination under the Code;
> [2] that they experienced an adverse impact with respect to the service; and
> [3] that the protected characteristic was a factor in the adverse impact.

[38] 2012 SCC 61 ("*Moore*"). [BOA at **Tab 15**]

37. Equality itself is, as described by the Supreme Court of Canada, "a comparative concept"; "comparison plays a role throughout the analysis."[39] While the Supreme Court has evolved its approach to comparisons, and in particular the use of comparator groups in the analysis, the fundamental importance of comparison remains. Indeed, comparison is built into the language of the *Human Rights Act*, which describes 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.[40] (Emphasis added)

38. Recent appellate court cases have noted that comparison is inherent to the discrimination analysis. This Court in *Skinner*, for example, while acknowledging that the Supreme Court has "cautioned against a rigid use of 'mirror' comparator groups," goes on to say (specifically citing the Supreme Court of Canada decisions in *Moore* and *Withler*):

> "…differential treatment based on an enumerated ground endures, as does some kind of comparison which is inherent in "differential" treatment."[41]

39. The PEI Court of Appeal, in dealing with a disability human rights case, also recently emphasized how a comparative analysis underlies the correct application of the test for discrimination:

> "Locating the appropriate comparator is necessary in identifying differential treatment and the grounds of the distinction."[42]

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[39] *Withler v. Canada (Attorney General),* 2011 SCC 12 ("*Withler*"), at para. 41, 61. [BOA at **Tab 25**]
[40] *Human Rights Act*, RSNS 1989, c. 214, at s. 4. [BOA at **Tab 11**]
[41] *Skinner*, at para. 51. [BOA at **Tab 7**]

40. Also crucial to a correct application of the discrimination test is a proper assessment of what "services" are at issue within the meaning of s.5 of the *Act*. Cases such as *Moore*, *Auton*, and *Skinner* have all turned on how the "service" at issue was defined. In *Moore*, the government characterized the service as "special education" in order to draw the comparison with other disabled students, but the Court accepted that the service was simply "education", which led to a more appropriate comparison between disabled and non-disabled students. Conversely, in *Auton (Guardian ad Litem of) v. British Columbia (Attorney General)*[43] and in *Skinner*, the complainants offered a broad interpretation of the "service" at issue ("funding for all medically required treatments" in *Auton*,[44] and "pain relief" or "medically required prescription drugs" in *Skinner*.[45]) In each case, the Court rejected the complainant's proposed articulation of the service, as it did not ground the proper comparison. The definition of the "service" is closely linked to the proper comparative analysis.[46]

41. Another important principle which defines limits to the legal concept of discrimination comes from the Supreme Court's decision in *Auton*:

> This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.[47] (references omitted)

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[42] *King* v *Govt. of P.E.I. et al.,* 2018 PECA 3 ("*King*"), at para. 45. [BOA at **Tab 14**]
[43] 2004 SCC 78 ("*Auton*"). [BOA at **Tab 2**]
[44] *Ibid*., at para 30.
[45] *Skinner* at paras.65, 59. [BOA at **Tab 7**]
[46] *Ibid.,* at para. 46.
[47] *Auton*, at para. 41. [BOA at **Tab 2**]

> … There can be no administrative duty to distribute non-existent benefits equally.[48]

42. While the Supreme Court of Canada has recently stepped away from other aspects of the analysis in *Auton*, this principle continues to be cited with approval. (See for example *King*[49] in the context of disability support benefits; *Tanudjaja* v. *Attorney General (Canada) (Application)*[50] in the context of housing benefits.)

43. In many ways, this principle from *Auton* is just an extension of the need for a comparative analysis and a proper definition of the service in question. Where the conferring of the service in question is capped or limited in a way that does not involve a distinction between disabled and non-disabled people, a proper comparative analysis will not show discrimination. Equality under anti-discrimination law does not involve a positive obligation to create or extend a benefit for disabled persons where there is no comparable benefit for those without disabilities.

44. Without explicitly citing *Auton*, this Court came to a similar conclusion in *Skinner* (which involved a private health plan rather than the public health plan in *Auton*.) In both cases, the service in question was intended for the benefit of the sick or disabled. While the limits of each plan did in each case mean that some disabled people did not receive the benefit of the plan, this did not amount to a distinction based on a disability. The fact that some disabled people's needs were met under the plan did not mean that the failure to

[48] *Ibid*. at para. 46.
[49] at para 12 [BOA at **Tab 14**]
[50] 2013 ONSC 5410. [BOA at **Tab 23**]

meet every need was discriminatory. The adverse effect would be based on the individual's "particular needs" and not the enumerated ground, *per se*.[51]

The Board's approach to the discrimination analysis in this case:

45. The Province submits that the Board fundamentally failed in its application of the test for discrimination in this case. While the standard of review is correctness, it should be noted that the errors are very similar to those identified by this Court in *Skinner*, where the standard of review was considered to be reasonableness.

**ISSUE 1(A): Failure to apply the test from Moore**

46. In this case, all parties in their submissions to the Board proposed that the three-part analysis from *Moore*, cited above, was the proper framework. The Board notes the test from *Moore,*[52] but does not use it as the framework for the discrimination analysis. Instead, the Board develops a novel approach based on the wording of s.4 of the Act:

"I distill the provision to read as follows:

A person discriminates where the person:

- makes a distinction
- based on a characteristic
- that has the effect of
- imposing disadvantages on an individual
- not imposed on others or which withholds or limits access to benefits
- available to other individuals."[53]

[51] *Skinner* at para. 87 [BOA at **Tab 7**].
[52] March 4th Decision, Appeal Book, Part I, Vol 1, Book 1, Tab 2, at p.148.
[53] *Ibid*, at p. 121.

47. The Board then applies this analysis at pages 122-127[54] (though replacing "imposing disadvantages on an individual" with "…an adverse impact…" at page 125.)

48. While it may not be an error in every case to use a different framework than the one set out in *Moore* and adopted by this Court in *Skinner*, it is not clear why the Board in this case chose a framework that no party used as the basis of their arguments. More importantly, the Board's application of its own novel framework leaves out considerations that would have been front and centre if the framework from *Moore* had been adopted.

49. The first flaw in this analysis is that it does not allow a clear definition of the "service" in question. As explained above, defining the service is crucial to proper application of the test in *Moore*, and many cases turn on whether the service is properly defined. Notably here, the Board only partially adopts the language of *Moore* when it makes "...an adverse impact…" part of the test; the second stage of the test in Moore refers to "an adverse impact *with respect to the service*".

