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

FACTUM OF THE APPELLANT/RESPONDENT BY CROSS APPEAL, DISABILITY RIGHTS COALITION

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PART 1 - CONCISE OVERVIEW OF THE APPEAL

1. While the specific issues raised by the Province in the cross appeal attack the Board's findings with respect to the individual complaints, its argument in relation to the individual complaints has a direct bearing on the systemic claim brought forward by the DRC. As a result of the timing of the factums, the DRC will endeavour to respond to the systemic discrimination issues in relation to the Province's argument.

2. The Province's arguments in this cross appeal continue to rely heavily on recasting the "service" at stake from social assistance to "residential supports" in an attempt to relieve the Province of its duty to ensure that no person in need is disadvantaged in their access to social assistance by virtue of their disability.

3. Having redefined the "service" to suit the outcome it is seeking, the Province then claims there is no discrimination, based on a discredited mirror comparator group analysis, contrary to Supreme Court of Canada jurisprudence.

4. In this appeal the Province continues to avoid any real engagement with the evidence concerning the systemic impacts of its policies and practices, including the indefinite and years long delays in obtaining accommodative social assistance, which have effectively resulted in a denial of meaningful access to social assistance for thousands of people with disabilities, as well as segregation and social exclusion in the form of unnecessary institutionalisation reserved exclusively for persons with disabilities for over 35 years.

PART 2 - CONCISE STATEMENT OF FACTS

5. In these consolidated appeals, the factual record is extensive and effectively undisputed. The record provides a sufficient basis for this Court to make its own assessment of the service at stake and in more general terms, whether the criteria for a *prima facie* finding of systemic discrimination have been met.

6. The Disability Rights Coalition (DRC) relies upon the protected ground of disability *and* source of income, in arguing that people with disabilities in need, *who require supports and services to live in the community*, have been adversely affected by the actions and inactions of the Province in relation to access to social assistance. The claim is not, as the Province has submitted, that "all people with disabilities" have been discriminated against.[1]

7. The evidence in the record, in fact, does not support the Province's submission that the provincial moratorium on the community based small option program came to an end in 2016.[2] The Province failed to adduce evidence of any formal provincial government decision to end this moratorium, which has been described as a freeze on the funding of new community based small options and the effective denial of such benefits to eligible applicants.[3]

8. The impact of the moratorium and the distinction between able-bodied and disabled persons in need of social assistance is clear: unlike the disabled, people without disabilities in their access to social assistance (and those with disabilities whose needs most closely match those of able-bodied people) face no requirement of institutional placement, no lengthy and indefinite wait

[1] Province's Factum, March 6, 2020, para 16.
[2] *Ibid*, para 11.
[3] Appeal Book, Book 22 Tab 33, pp 7068-7069, 7143-7144, Testimony of Lynn Hartwell, August 9, 2018.

times and no restrictions based on geographical region imposed by the Respondent. Instead, eligible applicants are entitled to the service immediately, as of right, in the community of their choice.

9. Contrary to the Province's submissions, its responsibility for social assistance programs predates 1998, when it assumed responsibility for *delivery* of certain programs. In 1995, the Province assumed direct and exclusive responsibility for funding *all* social services under the *Social Assistance Act*. Prior to 1995, the Province maintained statutory and financial responsibility through cost sharing arrangements for all social assistance programs, including programs for persons with disabilities as well as responsibility for the delivery of the *Family Benefits Act* programs.[4]

10. While the Province concedes that it is "preferable" to provide supports to live in the community rather than large facilities, the undisputed record in this appeal establishes the harms of unnecessary institutionalisation in large facilities.[5]

11. The Province suggests that the three individual complainants share a "unique history" having been placed at Emerald Hall that is somehow very different from others.[6] The record in this appeal demonstrates the opposite. Rather than being "unique," the experience of the three individual complainants is representative of the experience of hundreds of people with disabilities who require supports and services to live in the community in Nova Scotia, but have been denied meaningful access to social assistance and as a result have been unnecessarily institutionalised

[4] Province's Factum, March 6, 2020, para 9; but see *contra* Province reply submissions October 22, 2018 para 18; see also DRC Factum March 2020 note 18 and accompanying text.
[5] Province's Factum, March 6, 2020, para 10, see evidence cited in DRC Factum March 2020, para 71-82.
[6] Province's Factum, March 6, 2020, para 18, 58.

over the course of the last three decades. The harm inflicted on the individuals was the result of the effects of systemic discrimination.[7]

12. The evidence of systemic discrimination is also found in numerous *government* instituted or adopted reports as well as findings by the Board of Inquiry.[8]

13. With respect to Emerald Hall, a dual diagnosis wing of the Nova Scotia Hospital where all three individual complainants were unnecessarily hospitalised for many years, a 2006 report commissioned by the then health authority, established the widespread and systemic nature of unnecessary institutionalisation in Emerald Hall on the majority of its patients, as well as the harms of being left to languish and suffer physical abuse and psychological harm in institutional environments.[9] Those impacts, stretching over many years and on many patients, are the result of the Province's failure to provide meaningful access to social assistance for people with disabilities to enable those patients to leave the hospital and have resulted in the unnecessary institutionalisation of people with disabilities in hospitals and other facilities across the province.[10]

14. The Province's summary of the Department of Community Services "Disability Supports Program" (DSP) fails to identify the *institutional* nature of the services offered disabled persons

[7] See DRC Factum March 2020, notes 88, 94 and accompanying text; DSP Service Request and Placement Data, Exhibit 85, dated August 26, 2019; Appeal Book, Book 62, tab 85, p 20650; testimony of Lisa Fullerton, Appeal Book, book 27, p 9236; Ms. Fullerton confirmed that according to the most recent waitlist statistics there are 33 people in the Nova Scotia Hospital on the DSP waitlist.

[8] See evidence regarding the moratorium, DRC Factum March 2020, para 32-33 Note 40 and 41; Data Report August 2015-April 2018 from the East Coast Forensic Hospital DRC Factum March 2020 para 60 Note 74, para 67, para 75 Note 94 (Joint Review Report Emerald Hall, Griffiths and Stavrakaki Appeal Book, book 41, Tab 3, p 13445; BOI Decision BOA Tab 13 para 172, 269, 356, 359, 360, 361; Griffiths and Stavrakaki; Appeal Book, Book 38, Tab 32, pp. 12452, Choice, Equality and Good Lives in Inclusive Communities: A Roadmap for Transforming the Nova Scotia Services to Persons with Disabilities Program, prepared by The Nova Scotia Joint Community-Government summary on Transforming the SPD Program to the Honorable Denise Peterson-Rafuse and the Minister of Community Services, dated June, 2013.

[9] Griffiths and Stavrakaki, *ibid.*

[10] Griffiths and Stavrakaki, *ibid; see also* DRC Factum March 2020, Note 94.

in need who require supports and services to live in the community under the authority of the *Social Assistance Act*.[11] The Province funds and maintains Residential Care Facilities, Adult Residential Centers, Regional Rehabilitation Centers and the Community Transition Program – which the evidence establishes are segregated, congregate, long term residential facilities reserved exclusively for persons with disabilities. The most recent Provincial institution, known as "Quest," was opened in 2008.[12]

15. The Province claims that both the ARC and RRC institutions have "20 or more" residents, although this reference is not footnoted and does not reflect the legislation or policy.[13] Contrary to these submissions, elsewhere in the evidentiary record, the most recent data indicates that the two largest facilities (Breton ARC/RRC and Kings ARC/RRC) have 106 and 173 beds, respectively.[14]

16. Throughout this proceeding the Province has described social assistance as "voluntary" while at the same time conceding that the Province is statutorily obligated to provide "assistance" to "persons in need". From the perspective of the person requiring assistance, given that social assistance is a service of "last resort" provided when all other financial resources have been exhausted, the term 'voluntary' is inaccurate. The term is accurate only in the limited sense that the service is not court ordered or otherwise compulsory.

[11] Province's Factum, March 6, 2020, para 6.
[12] DSP Policy Manual, Appeal Book, book 58, p 19131 at 5.2.
[13] Province's Factum, March 6, 2020, para 6.
[14] ARC/RRC Current State Overview, AB vol 68 13304 at 13308-13309; see also Breton ARC/RRC residents level of support at 13327 and Kings ARC/RRC residents level of support 13346.