50. The Board does articulate what "services" it is considering, but only in the broadest and vaguest form, referring to "services offered generally to disabled people" or some similar phrase[55]. The most specific articulation it makes is "a wide range of supports including residential supports" or "residential services available to other disabled individuals."[56]

[54] References are to the page numbering in the Appeal Book, not the internal page numbering of the Decision.
[55]March 4th Decision, supra note 2, at pp. 125, 127, 128, 129, 131.
[56] March 4th Decision, supra note 2, at p. 129.

51. This vagueness about the nature of the service leads to a fundamental flaw in applying the discrimination analysis. The Province argued before the Board that the "service" was residential support, and that the proper comparative analysis was between the residential supports provided to disabled and non-disabled people. However, the Board frames the entire analysis in terms of "services offered generally to disabled people," which on the very face of it undercuts any comparison with services offered to non-disabled people. Again, this question would have been front and centre had the Board framed the analysis in terms of *Moore* and addressed whether there was "an adverse impact with respect to the service".

52. Another flaw in this analysis is that it places the "adverse effect" on individuals at the centre of the analysis without considering that adverse effect through a comparative lens. It has never been questioned in this case that the limitations of the DSP in providing residential supports to the Complainants had negative effects; the Province recognizes that a better and more complete system would have better outcomes for all participants. The question has been whether those adverse impacts are discriminatory within the meaning of the *Act*.

53. However, the Board's analysis proceeds as if the question is the severity of the negative effects, rather than whether the effect is discriminatory at law. In two separate components of the analysis ("That has the effect of" at pages 124-125 and "…an adverse impact…" at pages 125-127) the Board focuses solely on defining the nature of the impact on the individuals (the "malign effects" of being resident at Emerald Hall at page

126.) The Province does not, in this cross-appeal, challenge the factual findings as to the negative effects of being unnecessarily resident at Emerald Hall, but the analysis does not address the legal question of whether the effects were discriminatory. In fact, the test for discrimination simply requires there to be *some* comparative disadvantage; the degree of impact may go to remedy, but the question of discrimination focuses on whether the disadvantage is based on the characteristic, an inherently comparative question, not on the severity of the disadvantage itself.

54. This becomes even more clear when the Board tries to articulate a limitation to the impact of its finding at page 150, stating that "adverse effects on each individual will have to be assessed before meaningful access can be determined." In the Board's analysis, the existence of discrimination depends on the *degree* of the adverse impact on the individual, not the comparative *nature* of the adverse impact. This fundamentally misapplies the test for discrimination.

55. Again, a comparison to *Skinner* is apt. There, the Board erred by focusing on the disadvantage to Mr. Skinner's "particular needs", such that "disability as a connecting factor gradually disappeared in the Board's analysis." The Court found that the Board's analysis "disassociated" the impact on Mr. Skinner from the "legislated requirement of enumerated grounds."[57] Similarly here, the Board disassociates the question of impact on the individuals from the discrimination framework by failing to use a comparative lens.

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[57] *Skinner* at para. 87. [BOA at **Tab 7**]

56. A final flaw in the Board's application of the framework is the Board's treatment of the nature of the "distinction based on a characteristic". Again, the concept of "distinction based on a characteristic" inherently invites a comparative analysis. However, the Board shifts the nature of the "distinction" in question throughout the analysis—shifting at crucial points from the distinction between the Individual Appellants and other disabled persons, to the distinction between disabled persons and non-disabled persons.

57. The very framework of the Board's analysis invites error. The Board breaks down "makes a distinction" and "based on a characteristic" into separate heads of analysis, and then in analyzing "based on a characteristic" simply concludes, in three sentences, that all of the Individual Complainants share the "characteristic of 'disability'"[58]. The question of "based on"—which is in the wording of the *Act* and invites a comparative lens—goes missing completely in the Board's analysis.

58. The substantive treatment of "distinction based on a difference" just illustrates this error. At some parts of the analysis, the Board focuses on the distinction between the complainants and "other disabled persons"[59] This distinction emerges when the Board wants to focus on the specific experience of being resident in Emerald Hall, which is in fact somewhat unique to these three complainants compared to other disabled people.

59. However, neither the Complaint nor the decision were limited specifically to being unnecessarily hospitalized in Emerald Hall; the Board specifically finds that placements

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[58] March 4th Decision, Appeal Book, Part I, Vol 1, Book 1, Tab 2, at pp.123-124.
[59] *Ibid*., at pp.123, 124, 127, 129, 140.

at Quest, CTP, King's, and Harbourside Lodge (which are not hospitals) would also be discriminatory[60] When the analysis takes that shift, the "distinction" can no longer be between the Complainants and other disabled persons, as the evidence indicated that many, many DSP participants have placements in those facilities (indeed, that fact was the driving factor in the DRC's complaint.) Moreover, the Board readily extends its logic to find that

> "…all disabled people who do not have immediate access to services, that is to say are on waitlists, or people who are not on waitlists but are residents of 'institutions'…"

*may be* facing discrimination based on a case-by-case analysis[61]. At this point, the distinction cannot possibly be between the Individual Complainants and others with disabilities; every participant in the DSP may potentially be facing discrimination. The "distinction" drawn by the Board becomes meaningless in determining the question posed by the Act, whether the distinction is "based on" the characteristic of disability.

60. This Court may be open to a Board applying a discrimination analysis without quoting the three-part test in *Moore* verbatim. However, in this case, the Board's variances from the test in *Moore* cause real flaws in the analysis, and amount to errors of law. The common theme underlying these errors is that the Board's analysis allows it to sidestep the crucial comparative lens.

[60] *Ibid*., at pp.141, 145.
[61] *Ibid*., at p.150.

**ISSUE 1(B): Failing to apply a comparative analysis**

61. Discrimination, as a concept, is inherently comparative. As this Court points out in *Skinner*, *supra*, courts have evolved the methodology for comparisons, and rely less on a "mirror comparator group approach," but comparison remains key to the analysis. In this case the Board failed to give life to the comparative nature of equality by failing to do any meaningful comparative analysis.

62. The comparison proposed by the Province was not the kind of problematic search for a mirror comparator group with precisely the same characteristics as the Complainants, which was the approach criticized in *Withler*.[62] The Province's position is simply that the appropriate analysis should compare the experience of disabled and non-disabled persons when it comes to the service in question, residential support from the Province. This is a broad and general comparison, specific to the context of the actual service in question. It is exactly the sort of comparison which would have allowed the Board to assess whether the Complainants' experiences were "based on" the enumerated ground of disability.