17. With respect to its claim that the service in these complaints is related to housing, the Province suggests that public housing is for "non-disabled" Nova Scotians, unlike the Disability Supports Program, which is reserved for the disabled. However, this submission ignores the evidence from the Province's own witness. Neil MacDonald testified that the Province's public housing program *does not* exclude people with disabilities and that while participants in the DSP program don't enjoy any priority on the waitlist, there is no reason why a DSP recipient couldn't reside in public housing. The distinction drawn by the Province is not supported by the evidence.[15]

18. The Province suggests that they cancelled Sheila Livingstone and Joey Delaney's small options placements because they were no longer "suitable."[16] The Board found that that the placements were cancelled because of the length of time each spent in hospital after receiving treatment and that the service providers did not agree that these two individuals could not be supported in the community.[17] In addition, in Beth MacLean's circumstances, the evidence establishes that if the Province had provided the appropriate supports and services in a reasonable manner, she could have lived in the community. Instead, she spent 16 years in a locked psychiatric ward of the Nova Scotia Hospital as a result of the Province's failure to provide her with accommodative social assistance services.[18] Again, these are not isolated incidents but rather the result of systemic policies. The finding that the problems were systemic rather than personal or individual is reflected in the Board's decisions.[19]

[15] Province's Factum, March 6, 2020, para 15; Neil MacDonald, Testimony Appeal Book, book 19, 5878 at 5943-5944, 5956.
[16] Province's Factum, March 6, 2020, para 18.
[17] BOI Decision, para 80-81, 242, 245, 249.
[18] BOI Decision para 240.
[19] See for example BOI decision March 4 para 413; BOI Decision December 4 para 66.

PART 3 - LIST OF ISSUES

19. The Appellant has restated its grounds of appeal in its factum as follows:[20]

> 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?
>
> 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?

20. The Appellant's have abandoned ground 6 in its Notice of Appeal – that the Board erred in jurisdiction in interpreting legislation other than the *Human Rights Act*.

21. In this factum the issues will be dealt with in the following order:

> 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. misapplying the concept of "meaningful access" *[to the service];* and/or
> c. failing to apply a comparative analysis;
> d. failing to consider, or properly distinguish, prior relevant jurisprudence?
>
> 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?

[20] Province's Factum, March 6, 2020, para 22-23.

PART 4 - STANDARD OF REVIEW FOR EACH ISSUE

22. The Respondent does not oppose the standard of review as stated by the Province in its cross appeal.

PART 5 – ARGUMENT

Issue 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;

23. In *Moore,* at the *prima facie* stage of the discrimination inquiry the SCC stated the test as follows:

> ….to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.[21]

24. In order to respond to this ground of appeal, it is useful to review the human rights claim filed by the Disability Rights Coalition (DRC), in order to assess how the test in *Moore* should be applied in this appeal.

Ground of discrimination: disability and source of income

25. As the record in this appeal demonstrates, the characteristics protected from discrimination in this complaint, disability and source of income, are shared by an identifiable group of people living in poverty and eligible for social assistance who require supports and services to live in the community, including personal assistance with the activities of daily life.

[21] *Moore v British Columbia (Board of Education),* 2012 SCC 61 at para 33, Abella J [*Moore SCC*] Joint BOA Tab 19; Note: caselaw cited previously in these consolidated appeals will be referenced in the Joint Book of Authorities filed by the DRC and the individual complainants in March 2020 as 'Joint BOA'; cases cited for the first time in this factum will be included in 'BOA – DRC Respondent'.

26. Understanding the needs and circumstances of this group is vital to assessing whether the Province has met its duty to provide an accommodative service as well as the adverse effects of failing to provide an accommodative service.

27. The Province routinely and erroneously describes the group affected as "DSP (Disability Supports Program) Participants" in a way that ignores the true needs and circumstances of the group identified in the human rights complaint, and in particular their status as applicants on a waitlist. Restricting the claim to those receiving DSP services ("participants") distorts the claim and ignores those who, like MacLean, Delaney and Livingstone, are effectively denied meaningful access to social assistance by virtue of both their disability and their need. [22]

28. The Supreme Court of Canada has held that a substantive approach to equality is one that takes into account the true needs and circumstances of persons with disabilities and that recognising differences is key to avoiding the now discredited formal approach to equality.[23]

29. The Province's submissions restricting those affected to "DSP Participants" also has the effect of distorting the service in issue – in implying that it is the DSP rather than social assistance that lies at the core of this complaint. As the complainants have repeatedly stated, the DSP is not the service at issue but rather is designed to be *the means* by which people with disabilities access social assistance. As an accommodative program it is inadequate, given long and indefinite wait

[22] See for example Province's Factum March 6, 2020, para 151 and 156.
[23] *Vriend v Alberta* [1998] 1 SCR 493 para 82, BOA Respondent DRC Tab 6.

times, unnecessary institutionalisation and its failure to accommodate the differential needs of persons with disabilities.

30. The human rights complaint identifies that while some disabled recipients are being fully accommodated in their access to the service of social assistance, it discriminates against many more people with disabilities. Among those are people on the DSP waitlist who receive *no access to social assistance* and *are not DSP participants*, who are subject to indefinite and years long delays in accessing services, as well as those who have "given up" and are not reflected in the Province's waitlist statistics.[24]

31. Those on the DSP waitlist who are not receiving social assistance includes those waiting at the East Coast Forensic Hospital (ECFH). ECFH patients are included in the Province's own waitlist documents filed with the Board and part of the record in this appeal.[25] All those on the DSP waitlist, including ECFH residents, fall within the scope of the DRC's human rights complaint, and cannot be ignored. [26] The Province has failed to offer any cogent reason for its argument that this group of persons with disabilities on the DSP waitlist should be excluded from consideration as part of this complaint.[27]

32. The identifiable group denied meaningful access to the service includes people with disabilities who are eligible for social assistance but have "given up" and are not reflected in

[24] For those eligible applicants on the waitlist receiving no social assistance see testimony of Lisa Fullerton, Appeal Book, book 27, p 9221; and most recent waitlist statistics DSP Service Request and Placement Data, Exhibit 85, dated August 26, 2019; Appeal Book, Book 62, tab 85, p 20650.
[25] Testimony of Carole Bethune, Appeal Book, book 24, p 8086.
[26] DSP Service Request and Placement Data, Exhibit 85, dated August 26, 2019; Appeal Book, Book 62, tab 85, p 20650
[27] See Province's Post Hearing Brief para 24; Appeal Book, book 64, p 20969

waitlist statistics due to the indefinite and years long delays in receiving access to the service. Lynn Hartwell, Deputy Minister, testifying on behalf of the Province admits that their waitlist statistics underestimates the true number of people with disabilities who would be eligible but whose needs have been ignored under government policy.[28]

33. Finally, those DSP participants who are adversely affected in their access to social assistance include those placed in institutional settings in order to access social assistance (roughly 20% of "DSP Participants"), as well as others who receive services inappropriate to their differential need, such as those who are forced to reside with family members as a condition of receiving DSP benefits through the Flex Program while on the DSP waitlist for other more appropriate services.[29]

Social context: disability and source of income

34. In addition to their needs and circumstances, addressing the inequality faced by this identifiable group of people with disabilities requires an understanding of the social context they face. For people with disabilities, especially those who require supports and services to live in the community, this includes widespread exclusion and marginalisation arising not only from being relegated to institutions, but also in their wider access to society as a whole.[30]

35. The barriers resulting from having to meet the norms set by able bodied people are often the result of unintentional and unconscious decision making in relation to people with disabilities,

[28] Testimony of Lynn Hartwell, Appeal Book, book 22, p 7473; "I'm sure that there are people who choose not to go on the waitlist because they're not sure when they'll get service"
[29] See for example Testimony of Lynn Hartwell, Appeal Book, book 22, p 7254-55, 7311, 7430.
[30] *Eldridge v British Columbia (AG)*,[1997] 3 SCR 624 [*Eldridge*] para 56, Joint BOA Tab 10; See also DRC Factum March 2020, para 124-126.

sometimes referred to as "ableism." The Law Commission of Ontario in its leading report on discrimination against persons with disabilities noted that:

> Ableism may also result in a failure to address the real needs and circumstances of persons with disabilities. The Ontario Bar Association (OBA) has stated that:
>
> > The key change that must take place, therefore, is attitudinal or philosophical. Legislators have to act on the assumption that assistance, support and protection necessary to permit persons with disabilities to achieve equality and full participation in society are required as a right and are not offered as a privilege. The assumption has to be that society as a whole will benefit when persons with disabilities are encouraged and allowed to participate fully in society at all levels.[31]

36. In evaluating the systemic effects and the outcomes of Provincial government policies and practices since 1986 on people with disabilities in need, it is critically important to keep this wider context in mind.