63. To make this comparison, the Province provided evidence as to the residential supports it provides to persons without disabilities, through Housing Nova Scotia. This evidence—which was not disputed—showed that supportive housing for persons without disabilities was not guaranteed as of right, involved limited capacities, did not always provide beneficiaries their preferred living environment, and involved waitlists. This is very

[62] *Withler*, at para.40. [BOA at **Tab 25**]

similar to the limitations of the DSP which affected the Complainants. The bottom line is, there is no guaranteed right to government-provided housing in Nova Scotia, for disabled or non-disabled persons alike. As much as there are dissatisfactions with the residential supports provided for persons with disabilities, as much as there are legitimate calls for reform, the problems do not involve a differential treatment of persons with disabilities compared with non-disabled persons, and so are not problems of discrimination under the Act.

64. Another comparative lens that would illustrate the argument is to ask, what would the experience of each of the Complainants have been had they not been disabled? Once medically discharged by Emerald Hall, each of the complainants was legally free to leave the hospital—none were under an adult protection order or otherwise required by law to live where the Province dictated. Had they not been disabled, they would have been released from the hospital despite having no home to return to, and would have been forced to rely on the limited means of their families or shelters for a place to live. [63] They had precisely the same options as persons without disabilities. It would be cruel to suggest that they should have actually exercised those options, and the consequences would clearly have been tragic. However, the fact remains that the limited options available to them were not due to a distinction based on disability.

[63] Transcript of Lisa Fullerton, Appeal Book, Part II, Volume 2, Book 27, p.9029.

65. There is nothing in the Board's decision which even acknowledges this comparative argument by the Province, let alone addresses it. And, the Board adopts no meaningful comparative argument in the alternative. This error alone is enough to make the Board's decision not just incorrect, but unreasonable.

**ISSUE 1(C): Misapplying the concept of "meaningful access"**

66. The Board properly identifies that, after *Moore*, the concept of "meaningful access" can be helpful in analyzing the discrimination test. However, the Board misunderstands the context of "meaningful access" in this case, and applies it in a way that is divorced from the actual test for discrimination.

67. The *Moore* case involved a disabled student who faced difficulties accessing public education when the government cut programs designed to facilitate that access. The Supreme Court of Canada set out the three-part test for discrimination, as noted above. The Court then addressed an argument as to what "service" was at issue in the case; the government claimed that the "service" was "special education," while the Complainant claimed that the service was the "the general education services available to all of British Columbia's students"[64]. The Court found for the Complainant, that the service was the general public school education available to all. It then framed the discrimination analysis in terms of whether Moore was denied "meaningful access" to that service, and found that he was.

[64] *Moore* at para. 28. [BOA at **Tab 15**]

68. Importantly, the concept of “meaningful access” is tied to the definition of the service in question. *Moore* was about meaningful access to *the general education services available to all of British Columbia’s students*, and not about meaningful access to the special education services only available to disabled students. This framing allows the Court to use “meaningful access” to get to a comparative analysis, assessing Moore’s experience against the experience of non-disabled students.

69. *Moore* explicitly draws from the Supreme Court’s earlier decision in *Eldridge v. British Columbia (Attorney General)*[65], which involved deaf persons claiming that the lack of interpretive services in hospitals was discriminatory. In *Eldridge*, the Court similarly determined that the service in question was not the interpretive services themselves; rather, interpretive services were sought as a means of meaningful access to a benefit available to everyone, the public hospital system. (*Eldridge* itself does not use the term “meaningful access”, but the Court in *Moore* describes the *Eldridge* case using that concept.) Again, “meaningful access” plays a role specifically because the services in question are not the interpretive services which are only useful to persons with disabilities, but rather the general hospital services available to everyone.

70. The Board in this case misapplies the concept of “meaningful access”. While the decision recognizes the principle in *Moore* as “All disabled people are…entitled to meaningful access to generally available services”[66] it then frames question in terms of whether the

[65] [1997] 3 SCR 624 (“*Eldridge*”). [BOA at **Tab 8**]
[66] March 4th Decision, Appeal Book, Part I, Vol 1, Book 1, Tab 2, at p. 120.

Complainants, and later all disabled persons, have meaningful access to services *available to disabled people*:

> What I understand *Moore* to be saying, however, is that if services are generally available to disabled people, then the Province *prima facie* discriminates if it does not grant "meaningful access" to those services. …
>
> I may err, but I understand the law in Canada to be, on the contrary, that government may be discriminating against disabled individuals if it does not provide "meaningful access" to the services the government has constructed to be available to disabled people generally.[67]

71. This is not simply a sloppy phrasing of the principle from *Moore*. By ignoring *Moore*'s reference to services available generally, and instead focusing on services available to disabled people generally, the Board removes any comparison of the treatment of disabled and non-disabled people, and thus divorces the principle from the essential comparative question of discrimination.

72. One could imagine the relevance of "meaningful access" if, hypothetically, the Province provided a general right to housing services for all citizens, as it does when it comes to education and hospital services. Then, one might reasonably ask whether persons with disabilities have "meaningful access" to those generally available services, in order to assess whether there is discrimination compared to non-disabled people. However, the Province does not provide housing to all citizens; the question of "meaningful access" thus does not help analyze whether there has been discrimination in the provision of residential supports.

[67] *Ibid*., at p. 129.

73. The Board recognizes in passing that meaningful access "does not stand alone"[68] and "does not exist as a freestanding right"[69]. However, by misframing the question from *Moore* and erasing the comparative nature of the meaningful access analysis, the Board in fact treats "meaningful access" as a freestanding right rather than a means of assessing discrimination. The meaningful access concept permeates the Board's analysis; it is "the theme, *ad nauseam*, of this decision."[70] The fundamental error by the Board on this point makes the decision not just incorrect, but unreasonable.

**ISSUE 1(D): Prior jurisprudence**

74. In *Skinner*, applying a reasonableness analysis, this Court reviewed the Board's treatment of similar human rights decisions from other jurisdictions. It found that even though the cases were not binding on the Board, its reasons for distinguishing them were "unpersuasive"[71].

75. In the present case, the Board was provided with several human rights cases involving both disability support programs, and allegations of a right to supportive housing, all of which favoured the Province's position. These included human rights tribunal decisions from Ontario and Prince Edward Island:

[68] *Ibid*., at p. 141.
[69] *Ibid*., at p. 131.
[70] *Ibid*., at p. 49.
[71] *Skinner*, at para. 112. [BOA at **Tab 7**]

- In *Wood* v. *Director, Ontario Disability Support Program*,[72] 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.[73]

- In *Glover v. Ontario (Community and Social Services)*,[74] 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.[75]

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[72] 2010 HRTO 1979. [BOA at **Tab 27**]
[73] *Ibid*., at para. 7.
[74] 2010 HRTO 2412. [BOA at **Tab 9**]
[75] *Ibid*, at para. 19.

- In *Northey v. MacKinnon*,[76] 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"[77]:

> 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.[78]

- In *C.B. v. Ontario (Community and Social Services)*,[79] , the complaint focused 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:

> 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.[80]

[76] 2014 HRTO 1836. [BOA at **Tab 18**]
[77] *Ibid*, at para. 5.
[78] *Ibid*, at para. 6.
[79] 2016 HRTO 1409. [BOA at **Tab 5**]
[80] *Ibid*., at para.8.

- In *Wonnacott et al. v. PEI*,[81] the Panel (after finding that there was age-based discrimination in certain aspects of the disability support program) dismissed the aspect of the complaint that alleged that lifetime caps on funding were discriminatory, finding:

> 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. [82]

76. In addition to these human rights tribunal decisions, the Province cited two court decisions which were directly relevant.

77. In *Brock* v. *Ontario (Human Rights Commission)*[83] ("*Brock*"), the claimant had a medical condition which resulted in severe physical disabilities. The Province had a program for residential supports for those with developmental disabilities, available in the claimant's community; the claimant argued that the lack of such programs for physical disabilities amounted to discrimination. The Commission decided not to refer the case to Tribunal, and that decision was judicially reviewed by a 3-judge panel of the Ontario Divisional Court, which upheld the decision.

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[81] (2007) 61 CHRR D/49 ("*Wonnacott*"). [BOA at **Tab 26**]
[82] *Ibid*., at para.109.
[83] (2009) 245 O.A.C. 235 (ONSCDC). [BOA at **Tab 4**]

78. The Court in *Brock* accepted the Commission's finding that the benefit sought by the complainant—support to live in the community of his choice—was not assured to anyone, even to those with developmental disabilities who had qualified for support:

> neither people with developmental disabilities nor people with physical disabilities have a right to government-funded long-term group-living residential facilities in their own communities…[84]

79. Thus, there was no distinction made on the basis of the claimant's disability. The Court found this conclusion was consistent with *Auton*.

80. The New Brunswick Court of Queen's Bench in *PNB* v. *NB Human Rights Comm.*[85] applied *Auton* in circumstances even more closely aligned with this case. There, a human rights complaint was brought by a family on behalf of their son who had severe autism, alleging discrimination because the son "was institutionalized at [a large facility] instead of being placed in a community placement," and also because he was subsequently transferred to a facility in Maine rather than remaining in his home community[86]. The Province successfully challenged the Commission's preliminary finding that a *prima facie* case of discrimination had been made out. The case was decided on a procedural fairness basis, but the Court addressed flaws in the Commission's analysis, specifically its "failure to perform a differential analysis."[87]

81. The Court found that the logic of *Auton*, though a Charter case, applied in the human rights context as well, citing the passage quoted above. The Court found that the

[84] *Ibid*., at para.32.
[85] 2009 NBQB 47 ("*PNB*"). [BOA at **Tab 20**]
[86] *Ibid*, at para. 17.
[87] *Ibid*, at para. 35.

discrimination analysis required a comparative assessment, which was not done. Ultimately, by failing to do a comparative analysis and instead focussing on the quality and location of the service provided, the Commission was addressing issues that fell outside the scope of human rights legislation: "The question to be addressed is not one of quality but of discrimination."[88]

82. The case was upheld on appeal by the New Brunswick Court of Appeal,[89] which described equality as "an inescapably comparative concept" and cited *Auton* for

> the Supreme Court's repeated caution that, absent demonstration of a discriminatory purpose, policy or effect, legislatures are under no obligation to create a particular benefit.[90]

83. The Court of Appeal stated that it was "obvious" that "[t]he present case does not fall within the arguable category":

> We are not dealing with a person with a disability who is seeking access to existing government benefits or services as was true in *Eldridge, Auton* and *Moore*.[91] Specifically, we are not dealing with a case in which one party is arguing that the relief being sought amounts to the funding of a benefit or service not otherwise available to the public and the other party is arguing that the relief being sought is necessary in order for the person with a disability to gain access to an existing service. This is why the Commission's belief there is no need to isolate an appropriate comparator group is without legal foundation.[92]

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[88] *Ibid*, at para. 37.
[89] *New Brunswick Human Rights Commission* v. *Province of New Brunswick (Department of Social Development,* 2010 NBCA 40 (leave to appeal to the SCC dismissed, 2011 CanLII 2096,) [BOA at **Tab 17**]
[90] *Ibid*, at para. 66.
[91] Note that the Court refers to lower level decisions in *Moore*, as the case preceded the Supreme Court of Canada's decision.
[92] *Ibid*, at para. 80.

84. This line of cases clearly establishes that 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 that human rights legislation does not impose an obligation on government to provide supportive community-based housing for persons with disabilities. The Board made no effort to assess or distinguish this line of cases, and in fact made no reference to the cases argued by the Province at all. It is not clear that the Board even turned its mind to the need to address the precedents set by prior tribunal and court decisions. This error is worse than that encountered by this Court in *Skinner*, where at least the Board had made an effort, however unpersuasive, to distinguish relevant cases.

**ISSUE 2: Failure to consider testimony**

85. The Province recognizes that, even on a correctness review, this Court will not require the Board to recite all of the testimony before it. However, even if the review were on a reasonableness standard,

> [t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it.[93]

In this case, the Board summarized a great deal of the testimony in the decision itself. Notably, however, it fails to mention four of the Province's key witnesses - Tricia Murray, Renee Lockhart-Singer, Denise MacDonald-Billard, and Neil MacDonald. Most

[93] *Vavilov,* at para 126 [BOA at **Tab 6**]

significantly, it did not mention at all the key evidence offered by the Province as part of the comparative analysis. The Province argued that, to truly understand the situation of disabled versus non-disabled Nova Scotians when it comes to the "service" of residential supports, one should compare the DSP program to the programs offered by Housing Nova Scotia.

86. The evidence on this point was offered by the Province through Neil MacDonald, Director of Housing Services for Housing Nova Scotia.[94] Mr. MacDonald's testimony, which was not meaningfully challenged on cross-examination, included that:

- A non-disabled Nova Scotian seeking governmental support in establishing housing (beyond the financial shelter allowance available to all Nova Scotians under ESIA) would, if qualified based on income, be put on a waitlist for an eventual spot in public housing.[95]
- The choices of public housing for non-disabled Nova Scotians are limited, and are not guaranteed to be in the neighbourhoods and communities the individual prefers.[96]
- The housing itself meets basic standards of quality, but may not reflect an individual's chosen ideal housing.[97]
- A person may face a difficult choice between a less ideal option available immediately, or a more preferred option that has a longer waiting list.[98]

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[94] The transcript of Mr. MacDonald's testimony is at Appeal Book, Part II, Vol 2, Book 19, Tab 29, at pp.5872-5979.
[95] Transcript of Neil MacDonald, Appeal Book, Part II, Vol 2, Book 19, Tab 29, at pp.5904 – 5905; 5926 – 5934.
[96] *Ibid*, at p. 5925.
[97] *Ibid*, at pp. 5884, 5920.