Issue 1(b) "misapplying the concept of 'meaningful access' to the service"

The Moore *test: the accommodative program is* not *the service but the means to accessing the service for persons with disabilities*

37. The Supreme Court of Canada in *Moore* used the term "meaningful access *to the service*" in its analysis of the discrimination claim at the second step.[32]

38. Under this second step of the test for discrimination, identifying the service at stake was central to the outcome of the appeal in determining whether there had been an "adverse impact with respect to the service."

[31] Law Commission of Ontario, *A Framework for the Law as it Affects Persons with Disabilities*, 2012 p 18-19,
[32] *Moore*, *supra* Note 24, para 32 and 34.

39. The SCC overturned the BCCA decision, based on their flawed identification of the service. The BCCA rejected the discrimination claim based on access to *public education* by restricting the "service" to *special education*. The SCC soundly rejected this approach to the service in finding that special education was not the service, but *the means* by which students with disabilities accessed the service of public education. To restrict the service to the accommodative program was to doom the claim.[33]

Accommodative measures provide the means by which claimants access the service

40. With respect to persons with disabilities, at the *prima facie* stage of the test for discrimination the question is whether the service is accommodative of their differences, not whether it provides them with identical treatment.[34] Accommodation has also been described as ensuring equality in outcomes so that people with disabilities have "meaningful access" to the service. [35]

41. In circumstances such as these, the Province is required to take positive steps to ensure that all people with disabilities can benefit equally from social assistance. Programs for people with disabilities are the means by which the Province ensures meaningful access to social assistance as the service. In *Moore,* the Court addressed a similar issue in the context of public education for students with learning disabilities:

> I agree with Rowles J.A. that for students with learning disabilities like Jeffrey's, special education is not the service, it is the *means* by which those students get meaningful access to the general education services available to all of British Columbia's students:
>
> > It is accepted that students with disabilities require accommodation of their

[33] *Moore*, *ibid*, para 28
[34] Brodsky and Day, *Accommodation in the 21st Century*, at page 35, BOA DRC Respondent Tab 8
[35] *Eldridge*, *supra* Note 33, para 78, *Moore*, *supra* Note 24, para 25-36.

> differences in order to benefit from educational services. Jeffrey is seeking accommodation, in the form of special education through intensive remediation, to enable him equal access to the "mainstream" benefit of education available to all.... *In Jeffrey's case, the specific accommodation sought is analogous to the interpreters in* Eldridge: *it is not an extra "ancillary" service, but rather the manner by which meaningful access to the provided benefit can be achieved*. Without such special education, the disabled simply cannot receive equal benefit from the underlying service of public education.[36]

42. To ensure that all people with disabilities in need have meaningful access to social assistance, the evidence shows that social assistance must include supports and services for people with disabilities. The accommodative program may vary from person to person, but importantly it includes human resources and supports for activities of daily living.

43. As part of its social assistance programs, the Province has provided some "disability supports" services to meet the needs of some persons with disabilities. However, the outcome of Provincial government *practices and policy* is that many persons with disabilities are effectively deprived of social assistance that is sufficient to meet their true needs and circumstances.

44. Insufficient accommodation of persons with disabilities, such as we find in the Province's disability supports programs, can produce serious inequality. In *Moore,* the School Board provided programs for students for disabilities, but those programs were insufficient to meet the needs of students like Jeffrey:

> There is no dispute that Jeffrey's dyslexia is a disability. There is equally no question that any adverse impact he suffered is related to his membership in this group. The question then is whether Jeffrey has, without reasonable justification, been denied access to the general education available to the public in British Columbia based on his disability, access that must be "meaningful"[37]

[36] *Moore, supra,* Note 24, para 28.
[37] *Moore, ibid,* para 34.

45. Similarly in this case, the outcome of the Province's policies and practices is that it fails to meet the true needs and circumstances of persons with disabilities. The disadvantage lies in the Provinces failure to meet its obligation to provide persons with disabilities with meaningful access to social assistance.

Board's analysis with respect to the "service"

46. There is no dispute that in its articulation of the "service" the Board chose a third option not presented by either party in characterising the service as services reserved solely for persons with disabilities.

47. The DRC agrees that the Board erred in its identification of the service in focussing on the accommodative program (special education or services for persons with disabilities respectively) rather than the service itself (public education or social assistance). The Board's reasons with respect to the service are reminiscent of the error of the BCCA in *Moore*.

48. This approach guaranteed that the systemic impacts would be ignored because it restricted the distinctions to those between disabled and other disabled people, rather than comparing the access to social assistance of people with significant disabilities, to the access experienced by the able-bodied, or those with disabilities who most closely resemble the able-bodied. The Board's approach represents a search for "sameness" reflective of the discredited formal approach to equality.

49. Neither this characterisation of the "service" by the Board, nor the Board's comparison of disabled people to other disabled people, were presented or argued by either party to this appeal. In deciding on grounds not advanced in the complaint, without notice to the parties, the Board effectively deprived the parties of a decision that addressed the issues raised, or a chance to make submissions on the ground upon which it ultimately decided; a clear error of law. The Board erred when it decided on grounds not advanced in the complaint, depriving the parties of a decision that addressed the issues raised, or giving the parties a chance to make submissions on the ground upon which the Board ultimately decided.[38]

Social assistance is the service

50. The complaints filed by the individual complainants and the Disability Rights Coalition identified the "service" at issue as "social assistance" and the accommodative program as supports and services to live in community.[39] Elsewhere we have set out the legislative basis and history of social assistance as a service in Nova Scotia.[40] Originally provided under a single statute (the *Social Assistance Act*) successive legislative reforms have resulted in two social assistance statutes (with the addition of the *Employment Support and Income Assistance Act* in 2000), which together provide what the Deputy Minister described as a "continuum" of support to both the able-bodied and disabled persons "in need".

51. The social assistance programs under the two statutes share many significant characteristics: both identify "persons in need" as the subject of social assistance programs; both rely on the same financial eligibility criteria including the "budget deficit calculation"; and both

[38] *Rodaro v Royal Bank of Canada* 59 O.R. (3d) 74 para 60 BOA DRC Respondent Tab 5.
[39] Complaint, Appeal Book, Book 1, Tab 1, pp. 24, 25, para 135-139.
[40] See DRC Factum March 2020, para 15-31

impose an obligation on the Minister of Community Services to provide assistance to persons in need. [41]

52. The Province argues that the service identified by the human rights claimants should be restricted to "residential supports" rather than social assistance. This again confuses the accommodative program with the service. The arbitrary selection of an accommodative aspect of the disability supports program ignores the differential needs of persons with disabilities.

53. The Province's approach represents the kind of "excessive pigeonholing" that marks a formal, rather than a substantive approach to equality. It ignores the true needs and characteristics of the group affected and thus distorts or ignores the distinctions in access to the service and adverse effect.[42] It undermines substantive equality and a full appreciation of the effects of systemic discrimination in this case:

> Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination, as this Court acknowledged in *Action Travail, supra*.[43]

54. In considering the nature of the "service" at stake, context is crucial.[44] Restricting the service to "residential supports" as the Province has attempted to do, ignores the true needs and circumstances of people with disabilities who are in need and require supports and services to live

[41] *Social Assistance Act*, RSNS 1989, c 432, BOA Tab 42, *Municipal Assistance Regulations*, NS Reg 76/81, Regulations 1(i), 4(1), 4 (2), Joint BOA Tab 43; *Employment Support and Income Assistance Act*, SNS 2000, c 27, Joint BOA Tab 40 at s. 3 (g) and s. 7; for similarities between the ESIA and Social Assistance Act DSP program, see among others testimony of Carole Bethune Appeal Book, book 23, p 7285; in contrast Neil MacDonald testified that this was not an eligibility criteria used by public housing Appeal Book, book 19, p 5944-45.

[42] See Pothier Dianne, *Mirror, Mirror: Equality as a Comparative Concept*, 2006 33 SCLR 3d 135 at 143 BOA DRC Respondent Tab 10; the term "excessive pigeonholing" is used in describing the selection of a comparator group in a s. 15 case, but the term can also be applied to the characterisation of the service in the context of human rights, as the selection of the service determines the nature of the comparator.

[43] *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3 at paras 41, 43 [*Meiorin*], Joint BOA, Tab 4.

[44] Brodsky and Day, *supra*, Note 37, p 36-41.

in the community. The evidence establishes that they have a differential need for personal and other assistance in the activities of daily living and that by reason of their poverty they are unable to meet this need.