- Time on the waitlist varies depending on availability at the person's preferred option, with some options available nearly immediately, and other options having a waitlist of as long as ten years.[99]
- The waitlist is driven by the limited capacity in the public housing system; only so many places are available.[100]
- The average time spent on the waitlist for public housing is 2.7 years[101], which is quite close to the average waitlist time of 2.94 years for DCS residential supports.[102]

87. The Board makes no reference to this evidence, and gives no explanation for the omission. This oversight goes directly to the Board's failure to address the comparative nature of discrimination, and thus goes directly to the correctness of the decision under appeal.

Conclusion with respect to March 4, 2019 decision on prima facie discrimination

88. The Board, in its decision, fundamentally mischaracterizes the nature of discrimination itself, seeing it in terms of the quality and accessibility of services provided to persons with disabilities rather than as a comparison between the Province's treatment of persons with disabilities and the non-disabled population. This can be seen from the very way the Board frames its analysis, side-stepping key components which draw out the comparative

[98] *Ibid*, at pp. 5923.
[99] *Ibid*, at pp.5921 – 5922.
[100] *Ibid*, at p. 5924.
[101] *Ibid*, at pp.5921-5922.
[102] DCS Average Wait Times, Appeal Book, Part 2, Vol 3, Book 42, Tab 15, at p. 13888.

nature of the test, centering a concept of "meaningful access" which is divorced from a comparative analysis, and ignoring arguments, evidence, and cases which supported a proper comparative approach.

89. The Board's approach to discrimination, if allowed to stand by this Court, would represent a fundamental shift in human rights law. It would give the Commission and Boards of Inquiry jurisdiction not just to consider the comparative treatment of persons who belong to protected groups, but to create positive obligations on the government to create and expand services available to those who are ill or have disabilities *per se*. This is not speculative; the Board itself recognizes that the logic of its decision would make (for example) wait times for government-funded medical procedures *prima facie* discriminatory.[103]

90. The same logic could extend to any government activity that benefits those with disabilities; if the program is limited and an individual is adversely impacted by those limits, the individual (if the adverse impact is severe enough) has been deprived of "meaningful access" and discriminated against. This is the precise result cautioned against by the Supreme Court of Canada in *Auton* when defining limits on the concept of discrimination. While the Province has the same obligations as any private entity to avoid discriminatory treatment of persons with disabilities, the *Human Rights Act* does not put a Board of Inquiry in a position to supervise and control the quality and necessary limitations of services generally provided to those with disabilities.

[103] March 4th Decision, Appeal Book, Part I, Vol 1, Book 1, Tab 2, at pp.132,146.

**Issues from Cross Appeal of the December 4th Decision on Remedy**

91. Should this Court allow the Province's Cross-Appeal and overturn the Board's decision on discrimination, it will be unnecessary to consider the issues related to the Board's December 4th Decision on remedy. However, should this Court dismiss the Cross-Appeal, these issues then become relevant.

**ISSUE 1: The Board lacked legal authority to order costs**

92. In its decision, the Board explicitly acknowledges that all counsel agreed that there is no jurisdiction to award costs, and there are no regulations pursuant to the *Human Rights Act* granting authority to do so.[104] Despite this, the Board "rebels" against any limit on its authority to award costs:

> All counsel advise that I have no jurisdiction to award a payment of "costs" as a judge may do in the Supreme Court. I rebel against this since it seems to me as if, indeed, Boards of inquiry have the broad discretion to award remedies to fulfill the objects of the *Human Rights Act*, then it does not follow that Boards are to be circumscribed by rules about the lack of inherent jurisdiction of inferior tribunals. I am tempted to assert jurisdiction and award costs, but I defer. I do not, on the other hand, think it to be consistent with the goals of the *Human Rights Act* to say that "costs follow the event" and are to be expected in human rights proceedings. Circumstances alter cases[105].

93. With respect to the authority to award costs pursuant to the *Human Rights Act*, the Act is clear that costs may only be awarded pursuant to, and to the extent allowed by the regulations:

[104] Of note is that in their Notice of Appeal, the Individual Appellants have also acknowledged that the Board committed a legal error in awarding costs; see ground 17, of the Notice of Appeal of the March 4th, 2019 decision.
[105] December 4th Decision, Appeal Book, Part I, Volume 1, Book 1, Tab 13, at p.211.

> A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor **and, where authorized by and to the extent permitted by the regulations,** may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances.[106]
>
> [Emphasis added.]

94. The regulations enacted pursuant to the *Human Rights Act*[107] do not provide authority to award costs; as a result, there is no jurisdiction to do so. As the Board acknowledged, it is an inferior tribunal, therefore it is limited in its authority by its enabling legislation. However, the mere fact that there is a broad discretion to rectify discrimination does not grant a Board *carte blanche* to make an order in the absence of any authority to do so. Yet that is precisely what the Board did in this case. In asserting jurisdiction to award costs where there clearly was none, the Board committed a reviewable error.

95. Seemingly to avoid the lack of jurisdiction however, the Board orders that $40,000.00 become a term of each of the three trusts, to be paid to Pink Larkin from each of the trusts. Notably, the Board avoids the use of the word “costs” in making this award, but rather refers to it as the “payment to counsel,” and “legal fees.” The Board lacked jurisdiction to make this order and cannot avoid what is a clear lack of jurisdiction, by calling it something else or by directing that the amount of “legal fees” be cloaked in the veil of a trust, along with an award of damages.

[106] s. 34(8) [BOA at **Tab 11**]
[107] *Human Rights Boards of Inquiry Regulations*, N.S. Reg. 221/91.

96. This mechanism of ordering costs also runs afoul of the principles governing a solely discretionary trust, such as a Henson Trust. A Henson Trust vests absolute discretion in the trustee(s) to make payments as they see fit. To order that specific payments be made out of such a discretionary trust to a third party is contrary to the purpose of the trust, which is to provide the trustees with absolute discretion to make payments to or on behalf of the beneficiary. As noted in one case:

> Provision VII of Lillie's will also suggests that the Paul Stoor Trust is intended to operate as a Henson trust. A Henson trust is so named after the case of Ontario (Director of Income Maintenance, Ministry of Community & Social Services) v. Henson (1987), 26 O.A.C. 332 (Ont. Div. Ct.), upheld by the Ontario Court of Appeal in (1989), 36 E.T.R. 192 (Ont. C.A.). A Henson trust is an absolute discretionary trust. The trust instrument leaves the distribution of the income and capital of the trust in the absolute discretion of the trustee. The trust funds are beyond the reach of the beneficiary, who has no ability to compel the trustee to make payments to him or her: Elliott (Litigation Guardian of) v. Elliott Estate (2008), 45 E.T.R. (3d) 84 (Ont. S.C.J.), at para. 35. The Henson trust, properly constituted, allows the beneficiary to retain entitlement to government benefits, while simultaneously deriving funds from the trust, at the trustee's discretion. The trust funds do not interfere with beneficiary's qualification for government benefits because no interest in the trust funds vests in the beneficiary. In order to prevent any such vesting, a Henson trust will include a gift over of any remainder of the trust fund capital, upon the death of the beneficiary of the life estate.[108] [Emphasis added.