Contextual approach to the service

55. The identification of the service can make or break a discrimination claim. To avoid the unjust dismissal of otherwise valid claims, the SCC has identified a contextual approach to the identification of the service as essential in achieving substantive equality, rather than formalistic "identical treatment." In *VIA Rail,* the Court noted:

> This ad hoc provision of taxis or a network of rail services with only some accessible routes is not, it seems to me, adequately responsive to the goals of s. 5 of the Canada Transportation Act. Section 5 provides that the transportation services under federal legislative authority are, themselves, to be accessible. **It is the rail service itself that is to be accessible, not alternative transportation services such as taxis. Persons with disabilities are entitled to ride with other passengers, not consigned to separate facilities.**[45]

56. Similarly in *Jodhan*, in addressing a *Charter* s 15 claim, the Federal Court of Appeal has this to say about a similar attempt to restrict "the benefit" by the government respondent:

> The Attorney General's position before us is that the judge erred in his characterization of the benefit. In the Attorney General's submission, that benefit is effective access to government information and services. Consequently, the Attorney General says that the provision of its services and information by way of alternative channels and formats, i.e. by mail, telephone and in-person visits to government centres (the "alternative channels") and Braille ("alternative format") is sufficient to meet the substantive equality test of subsection 15(1). Thus, if I properly understand the Attorney General's case, even if the government failed to provide the visually impaired with any access to its websites, this would not constitute a violation of subsection 15(1), as effective access would have been made available through other means of communication.
>
> In my view, that cannot be right. In Eldridge, at paragraph 73, the Supreme Court held that every benefit offered by the government had to be offered in a non-discriminatory manner and that in achieving that goal, the government might be required to take to take positive action. Substantially for the reasons given by the judge, I must conclude that the

[45] CCD v *VIA Rail Canada,* SCC 2007 15 Joint BOA Tab 36, para 175, emphasis added.

> consequence of the Treasury Board's failure to issue adequate standards and to ensure departmental compliance with its accessibility standards is that Ms. Jodhan and the visually impaired are denied equal access to the benefit of government information and services. An easy remedy to that situation is for the Treasury Board to correct the inadequacy of its standards and to use its best efforts to ensure that the standards are implemented by the various departments under its supervision.
>
> As I indicated earlier, I have difficulty with the proposition that equal access to government information and services can be attained without access to online information and services. In the present matter, no evidence has been offered by the Attorney General to the effect that there is any impediment to moving forward and enabling the visually impaired to readily access government information and services online. Consequently, I also have difficulty with the proposition that alternative formats and channels meet the goal of substantive equal treatment. [46]

57. The FCA rejected the government's attempt to restrict the benefit to "government information" without providing access to on-line resources, describing that outcome as contrary to the goal of "substantive equal treatment." The government's approach in *Jodhan*, rejected by the Court, is similar to the Province's attempt to narrow the service in these appeals to "residential supports" and should also be rejected as the result also has the effect of undermining substantive equality.

Province imposes waitlists for non residential supports

58. The Province argues that both able-bodied and disabled persons receive identical treatment by receiving immediate access to *non-residential* supports and services under the ESIA and the *Social Assistance Act* "as of right".[47]

59. Accepting without admitting that the distinction drawn between residential and non residential supports is a valid one, the Province's submission on this point is not supported by the

[46] *Jodhan v Canada* 2012 FCA 161, para 149-151, see also para 110-111 regarding the importance of a contextual approach in achieving substantive equality BOA DRC Respondent Tab 3.
[47] Province's Factum, March 6, 2020, para 6.

evidence, particularly the evidence that there are waitlists for what it defines as "non-residential supports" such as the DSP Independent Living Support (ILS) program. The evidence demonstrates that ILS is not available "as of right". All DSP programs are capped financially and have waitlists with the exception of the "Flex at home" program reserved for those who have family members willing and able to provide them with care and a residence. [48]

60. Waitlists are not reserved for persons requiring residential supports, contrary to the Province's submissions, but are experienced by persons with disabilities in need who require both residential and non-residential supports.

Distinction between residential and non residential not supported by the legislation

61. The distinction drawn by the Province between "residential" and "non residential" support options is not reflected in the language of the legislation.

62. The regulations passed pursuant to the *SAA*, define "assistance" broadly as follows:

> s. 1(e) "assistance" means the provision of **money, goods or services** to a person in need, including:
>
> (i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,
>
> (ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements, funeral and burial expenses and comforts allowances. The Director may approve **other items of special requirement he deems essential to the well being of the recipient**,
>
> (iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and **nursing services** which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,
>
> (iv) **care in homes for special care**,
>
> (v) social services, including family counselling, **homemakers, home care and home nursing services,**

[48] DSP Service Request and Placement Data, Exhibit 85, Appeal Book, Book 62, tab 85, p 20650; see also testimony of Lynn Hartwell Appeal Book, book 22, p 7311and Carole Bethune, book 24, p 8070.

(vi) **rehabilitation services**;[49]

63. The social assistance legislation specifically defines the "service" (social assistance) as including an array of what are clearly accommodative programs for people with disabilities. These programs include income assistance and personal assistance and services designed to meet the differential needs of persons with disabilities. All the services sought by the DRC and individual complainants are authorised by legislation and fall squarely within detailed government policy. The Province's argument, based on a distinction between residential and non residential supports, has no basis whatsoever in either legislation.

64. In addition, the Department of Community Services, through its own policy, does not reflect the "non residential"/ "residential" dichotomy as argued by the Province but rather articulates that it provides a "range" of "support options" consistent with the *Social Assistance Act* and Regulations:

> The Disability Support Program (DSP) provides for assistance to persons in need under the mandate of the Social Assistance Act. It provides support to children, youth, and adults with disabilities through residential and at-home support programs. DSP Support Options range from supporting families who care for a family member with a disability in their own home, to supporting people with disabilities in a 24-hour residential support option.[50]

65. The "support options" identified in the DSP policy are described as "community based support and residential support".[51] "Community based supports" include the Flex, Independent Living Supports, and Alternate Family Support programs. "Community homes" are described as

[49] Municipal Assistance Regulations, NS Regs 76/81as amended, *supra,* Note 44.
[50] DCS/DSP Program Policy effective June 2012, Appeal Book, book 58, p 19131 at p 19138.
[51] *Ibid,* p 19142

"group homes, developmental residences, and small options homes." [52] Institutional settings, including RCFs, ARCs and RRCs, are described in separate policies. The distinction drawn by the Province in this appeal between residential and non residential supports is not reflected in its own policy.

66. In *Boudreau,* the Nova Scotia Supreme Court in considering the scope of the assistance provided under this provision of the regulations under the *Social Assistance Act*, found as a fact that the Minister was obligated to provide "assistance" as defined under the Regulations, and assistance included both homecare (in-home support) and respite services for a person with disabilities living at home with their parent.[53] This finding incidentally contradicts the Province's submissions that Flex is restricted to non residential supports. The Province has failed to cite any authority to support its claim that there are different obligations on the Province to provide non residential and residential supports.

67. Conversely, every aspect of the program sought by the Appellants falls squarely within the statutory definition of social assistance, and is clearly authorised by statute as an entitlement for "persons in need" pursuant to the *Social Assistance Act*.[54]

Other relevant contextual factors in the identification of the service

68. The Province argues in this Appeal that the "service" should be characterised as "residential support" in grouping together provincial public housing programs with provincial social assistance for persons with disabilities. The factum filed by the Province is remarkably

[52] *Ibid,* p 19143
[53] *Nova Scotia (Community Services) v. Boudreau,* 2011 NSSC 126, at para 26 (Joint BOA, Tab 24)
[54] *Social Assistance Act*, *supra* Note 44, at s. 4(d), s. 9(1)

vague on the points of comparison between these two separate government programs, or why they should be considered as comparable. In contrast, the evidence in this appeal demonstrates that the services for persons with disabilities at issue in this appeal are not restricted to "residential supports" and are combined with many other non residential services.

69. In addition, residential services are not required by all persons with disabilities who require supports and services to live in the community. Some require simply in-home supports and income assistance – as reflected in the Province's "independent living supports" (ILS) program offered by the DSP, which offers both services in the form of people to assist the recipient with activities of daily living, as well in income assistance. In fact, more than 50% of persons with disabilities who receive assistance through the ILS or Flex programs are primarily receiving in home supports where the Province provides no housing because they live with family members who provide a residence.

70. With respect to those persons with disabilities who are supported in community based settings, the housing costs (bricks and mortar) occupies on average less than 7.5% of the DSP budget.[55] The primary accommodative service is not "residential supports" but rather human resources support through personal attendants, staffing and other in-person supports and services. Public housing and the DSP are offered under different government departments and there is no government document or evidence in this proceeding that links housing services and the DSP as a single 'service'.

[55] Testimony of Carol Ann Brennan Appeal Book, book 15, p 4556.

71. Similar to other social assistance recipients, DSP participants must be "persons in need" to be eligible whereas Housing NS provides services to people residing in public housing, and while there are separate low income eligibility requirements to apply for housing (that differ from social assistance), residents of public housing face no restrictions on income and assets as long as they disclose their income.[56]

72. Thus it is clear from the record in this appeal that Housing NS programs and services are not restricted to people on low income and applicants are not required to exhaust all other financial assets and resources as a condition of eligibility; whereas DSP programs are restricted to assisting people in need, in a manner similar to other social assistance recipients.[57]

73. Recipients of public housing have no statutory entitlement or protections, unlike applicants and recipients of the DSP who have a statutory entitlement under the *Social Assistance Act* similar to recipients under the ESIA.

74. Although public housing is available to DSP recipients who receive non-housing-based DSP services such as ILS or Flex, there are two very separate application processes and the services are not integrated. Individuals must apply and qualify separately for each program and satisfy separate eligibility criteria, suggesting that they are separate programs – one to provide assistance to persons in need and the other to provide housing services.

[56] Testimony of Neil MacDonald, Appeal Book, book 19, p 5944-45.

75. The Province suggests that public housing is reserved for "non disabled Nova Scotians", however, the testimony of its own witness contradicts this suggestion. The evidence establishes that persons with disabilities are eligible for public housing and may reside in public housing.[58]

76. The characterisation of the service put forward by the Province in this appeal has no basis in the experience of people with disabilities, in government policy, or in law and should be rejected.

Skinner *provides no assistance to the Province in this appeal*

77. The Province in this cross appeal relies heavily upon this Court's decision in *Skinner* in relation to the failure to show a distinction in access to the service. The Province suggests that a similar error by the Board was addressed by this Court in *Skinner*.[59]

78. In *Skinner* the Court determined that discrimination claim failed because the evidence failed to disclose a distinction between the claimant and other plan beneficiaries in their access to the service. This Court found that none of the beneficiaries of the Plan were entitled to drugs that were not approved by Health Canada. As a result it determined that disability was not a factor in the denial of those benefits.

79. In this appeal, there is ample evidence of clear distinctions in access to social assistance between able-bodied (and those with disabilities that most closely match those of able-bodied

[58] Province's Factum, March 6, 2020, para 15, 85-88; evidence of Neil MacDonald, Appeal Book, book 19, p 5955-5956, 5962.
[59] Province's Factum, para 40, 51, 55; *Canadian Elevator Industry Welfare Trust Fund v Skinner* [*Skinner*] 2018 NSCA 31, Province's BOA Tab 5.

persons) and those persons with disabilities who require supports and services to live in the community, and those distinctions are not seriously in dispute.

80. Unlike *Skinner*, the distinctions in the record in this appeal include the fact that people without disabilities (and those with disabilities whose needs most closely match those of able-bodied people) who are eligible for social assistance under the ESIA face no requirement of institutional placement, no comparable wait times and no restrictions based on geographical region imposed by the Respondent. Instead, people without disabilities are entitled to the service immediately, as of right, in the community of their choice.

81. The Board's error in *Skinner*, as found by this Court, bears no relationship to the issues in this appeal, and the decision does not assist the Province in arguing against social assistance as the service, as identified in the original complaint.

82. In *Skinner*, the question of discrimination focussed upon an employees' private health insurance benefit plan, the terms of which explicitly excluded drugs not approved by Health Canada for all its beneficiaries, including the drug prescribed to Mr. Skinner.[60] The Court found that the Board erred in expanding its characterisation of the "service" beyond the terms of the Plan, from drugs approved by Health Canada, to all "medically necessary prescription drugs".[61]

[60] *Skinner*, *ibid.*
[61] *Skinner*, *ibid.* para 56, 59-66

83. In addition to the failure to show a distinction, the Court concluded that because the exclusion of drugs not approved by Health Canada applied to all beneficiaries of the plan the claimant had failed to prove that disability was a factor in his access to the service and that there was no evidence that this distinction in access to the service was based on a protected ground, either directly or in its effects.[62]

84. Unlike *Skinner*, where the Plan clearly *excluded* the service sought by the claimant (a prescription drug not approved by Health Canada), the social assistance regulations and policy *explicitly provide* for the very accommodative programs sought by the claimants. In addition, in *Skinner*, the distinction – in excluding non-Health Canada approved drugs – applied to all beneficiaries, whereas in this case, the evidence clearly demonstrates a distinction between non-disabled and disabled persons in need in their access social assistance. Those distinctions are outlined at paragraphs 103-108 and their adverse effects at para 117 of this factum.

Issue 1 (c): Failing to apply a comparative analysis

85. The 'comparative analysis' in a human rights complaint is driven by the service:

> In the cases alleging discrimination in the provision of a service, the choice of comparator group is integrally linked to the way the service is defined.[63]

Accommodation requires taking into account the true needs of people with disabilities

86. As a disability rights based claim, this appeal is importantly about the "accommodation of difference."[64] The rights violation in this case is not that persons with disabilities have been treated differently because of stereotypes about their disability, but rather that the violation is the result of

[62] *Skinner, ibid.*
[63] Brodsky and Day, *supra* Note 37 at p 33
[64] Brodsky and Day, *ibid.*

a failure to take their disability fully into account with the result that their access to a service (in this case social assistance) has been undermined.

87. Stated otherwise, in this context, the objective of equality rights and anti-discrimination law is to identify the true characteristics of the group in order to ensure that the proper adjustments are made to meet the needs of that group so that they are able to fully share in social benefits:

> The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them.[65]

88. The goal of such services is not to eradicate differences in *treatment*, but rather to ensure that the services are equally available to people with and without disabilities:

> In an accommodation case, the issue is not whether the claimant has received formal equality of treatment but whether the actual characteristics of the person have been accommodated so that they can access a benefit that is otherwise unavailable.[66]

89. "Accommodation" is defined as removing barriers to ensure that people with disabilities have meaningful access to that service. The *outcome* of properly accommodating people with disabilities is to provide them with *meaningful access to the service*.

90. In the case of *Eldridge*, accommodation meant providing interpretation so that the deaf were able to communicate with their healthcare provider; interpretation was not the service, but the means of accessing the healthcare service.[67]

[65] Brodsky and Day, *supra* Note 37, quoting Sopinka J, in *Eaton v Brant Board of Education*, at page 35 Note 115.
[66] Brodsky and Day, *ibid*, p 36.
[67] *Eldridge*, *supra*, Note 33.

91. In *Grismer*, meaningful access to motor vehicle license services meant allowing a persons with disabilities the opportunity for an individual assessment, to meet the necessary qualifications for a driver's license, rather than an automatic disqualification based on physical disability. [68]

92. In *Moore,* accommodation meant providing a disabled student with the special education programs he needed to benefit from the service of public education. Special education was not the service but rather the "ramp" or accommodation that gave access to public education as the service.[69]

93. In this appeal, accommodating persons with disabilities in their access to social assistance requires the necessary supports and services to live in the community. In order for access to be "meaningful" it must be provided immediately, as of right, and in the geographical region of choice in Nova Scotia.

94. The accommodative social assistance program reserved for persons with disabilities in Nova Scotia (the DSP) fails to fully accommodate the needs of all persons with disabilities with the result that their access to social assistance has been seriously eroded and undermined.

95. The DSP's failure of accommodation is multi-faceted. The complaint sets out a clear comparative framework of analysis in identifying significant distinctions in access to social assistance between non-disabled and disabled persons in need.

[68] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868 [*Grismer*], para 22-23, BOA DRC Respondent Tab 1.
[69] *Moore*, *supra* Note 24.

96. For disabled applicants, the distinctions include years long delays in receiving social assistance. For many of those who are capable and wish to live in the community, it restricts them to institutional settings in congregate, segregated facilities known as RRCs, ARCs and RCFs in segregated, isolated facilities far from their home communities. It forces other adults with disabilities to rely on the goodwill of family members – usually parents- to provide them with care and a residence. For those whose parents or family members are no longer able to provide care and a residence, the delays in obtaining social assistance exposes those persons with disabilities to lengthy and unnecessary periods of institutionalisation in the Nova Scotia Hospital and East Coast Forensic Hospital, or other inappropriate settings.