Even accepting that the legal fees were being paid on behalf of the beneficiaries, the trustees in a true Henson Trust arguably cannot be compelled to make said payments in any event. In its attempt to avoid what is a clear prohibition on the awarding of costs, the Board violates a principle of a Henson Trust, despite the fact that in the Remedy decision, the Board agreed with counsel for the Individual Appellants that such a trust was

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[108] *Stoor v. Stoor Estate*, 2014 ONSC 5684, at para. 7.[BOA at **Tab 22**]

warranted in the circumstances. (To clarify, this concern is raised, not to take issue with the Board's ordering that the general damages be placed in Henson Trusts *per se*, but rather to highlight for this Court the Board's efforts to circumvent its lack of jurisdiction to award legal costs.)

**ISSUE 2: The Board ordered general damages in an amount at variance with the principles governing general damages under the *Human Rights Act*.**

97. The Province submits that there are few analogous cases awarding general damages in situations akin to those of the Individual Appellants. The Province was only able to find one human rights case in which a Complainant was awarded damages for an inability to access their province's disability support program. In *King v. Government of Prince Edward Island (Disability Support Program)*[109], the PEI Human Rights Tribunal found that the Complainant was discriminated against in her ineligibility to access PEI's DSP because she suffered from schizophrenia, and those with mental illnesses were excluded from the PEI DSP. The Complaint was made out and the Complainant was awarded $15,000.00 for the denial of the benefits of the DSP. While the facts, as well as the claim of discrimination, differ in *King*, it appears to be the only case in which a human rights tribunal has considered damages in connection with a claim of discrimination in a Province's DSP.

98. However, the lack of direct comparator cases does not warrant disregarding the principles with respect to general damage awards articulated in human rights cases, nor does it

[109] 2015 CanLII 21171 (PE HRC) [BOA at **Tab 13**]; affirmed on appeal at 2018 PECA 3.

entitle the Board to ignore the general damages awards made in other cases in Nova Scotia. Although the Board makes passing reference to other awards in noting the significance of the amounts, "…particularly in the context of human rights awards,"[110] it fails to actually consider these cases in setting the award. Nowhere is this more evident than in the Board's own acknowledgement that the amounts of the awards it made was "arbitrary."[111]

99. The Board ordered $100,000.00 to each of the two surviving Individual Appellants, and $10,000.00 to each of a sister and a niece of the deceased Appellant. It is submitted that the awards to the surviving Individual Appellants far exceed the highest quanta of general damages ordered by a Board in Nova Scotia, and the Board erred in principle in making these awards. Moreover, the Board erred in principle in awarding sums to the sister and niece of the deceased Complainant, Shelia Livingstone.

100. In *Willow v. Halifax Regional School Board*[112], this Board Chair found that monetary damages awards only go so far in answering for the hurt feelings of a Complainant:

> The decisions seem to implicitly acknowledge that money, beyond a certain amount, cannot answer for the hurt suffered by someone who is the victim of discrimination. I have used the word invidious to express the difficulty of finding that, for example, Ms. Willow's agony was worse than Mr. Johnson's.
>
> Complainants will obviously do their best to make their own case "the worst", that their victimization is greater than others, but I see a policy underlying the

[110] December 4th Decision, Appeal Book, Part I, Volume 1, Book 1, Tab 13, at pp.212-213.
[111] *Ibid*., at p. 213.
[112] 2006 NSHRC 2. [BOA at **Tab 24**]

> human rights process and the awards that follow from it. I am content to more or less adopt the limits that other tribunals have imposed on themselves.[113]

101. In *Wynberg v. Ontario*, the Ontario Court of Appeal, in finding that damages were not an appropriate remedy where a declaration is sought for a *Charter* breach, also noted that damage awards have a precedential value, which can have the effect of diverting public funds from government programs and initiatives:

> 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 case illustrates this point in that the damages award creates an indefinite liability for Ontario to pay for privately purchased intensive behavioural intervention of the respondent families for so long as the private intensive behavioural intervention service providers consider it to be clinically required. This cost rises exponentially if the same benefit were extended to other similarly situated families, a point discussed below.[114]

102. The Province acknowledges that the principle of deterrence is also a consideration in human rights general damage awards. However, it is submitted that this is not a case in which it would be appropriate for this Court to consider deterrence, either specific or general, in assessing the damage award. With respect to specific deterrence, the Province has been working diligently to provide small options homes for each of the two surviving Individual Appellants, and an award of general damages is not going to affect the Province's efforts in that regard. With respect to Joey Delaney, as of the date of the Remedy hearing, the Province had received proposals from service providers to support

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[113] *Ibid*, at para. 124.

[114] (2006) 82 OR (3d) 561 at para. 197. [BOA at **Tab 28**]

him in a small options home. The Province had agreed to a service provider and efforts were underway to have him move into a home in the community.[115] With respect to Beth MacLean, a home was secured for her in Dartmouth in the Fall of 2018. Renovations were completed and Ms. MacLean moved into the home in February of 2019, with two other people. Unfortunately, an incident occurred at the home and Ms. MacLean was moved back to the Community Transition Program for a period of time and the two other individuals were moved from the home. However, as of the date of the Remedy hearing, Ms. MacLean was residing at CTP, while having visits at the small options home. The plan was for her to move into the home in the near future as soon as staffing was available.[116]

103. With respect to general deterrence, there was much evidence at the hearing on the Province's plans to transform the system. An award incorporating the principle of general deterrence will not speed up the Province's efforts in that regard; however, a significant damage award and its corresponding precedential effect, could divert funds away from and effectively stymie the Province's efforts in transforming the system. The Board rightly rejected the principle of deterrence in making its award.[117]

104. Moreover, it is relevant to note that the Board found no evidence of malice or ill will in the Province's actions vis-à-vis the Individual Appellants, and found that they received

[115] Transcript of Lisa Fullerton, Appeal Book, Part II, Vol 2, Book 29, Tab 44 at pp.9033, 9086.
[116] *Ibid*, at pp.9155 – 9165; 9182; 9195.
[117] December 4th Decision, Appeal Book, Part I, Volume 1, Book 1, Tab 13, at p. 209.