97. Unlike persons who are able to access the mainstream social assistance program (ESIA) which is provided immediately, as of right, in the community, in the geographical region within Nova Scotia of their choice, this group of persons with disabilities experience clear disadvantages in their access to the service.

Unnecessary institutionalisation and the comparative analysis

98. Another significant distinction affecting persons with disabilities in need of social assistance, is that unlike non disabled persons in need, the Province relies upon institutional arrangements for persons with disabilities –segregate, congregate facilities reserved solely for persons with disabilities – arrangements that the evidence demonstrates is harmful, contrary to the wishes of many people with disabilities, and unnecessary because the Province has admitted that all persons can be supported to live in the community. Yet on one level, it is impossible to find a “similarly situated” or mirror comparator group because no non-disabled group in our

society is required to accept institutionalisation or segregated congregate care facilities as a condition of receiving social benefits like social assistance. Concretely, able-bodied persons in need of social assistance do not face the prospect of institutionalisation in a congregate segregated facility in order to access social assistance.

99. In these circumstances, the necessary comparative analysis has been described as "between persons with disabilities and without disabilities with regard to the relatively disadvantageous effects on persons with disabilities of dominant norms designed for persons without disabilities."[70] The dominant norm assumes people do not need supports and services with their activities of daily living. Unnecessary institutionalisation is one disadvantageous effect of that dominant norm. The unnecessary institutionalisation of persons with disabilities represents one of the most glaring examples of exclusion and failure to accommodate the needs of persons with disabilities.

Comparative analysis and the distinction

100. The comparative aspect of the discrimination analysis is found in the *Human Rights Act*, which identifies that discrimination occurs in part as a result of a "distinction."[71]

101. The record in this appeal establishes four main distinctions between non-disabled and disabled persons in need, consistent with the complaints filed by the DRC and the individual

[70] Brodsky and Day, *supra* Note 37, at p 34

[71] *Human Rights Act*, RSNS 1989, c 214, s 4, Joint BOA Tab 41 "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."

complainants. Consistent with an "adverse effect" discrimination analysis these "distinctions" are the outcome or effect of government policy, rather than a case where a law or government policy singles out people with disabilities explicitly for less advantageous treatment.

102. The distinctions clearly set out a comparative basis upon which to assess the human rights violation, contrary to the Province's repeated assertions that the claimants have rejected a comparative analysis. The adverse effects of those distinctions have been amply documented in the record in this appeal. Contrary to the Province's submissions, this complaint is not about absolute adequacy or "freestanding" rights, but about the relative disadvantage experienced by people with disabilities in their access to social assistance when compared to the non-disabled. The evidence supports the finding of four main distinctions in the outcomes for able-bodied and disabled persons in need in their access to social assistance.

103. The first distinction lies in the fact that in implementing its legislative obligations to provide assistance to persons in need, the Province has consistently failed to provide assistance to those people with higher levels of disability "as of right", unlike people without disabilities (as well as those disabilities most closely match the non-disabled). As indicated previously in these submissions, only those persons with disabilities fortunate enough to have family to provide them with a home, receive social assistance immediately, and as of right. All other programs for people with disabilities have lengthy, indeterminate and growing wait times and delays in receiving social assistance.

104. Despite the fact that both the *Social Assistance Act* (*SAA*) and the *Employment Support and Income Assistance Act* (*ESIA Act*) create a legislative obligation on the Province to provide to

social assistance, the outcome of provincial policies and practices is that only people with disabilities restricts experience such wait times and delays.

105. The second distinction is that the Province provides social assistance on an immediate basis to able bodied persons or persons with disabilities whose needs most closely match the able-bodied. The only group of social assistance applicants who experience indefinite and years long delays in accessing social assistance are people with disabilities who require accommodative social assistance in the form of supports and services to live in the community.

106. The third distinction is that the Province provides social assistance to the non-disabled or persons with disabilities who do not require supports and services to live in the community in their community of choice. The Province places no restrictions on where eligible non-disabled social assistance applicants can live within Nova Scotia. In contrast, the Province requires some people with disabilities in need who require supports and services to live in the community to move away from family and community supports in order to receive the supports and services they require to access social assistance.

107. The fourth distinction is that the Province provides social assistance to the non-disabled or persons with disabilities who do not require supports and services to live in the community, in a community setting. In contrast, the Province requires some people with disabilities who require social assistance to live in segregated institutional settings, such as RRCs, ARCs and RCFs. Fully 20% of recipients of DSP recipients, who are all persons in need who require social assistance, reside in such settings.[72] The Province admits that all of these individuals can be supported to live in the community, but the outcome of their ongoing policy is that persons with disabilities who are

[72] Testimony of Lynn Hartwell, *supra*, Note 32.

capable and wish to live in community, continue to be restricted to institutional settings. In fact ,there is no other group in our society that is required to live in segregated congregate institutional settings aside from correctional context, or those with a mental disorder who are a danger to themselves or others.

108. All those affected by these distinctions are people with disabilities and are poor. Under the third branch of the *Moore* test, there is no real dispute that the differences in access to social assistance is linked to the protected grounds, disability and source of income.

109. The Province's policies and practices that have the effect of depriving people with disabilities in need of meaningful access to social assistance reflect a view that their needs are less important than others, and that their needs are outside what is normal or reasonable to provide.[73] The failure to provide accommodative programs to access social assistance to persons with disabilities in need undermines their human dignity.

110. Delays in accessing social assistance, through waitlists and unreasonable wait times, deprive persons in need of meaningful access to social assistance. Being deprived of timely access to social assistance imposes hardship on people with disabilities in need and exposes them to the harms of unnecessary institutionalisation and/or inadequate services in the community.

111. The Province's failure to provide social assistance to people with disabilities in the community of their choice also restricts their autonomy and deprives them of the benefit of networks of support.

[73] Testimony of Catherine Frazee, Appeal Book, book 13, 4053; Opinion Letter from Catherine Frazee to Claire McNeil re: Disabilities Studies Perspective, dated December 7, 2017; Appeal Book, book 57, 18937.

112. The focus of this human rights inquiry is whether the measures taken by the Province in responding to the differential needs of persons with disabilities in their access to social assistance is discriminatory.

113. Those measures include government programs and policy currently known as the "Disability Supports Program (DSP)." The DRC acknowledges that for the lucky few who manage to obtain the service, the community based supports and services offered by the DSP respond to the differential needs of persons with disabilities in their access to social assistance.

114. However, other aspects of the DSP are discriminatory, including its reliance on segregated institutional congregate settings, exclusively reserved for persons with disabilities, which are inadequate in meeting the differential needs of people with disabilities and are discriminatory.

115. Discriminatory effects of the DSP also result from the unreasonable delays, indefinite wait times and waitlists that in their effect constitute a denial of meaningful access to social assistance for many people with disabilities who are in need.

116. The DRC does not claim that all aspects of the DSP are bad, and for some *participants*, those programs accommodate their needs. The fact that not all members of the group are affected in the same way does not undermine the claim of systemic discrimination against persons with disabilities in need of social assistance.

117. In summary, the accommodative social assistance programs offered by the Province fail to meet the differential needs of persons with disabilities as follows:

1. Restricting access to social assistance to congregate, institutional settings where persons with disabilities who are capable of living in the community and want to live in the community are segregated from the community at large;
2. Imposing indefinite and years long wait times for meaningful access to social assistance for persons with disabilities in need who require supports and services to live in community;
3. The denial of meaningful access to social assistance has resulted in persons with disabilities in need who require supports and services to live in community experiencing homelessness including homeless shelters, or inadequate supports in their own homes;
4. Forcing people with disabilities in need who require supports and services to move away from their community of choice while limiting access to supports and services to locations where they are isolated from family and friends as a condition to obtaining social assistance;
5. Treating access to social assistance for persons with disabilities in need who require supports and services as "discretionary" rather than as a legal entitlement.[74]

Conclusion: the service and comparative analysis

118. In cases such as this, the identification of the service and corresponding comparator group can result in the unfair rejection of an otherwise valid discrimination claim.

119. The improper identification of the service and detailed comparator group analysis can result in a "race to the bottom" where the service and non-disabled comparator group is selected because they are subject to identical restrictions.[75] The Province's identification of the service as "residential supports" and choice of comparator illustrates just such as strategy in selecting a government program (public housing) which also has a waitlist to support its argument that there is no difference in treatment because both disabled and non-disabled experience waitlists. Setting aside for a moment the inappropriate restriction of the service to housing, the hollowness of this comparison is apparent if we consider the circumstances of the person with disabilities in need of social assistance who has by definition no other options. For those with no savings and no

[74] Complainants' joint post hearing submissions para 604, Appeal Book, book 63, p 20969.
[75] Brodsky and Day, *supra* Note 37, p 35.

income, with the added characteristic that they require supports and services to live in the community (unlike public housing applicants who can seek housing in the private market) the Province's comparison is devoid of any connection to the real world.

Issue 1 (d): The Board erred in failing to consider, or properly distinguish, prior relevant jurisprudence?

120. The Province fails to cite any authority to support its claim that the Board was under a legal obligation to address certain caselaw in its written decision. Reasons for a decision need not be an exhaustive catalogue of all the caselaw and evidence considered and the burden is on the Province to demonstrate that the Board did not put its mind to the issues:

> As the Supreme Court of Canada has recently stated, "the onus is on the party challenging the decision to show that a reasonable person apprised of all the circumstances would conclude that the judge did not put his mind to the issues and decide them impartially and independently . . .' [76]

121. A tribunal need not address every authority cited by the parties, especially where, as here, none of the caselaw at issue was relevant to the human rights claim or binding on the Board.

122. The first six cases relied upon by the Province bear only a superficial resemblance to the human rights claim in this appeal, in that they involve a claim on behalf of a person with disabilities in the context of social welfare programming, based on a variety of alleged deficiencies from poor communication to general unfairness. The cases all possessed one fatal flaw; the claimants fail to allege any distinction-based disadvantage. There were no comparisons made. They simply alleged unfair treatment or other inadequacies in the programming with no attempt to show a ground-based distinction that resulted in a disadvantage. In the seventh case, the Court dismissed the claim on

[76] Brown, *Civil Appeals*, 13:4230 at note 280, BOA DRC Respondent Tab 7.

the basis that the service identified was not one that was available to the public. Accordingly, the cases bear absolutely no relationship to the human rights complaints before this Court.

123. It is not surprising, therefore, that the Province makes no attempt to apply their reasoning to alleged flaws in these human rights complaints. For example, under the current state of equality rights law, it would not be surprising to see a court dismiss a complaint from a person who complained of discrimination on the basis that social assistance benefits were too low or inadequate *per se* i.e., in the complete absence of any distinction based comparison. But just such a scenario (a freestanding, absolute claim to adequacy under human rights legislation) was what was taking place in each of *Wood*, *Glover*, *Northey*, *C.B.* v. *Ontario* and *Wonnacott* v. *PEI.* Thus, it is no surprise that they were dismissed—most on preliminary summary motions. While under no obligation to address the cases, it is clear that these authorities offered no assistance to the Board in this case.[77]

124. In *Wood*, the complainant identified the Ontario Disability Supports Program as the service, and pointed to regulations under the ODSP that treated CPP-D income less favourably than employment income as the basis of the discrimination. The tribunal concluded that because all recipients of the ODSP were disabled, the complainant had failed to show that the treatment of income, which applied to all ODSP participants, affected him differently based on his disability. Apart from the obvious fact that it deals with a disability support program, the *Wood* decision has no relevance to the DRC complaint.[78]

[78] *Wood v Director, Ontario Disability Support Program*, 2010 HRTO 1979; Province's BOA Tab 22.

125. In *Glover*, the Board dismissed a complaint alleging unfairness by the ODSP on the basis that the pleadings failed to allege facts to support a claim of discrimination. It found that "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." Glover's claim bears no resemblance to the discrimination claim plead in this appeal, apart from the fact that it dealt with a social welfare program.[79]

126. In *Northey*, the applicant claimed that the respondents' behaviour was abusive and cruel and that they showed no accountability. Holding that the applicant failed to identify any specific acts of differential treatment, the Tribunal stated it does not have jurisdiction over cases of general unfairness that is unconnected to a ground protected under the *Code*. The decision has no relevance to the discrimination claim in this appeal where specific acts of differential treatment have been pleaded.[80]

127. In *CB* the applicant claimed that the ODSP failure to advise her of her eligibility for a specific program or grant her benefits retroactively. The Board found that CB's disability was not a factor in her treatment and dismissed the complaint on a summary basis. The claimant failed to identify a distinction in her treatment or link it to a ground.[81]

128. *Wonnacott* represents another discrimination claim in which the claimants failed to identify a distinction that was based on a ground of discrimination. Instead, the claimants challenged the adequacy of a number of practices, around income testing, assessment tools and the capping of

79 *Glover v Ontario (Community and Social Services),* 2010 HRTO 2412; Province's BOA Tab 8.
80 *Northey v MacKinnon,* 2014 HRTO 1836; Province's BOA Tab 15.
81 *CB v Ontario (Community and Social Services),* 2016 HRTO 1409; Province's BOA Tab 4.

benefits. They failed to show how these practices created a distinction in their access to the service, or to link that distinction to a ground of discrimination. In contrast, in this appeal there are clear distinctions between the non-disabled and disabled in their access to social assistance, and all those disadvantaged by those distinctions have significant disabilities. For these reasons, the cases cited by the Province have no relevance to the human rights claim before this Court.[82]

129. The Province cites the human rights case of *Brock* for the principle that there is 'no right to supportive housing in one's community'. That case involved a summary dismissal by a Human Rights Commission, ie, a refusal to even refer the complaint to a tribunal.

130. Unlike the complaints before this Court, *Brock* involved a government program in which nobody was given the right to supported living in one's community. Therefore, there could be no distinction and, thus, no discrimination.[83]

131. Here, there is very considerable uncontradicted evidence that non-disabled 'persons in need' have had the right to be provided social assistance wherever they choose to live and are *never* directed to live elsewhere as a condition of eligibility.[84] Moreover, unlike *Brock*, the Province's DSP program provides supportive living in many communities and some DSP participants receive this benefit. *Brock* bears no factual similarity to the present cases and its legal reasoning has no application in this human rights claim.[85]

82 *Wonnacott et al v PEI,* (2007) 61 CHRR D/49; Province's BOA Tab 21.
83 *Brock v Ontario* 2009 245 OAC 235 (ONSCDC) at paras. 29-32, Province's BOA Tab 3;
84 See DRC Factum March 2020, Note 21.
85 *Brock*, *supra* Note 88.

132. The Court of Appeal dismissed the case on the preliminary threshold point that the service sought by the complainants was not one 'available to the public' and that the appellants had failed to present an arguable case, because:

> 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*…this is not a case about access to an existing benefit or service. This is a case in which the complainant is being provided a service that, on the record, does not appear to be available to any other person in New Brunswick.[86]

133. However, insofar as the Province argues that the case stands for the proposition "that human rights legislation does not impose an obligation on government to provide supportive community-based housing for persons with disabilities," it has incorrectly stated the ratio, which turns on the threshold determination that, in fact, such services were not offered to any person in New Brunswick and thus, questions of discrimination (including distinctions or comparisons) did not form the basis of the Court's dismissal of the claim.

134. By way of contrast, social assistance **is** 'available to the public,' particularly given that the Supreme Court of Canada, in the equality rights context, has made reference to "broad societal legislation, such as social assistance programs."[87] Moreover, unlike the facts in *PNB*, Nova Scotia's social assistance legislation *already* provides supportive living 'assistance' to many people with disabilities. In short, there is nothing in the court's reasoning in *PNB* that is of use to this Court.

[86] *New Brunswick Human Rights Commission* v. *Province of New Brunswick (Department of Social Development)*, 2010 NBCA 40 at paras. 80 and 84 (emphasis added) overturning in part *PNB v NB HRC* [2009] NBQB 47; Province's BOA Tabs 14 and 20.
[87] *R. v. Kapp*, 2008 SCC 41 at para 55, BOA DRC Respondent Tab 4.

Issue 2: Neil MacDonald's evidence

135. The Province argues that it was an error for the Board not to address the Province's evidence, and particular the testimony of Neil MacDonald, concerning the poor state of public housing in Nova Scotia. The evidence was intended to bolster the Province's submissions that the "service" should be redefined as "residential supports".

136. In considering whether the Board gave proper weight to the testimony of a witness, courts have deferred to the trier of fact. There is no obligation on the trier of fact to cite all the evidence particularly where the evidence is not disputed, as is the case with Mr. MacDonald's testimony:

> Indeed, it has been established that they [reasons for decision] do not have to refer to each item of evidence. Rather it has been said that it will be assumed that where there is no reference in the reasons to the evidence, the trial judge did not regard such evidence as significant in explaining the result reached.[88]

137. Where the evidentiary record is extensive, the reasons need not elaborate on every piece of evidence as long as the findings of fact are made in a clear and comprehensive manner.[89] Furthermore, the Province bears the onus of proving that the Board did not put his mind to all the issues."[90]

138. Where the Board found that there were no significant conflicts in the evidence nor issues of credibility in the evidence of witnesses, there was no obligation to make findings in relation to Mr. MacDonald's evidence.