good care, at considerable cost, throughout their lives. It also found that any discrimination was more institutional than personal.[118]

105. However, the Board awarded general damages that are well beyond the range of general damages awarded in prior Nova Scotia human rights decisions, and that are among the highest in Canada. Prior to this decision, the highest award made by a Nova Scotia Board of Inquiry was $80,000.00 to a complainant in the case of *YZ v. HRM*. A general damage award of $25,000.00 was also made to YZ's spouse. In making her award, the Board Chair noted the significant impact the racism suffered by the Complainant had on his mental and physical health, including that he had attempted suicide, was effectively housebound, and would never work again.[119]

106. Prior to *YZ*, the highest general damage award by a human rights tribunal in Nova Scotia was the *Willow* case, in which this Board Chair awarded general damages of $25,000.00 to the Complainant.[120] In *Yuille v. NSHA,* a case from 2017, Board Chair Eric Slone noted that the range of general damage award is from $15,000.00 to $25,000.00.[121]

107. Outside Nova Scotia, human rights tribunals appear to have made general damage awards at or exceeding $100,000.00 in only two cases:

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[118] *Ibid.*, at p. 214.
[119] *YZ v. HRM*, May 7, 2019, Board file No. 51000-30-H05-1860, at para. 42. [BOA at **Tab 30**]
[120] 2006 NSHRC 2. [BOA at **Tab 24**] Of note is that in the case of *Wakeham v. Nova Scotia (Dept of Environment),* 2017 CanLII 50786 the Board ordered $35,000.00 in general damages, however the finding of discrimination was overturned on appeal.
[121] *Yuille v. NSHA*, March 17, 2017, Board File No. Board File No. H15-0691, at para. CLVIII. [BOA at **Tab 29**]

- In *OPT v. Presteve*,[122] a Complainant migrant worker who was subjected to persistent acts of sexual harassment and sexual assault, including forced sexual intercourse, was awarded $150,000.00 by the Ontario Human Rights Tribunal. In making this award, the Board determined that the Respondent's conduct was unprecedented in terms of its egregiousness, and the complainant was particularly vulnerable as a migrant worker, who was threatened to be returned to Mexico if she did not comply with the Respondent's demands. Because of these factors, the Board determined that this award was beyond the range of prior decisions. Another worker was awarded $50,000.00, which the Board felt was appropriate as the harassment she suffered was consistent with awards in prior decisions.

- In *AB v. Joe Singer Shoes*,[123] a Complainant was awarded $200,000.00 in general damages for significant and egregious acts of sexual harassment and sexual assault over approximately 18 years. In coming to that determination, the Board of Inquiry noted that the complainant was subjected to numerous acts of sexual harassment and assault, and that she was particularly vulnerable as an immigrant to Canada, who had no family here, and who had a son with a disability. After reviewing the case law, the Board determined that the acts complained of occurred over a longer period than in *Presteve*, that the Complainant was vulnerable and was in a situation in which she felt she could not leave, and thus a larger award was warranted.

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[122] 2015 HRTO 675. [BOA at **Tab 19**]
[123] 2018 HRTO 107. [BOA at **Tab 1**]

108. At the remedy stage, the Province advised that in its view, $50,000.00 per surviving Individual Appellant was an appropriate general damage award, which strikes a balance between consistency with case law and the principles contained therein, and the situation of the complainants, including the fact that they were waitlisted for supportive housing options for many years, and yet received quality care during that time. It remains an appropriate quantum of damages to order, and if so ordered, would be the second highest award in Nova Scotia, behind *YZ*.

Wrongful Imprisonment Cases Are not an Appropriate Analogy

109. At the remedy hearing, the individual Appellants argued that the Board should award damages akin to those awarded for wrongful incarceration. This is an inappropriate basis for a Board or this Court to use for an award of damages. Firstly, the voluntary nature of the DSP must be re-iterated. None of the three Individual Appellants were under any legal compulsion to be in any DSP setting. While the use of the term "voluntary" has been discussed previously, it remains the fact that any of the three could have refused the continued support of the DSP at any time.

110. Secondly, the Individual Appellants articulated a list of factors that are relevant considerations in awarding damages in wrongful imprisonment cases, including loss of privacy, loss of freedom, personal humiliation demonstrated by the presence of guards, use of restraints, the atmosphere of high stress, etc. The individual Appellants then attempted to fit these factors to the complainants' situations. However, they failed to note one significant point, which is that, given the nature of these individuals' significant and

complex disabilities, as adults they have always been and always will be dependent upon others for support with all aspects of their personal care and living arrangements. None of the three has ever had the ability to live the independent lives that Mr. Henry and Mr. Sophonow lost upon their incarceration. Moreover, the Board found that the three Individual Appellants were well cared for while they were waitlisted for supportive housing options, and there was no ill-will towards any of them. Thus, it would be erroneous to draw upon the analogy of incarceration for these individuals.

111. In their submissions before the Board, the Individual Appellants also referenced the case of *Muir v. Alberta*, [124] as authority for an award of general damages in a case in which the Plaintiff sued the province of Alberta for being unlawfully confined to a training school for “mental defectives” for ten years during which time she was sterilized. She was awarded $250,000.00 for the unlawful confinement. However, this case has a number of distinguishing features from the within situation and thus it is not an appropriate analogy. In that case, the Plaintiff did not undergo the requisite testing before being admitted to the training centre; she did not have an intellectual disability, and yet was labelled as having one, with the stigma associated with that; and it was found that the confinement led to the sterilization. Moreover, unlike Ms. Muir, the Individual Appellants, despite this Board’s assertions to the contrary, were not “retained in a custodial setting.”[125]

[124] 1996 CanLII 7287 (AB QB) [BOA at **Tab 16**]
[125] December 4$^{th}$ Decision, Appeal Book, Part I, Volume 1, Book 1, Tab 13, at p.3.

There Was No Basis on Which to Order General Damages to Non-Parties

112. The only explanations that the Board gave for awarding $10,000.00 to each of a sister and a niece of the deceased Complainant, Sheila Livingstone, were that they were the only ones who took an interest in her, they worked to get her out of Emerald Hall, and they did a service to the disabled generally through the pursuit of the human rights claim.[126] With respect, none of these are legally sound reasons to award damages to non-complainants.

113. The Act provides discretion to a Board to rectify any injury to a person or party or to compensate them for said injury. However, based on its rationale set out above, the Board did not find that Ms. Livingstone's sister and niece actually suffered any compensable injury. If it had, by this logic, Joey Delaney's sister, Beth MacLean's parents and potentially some or all of Ms. Livingstone's siblings all become entitled to general damages. However, it was not reasonably foreseeable to order damages to any of these non-parties.