[88] Brown, *supra* Note 79, Ch 13 pp 41-42.
[89] Brown, *ibid*, pp 4229-4230
[90] *Cojocaru v. British Columbia Women's Hospital & Health Center* 2013 SCC 30 at para 51, BOA DRC Respondent Tab 2.

139. The Province argues on appeal that Mr. MacDonald's testimony was offered "key evidence…as part of the comparative analysis."[91] The complainants have argued throughout that this evidence his testimony was irrelevant to the complaint and the distinctions in access to the service identified in the complaint.[92]

140. The human rights complaint, which effectively constitutes the "pleadings" in this matter, identifies the service at issue as social assistance. In its submissions before the Board, the Province presented a competing view, arguing that the service should be redefined as "residential supports." The purpose of the Province's argument was to defeat the claim, in an attempt to show that disabled and non-disabled were treated equally poorly in accessing publicly funded housing.

141. The Province's evidence concerning housing programs was a red herring and irrelevant to the determination of the substantive issues in this complaint and the Province has failed to show that there was any legal obligation on the Board to refer to Mr. MacDonald's testimony in the written reasons for decision.

[91] Province's Factum March 6, 2020, para 85.
[92] Province's Factum, *ibid*, para 15; evidence of Neil MacDonald, Appeal Book, book 19, p 5955-5956, 5962; Mr. MacDonald's testimony undermined the Province's arguments regarding comparability, where he emphasized that public housing is not reserved for a "non-disabled Nova Scotian" contrary to the arguments of the Province. He also testified that the financial eligibility requirements are far higher for the housing related programs he administers than social assistance (p 5943), that unlike social assistance there is no asset limit (p 5944-45), and that both the 'budget deficit' calculation' and the definition of 'person in need' that define social assistance are absent from housing programs (p 5944 and 5948).

PART 6- ORDER OR RELIEF SOUGHT

142. The respondent seeks an Order for the following:

1. Dismissing the Province's cross appeal;
2. Allowing the DRC appeal;
3. Setting aside the judgment below by the Nova Scotia Board of Inquiry;
4. Make a finding of *prima facie* systemic discrimination; and,
5. Remitting the matter to a differently constituted Board of Inquiry to continue the hearing of the DRC's complaint of systemic discrimination.

All of which is respectfully submitted.

Dated at Halifax, Nova Scotia, this 2nd day September, 2020.

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Claire McNeil
Counsel for the appellant/respondent by cross appeal, Disability Rights Coalition

APPENDIX A: LIST OF CITATIONS

Caselaw:

1. *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights*) [1999] 3 S.C.R. 868 [*Grismer*] DRC Respondent BOA Tab 1

2. *Brock v Ontario* 2009 245 OAC 235 (ONSCDC) at paras. 29-32, Province's BOA Tab 3

3. *CB v Ontario (Community and Social Services*), 2016 HRTO 1409; Province's BOA Tab 4

4. *Canadian Elevator Industry Welfare Trust Fund v Skinner* [*Skinner*] 2018 NSCA 31, Province's BOA Tab 5

5. *Cojocaru (Guardian ad litem of) v. British Columbia Women's Hospital & Health Center* 2013 SCC 30, DRC Respondent BOA Tab 2

6. *Eldridge v British Columbia (AG),*[1997] 3 SCR 624 [*Eldridge*], Joint BOA Tab 10

7. *Glover v Ontario (Community and Social Services)*2010 HRTO 2412; Province's BOA Tab 8

8. *Jodhan v Canada* 2012 FCA 161, DRC Respondent BOA Tab 3

9. *Moore v British Columbia (Board of Education)*, 2012 SCC 61 at para 33, Abella J [*Moore SCC*] Joint BOA Tab 19

10. *New Brunswick Human Rights Commission* v. *Province of New Brunswick* (*Department of Social Development*), 2010 NBCA 40, overturning in part *PNB v NB HRC* [2009] NBQB 47; Province's BOA Tabs 14 and 20

11. *Northey v MacKinnon*, 2014 HRTO 1836; Province's BOA Tab 15

12. *NS (Community Services) v. Boudreau*, 2011 NSSC 126, at para 26, Joint BOA, Tab 24

13. *R. v. Kapp*, 2008 SCC 4, DRC Respondent BOA Tab 4

14. *Rodaro v Royal Bank of Canada* 59 O.R. (3d) 74, DRC Respondent BOA Tab 5

15. *VIA Rail Canada*, SCC 2007 15 Joint BOA Tab 36

16. *Vriend v Alberta* [1998] 1 SCR 493 DRC Respondent BOA Tab 6

17. *Wonnacott et al v PEI,* (2007) 61 CHRR D/49; Province's BOA Tab 21

18. *Wood v Director, Ontario Disability Support Program*, 2010 HRTO 1979
Province's BOA Tab 22.

Texts and Jurisprudence

Brown, *Civil Appeals,* BOA DRC Respondent Tab 7

Brodsky and Day, *Accommodation in the 21st Century,* https://commentary.canlii.org/w/canlii/2012CanLIIDocs429 BOA DRC Respondent Tab 8

Law Commission of Ontario, *A Framework for the Law as it Affects Persons with Disabilities,* 2012 www.lco-cdo.org (Note 35) BOA DRC Respondent Tab 9

Pothier, Dianne, *Mirror, Mirror: Equality as a Comparative Concept*, 2006 33 SCLR 3d 135 BOA DRC Respondent Tab 10

APPENDIX B: STATUTES AND REGULATIONS

***Employment Support and Income Assistance Act,* SNS 2000, c 27**

3. In this Act,

(a) **"assistance"** means the provision of money, goods or services to a person in need for

(i) basic needs, including food, clothing, shelter, fuel, utilities and personal requirements,

(ii) special needs,

(iii) employment services;

(g) **"person in need"** means a person whose requirements for basic needs, special needs and employment services as prescribed in the regulations exceed the income, assets and other resources available to that person as determined pursuant to the regulations.

7(1) Subject to this Act and the regulations, the Minister shall furnish assistance to all persons in need.

7(2) Persons assisting the Minister in the administration of this Act shall

(a) receive applications for assistance; and

(b) in accordance with this Act and the regulations,

(i) determine whether the applicant is eligible to receive assistance,

(ii) determine the amount of financial assistance the applicant is eligible to receive,

(iii) determine the other forms of assistance available that would benefit the applicant,

(iv) advise the applicant of the amount of financial assistance that will be provided, the other forms of assistance that will be available for the applicant and the conditions to be met to ensure the continuation of the assistance provided,

(v) advise the applicant that the applicant has the right to appeal determinations made pursuant to this Act, and

(vi) from time to time review the assistance provided to a recipient, and in particular whether any conditions imposed have been met, and promptly advise the recipient of any changes in eligibility and of the right to appeal the change.

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

4. Meaning of discrimination

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.

***Social Assistance Act,* RSNS 1989, c 432**

4. Interpretation of Parts I and II

In this Part and in Part II,

(d) **"person in need"** means a person who requires financial assistance to provide for the person in a home for special care or a community based option;

9(1) Duty of committee to assist person in need

Subject to this Act and the regulations the social services committee shall furnish

assistance to all persons in need, as defined by the social services committee, who reside in the municipal unit.

***Municipal Assistance Regulations*, made under Section 18 of the *Social Assistance Act*, RSNS 1989, c 432, OIC 81-665 (May 19, 1981), NS Reg 76/81 as amended up to and including O.I.C. 1999-464 (Sept 28, 1999), NS Reg 93/99**

1 In these regulations

(e) "assistance" means the provision of money, goods or services to a person in need, including

(i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,

(ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements, funeral and burial expenses and comforts allowances. The Director may approve other items of special requirement he deems essential to the well being of the recipient,

(iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,

(iv) care in homes for special care,

(v) social services, including family counselling, homemakers, home care and home nursing services,

(vi) rehabilitation services;

4(1) Assistance shall be provided on the budget deficit system whereby a person's financial needs are calculated pursuant to these regulations and the municipal social services policy as approved pursuant to these regulations. Where the needs exceed the income, assistance shall be granted in the amount by which the needs are in excess of the income.

4(2) For the purpose of calculating a person's budget deficit, the municipal unit will take into account the recipient's items of basic requirements as specified in the municipal social services policy and the income, assets and resources available to him to meet such requirements to provide adequately for himself or for himself and his dependents.