114. Human rights damages must be justified on the basis of reasonable foreseeability:

> 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

[126] *Ibid*., at pp.209, 212.

> distil an award of damages that is fair and appropriate in all the circumstances.[127]

It is simply not reasonably foreseeable that the Province, in its actions pursuant to DSP policy, created potential liability, not only to those participants in DSP (of which there are approximately 5,400), but also to the thousands of their relatives who may also feel aggrieved. The policy reasons against damage awards as discussed in *Wynberg*, are apt here as well. There is no rational basis on which to order damages to non-complainant relatives in this situation; in so doing, the Board has effectively created a situation of unlimited liability against the government for its actions under the DSP. In awarding general damages to non-complainants, the Board committed a reviewable error, and this aspect of its award ought to be overturned.

Conclusion with respect to the Remedy Decision

115. The errors in the Remedy Decision become relevant only if the Cross-Appeal is dismissed with respect to the findings of discrimination. If they are to be considered, the Province submits that the Board erred in awarding legal costs where there was no jurisdiction to do so and erred in its award of general damages.

116. The award of costs was beyond the jurisdiction of the Board to order, and in extending its jurisdiction in this manner, this Board has erroneously opened up a new area of liability where none has been authorized by the legislation. With respect to its award of general damages to the surviving Individual Appellants, the Board's admittedly arbitrary award

[127] *Hogan v. Ontario*, 2006 HRTO 32, at para. 160. [BOA at **Tab 10**]

was without due consideration of either the principles set out in the case law, or the quanta awarded in other cases. These amount to errors of law that warrant this Court's intervention. Likewise, the award of general damages to non-complainants in this situation was an inappropriate exercise of the Board's discretion to award damages. In awarding damages to these non-complainants, the Board has extended the Province's potential liability to the relatives of participants of the DSP, once they meet the threshold of not having "meaningful access" to the DSP.

## PART VI

## ORDER

117. The Province requests that this Court grant the following orders:

- An Order allowing the Cross-Appeals with respect to the Board's application of the test for discrimination.

- An Order dismissing the findings of *prima facie* discrimination against the three individual Appellants.

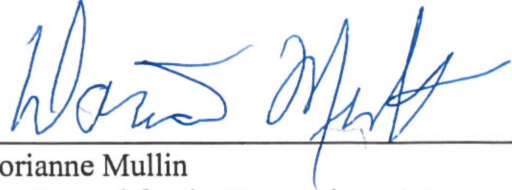
118. Should this Court dismiss the Cross-Appeals on the findings of *prima facie* discrimination, the Province alternatively seeks:

- An Order allowing the Cross-Appeal on the issue of costs, and a finding that the Board lacked jurisdiction to order costs.

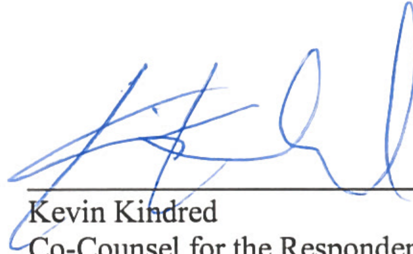
- An Order reducing the general damages from $100,000.00 to $50,000.00 to each of the surviving individual Appellants, Beth MacLean and Joey Delaney

- An Order overturning the award of general damages of $10,000.00 to the two non-complainants, Olga Cain and Jackie McCabe-Sieliakus.

119. All of which is respectfully submitted.



Dorianne Mullin
Co-Counsel for the Respondent, Attorney General of Nova Scotia



Kevin Kindred
Co-Counsel for the Respondent, Attorney General of Nova Scotia

Halifax, Nova Scotia
March 6, 2020

## APPENDIX A

## LIST OF CITATIONS

**Citations:**

1. *AB v. Joe Singer Shoes*, 2018 HRTO 107
2. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78
3. *Brock* v. *Ontario (Human Rights Commission),* (2009) 245 O.A.C. 235 (ONSCDC)
4. *C.B. v. Ontario (Community and Social Services)*, 2016 HRTO 1409
5. *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31
6. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
7. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624
8. *Glover v. Ontario (Community and Social Services)*, 2010 HRTO 2412
9. *Hogan v. Ontario*, 2006 HRTO 32
10. *King v. Government of Prince Edward Island et al,* 2018 PECA 3
11. *King v. Government of Prince Edward Island (Disability Support Program),* 2016 CanLII 21171 (P.E.I HRP)
12. *Moore v. British Columbia (Education)*, 2012 SCC 61
13. *Muir v. Alberta*, 1996 CanLII 7287
14. *New Brunswick Human Rights Commission* v. *Province of New Brunswick (Department of Social Development,* 2010 NBCA 40
15. *Northey v. MacKinnon*, 2014 HRTO 1836
16. *O.P.T. v. Presteve Foods Ltd*., 2015 HRTO 675
17. *PNB v. NB Human Rights Comm.*, 2009 NBQB 47
18. *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410
19. *Stoor v. Stoor Estate*, 2014 ONSC 5684
20. *Withler v. Canada (Attorney General),* 2011 SCC 12

21. *Wonnacott et al. v. PEI*, (2007) 61 CHRR D/49

22. *Wood* v. *Director, Ontario Disability Support Program*, 2010 HRTO 1979

23. *Willow v. Halifax Regional School Board*, 2006 NSH

24. *Wynberg v. Ontario*, (2006) 82 OR (3d) 561RC 2

25. *Yuille v. NSHA*, 2017 CanLII 17201

26. *YZ v. HRM*, 2014 CanLII 67576

# APPENDIX B

## STATUTES AND REGULATIONS

**Statutes and Regulations:**

1. *Human Rights Act*, RSNS 1989, c 214

**Meaning of discrimination**

4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society. 1991, c. 12, s. 1.

**Prohibition of discrimination**

5 (1) No person shall in respect of

(a) the provision of or access to services or facilities;
(b) accommodation;
(c) the purchase or sale of property;
(d) employment;
(e) volunteer public service;
(f) a publication, broadcast or advertisement;
(g) membership in a professional association, business or
trade association, employers' organization or employees' organization,
discriminate against an individual or class of individuals on account of
(h) age;
(i) race;
(j) colour;
(k) religion;
(l) creed;
(m) sex;
(n) sexual orientation;
(na) gender identity;

(nb) gender expression;
(o) physical disability or mental disability;
(p) an irrational fear of contracting an illness or disease;
(q) ethnic, national or aboriginal origin;
(r) family status;
(s) marital status;
(t) source of income;
(u) political belief, affiliation or activity;
(v) that individual's association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).

(2) No person shall sexually harass an individual.
(3) No person shall harass an individual or group with respect to a prohibited ground of discrimination.

**Parties to proceeding**

33(8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances.