2019 **Nova Scotia Court of Appeal** CA No. 486952

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

REPLY FACTUM OF THE APPELLANTS, Beth MacLean, Olga Cain on behalf of Sheila Livingstone, Tammy Delaney on behalf of Joseph Delaney

Vincent Calderhead
Pink Larkin
1463 South Park Street, Suite 201
Halifax, NS B3J 3S9
Counsel for the Appellants, Beth MacLean, Olga Cain on behalf of Sheila Livingstone, Tammy Delaney on behalf of Joseph Delaney

Kevin Kindred and Dorianne Mullin
Department of Justice (NS)
1690 Hollis Street, 8th Floor
Halifax, NS B3J 3J9
Counsel for the Respondent, Attorney General of Nova Scotia

Claire McNeil
Dalhousie Legal Aid Service
2209 Gottingen Street
Halifax, NS B3K 3B5
Counsel for the Appellant, The Disability Rights Coalition

Kymberly Franklin and Kendrick Douglas
Nova Scotia Human Rights Commission
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 Joëlle Pastora Sala
Public Interest Law Centre
200-393 Portage Avenue
Winnipeg, MB R3B 3H6
Counsel for the Intervenors, Canadian Association for Community Living, the Council of Canadians with Disabilities, and People First of Canada

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PART 1 – CONCISE OVERVIEW OF THE APPEAL

1. The Province advances many of the same criticisms of the Board of Inquiry's decision that the Complainants have. These include the points that, despite citing the Supreme Court of Canada's judgment in *Moore* concerning the fundamental err in the identification of the service, the Board of Inquiry actually failed to properly apply *Moore*.

2. In particular, the Board failed to properly identify the 'service' which is at issue here. As occurred in the lower courts in both *Moore* and *Eldridge*, the Board mistakenly identified the accommodation sought by the equality-claimants for 'the service at issue'.

3. From there, the Complainants and the Province agree that the Board wrongly compared the experience of people with disabilities requiring supports and services *with each other*.

4. The Complainants and the Province part company, however, in the proper interpretation and application of the test for discrimination and the corresponding identification of the 'service' that is the focus of the complaint.

5. At the core of the Province's position is its attempt to defeat the human rights claim by trying to distract this Court from the core human rights issues in this case—the harmful institutionalization and segregation of low-income people with disabilities in the Province's provision of social assistance.

6. Rather than have the Court look at the appalling and outrageous treatment afforded to the Complainants as low-income people with disabilities—within the Province's social assistance scheme—the Province seeks to divert the Court's attention by urging it to look at and compare the Complainants' experiences with conditions experienced by people applying for public housing—an entirely different scheme, one without *any* legislative entitlement framework. The strategy here,

of course, is to contrive an axis of comparison which will result in no comparative disadvantages, i.e., no discrimination.

7. There are several flaws with this tactic; principle among them is that, the under the Province's approach to equality, the 'soul-destroying' experience of Beth MacLean and the other Complainants is made to disappear from the discrimination radar. This outcome would be inconsistent with substantive human rights in Canada.

8. With respect to the Province's contention that the Board failed to address jurisprudence which it had cited, the Complaints rely on and adopt the argumentation advance by the Disability Rights Coalition—essentially that the cases are irrelevant to the claims raised in the complaint and in this appeal. Similarly, the Complainants adopt the Coalition's submissions with respect to the evidence concerning public housing in Nova Scotia.

9. With respect to the issue of remedy, the Complainants contend that the Province's arguments are either inapt or inapplicable. On the substantive question regarding the quantum of damages to be ordered, the Province's arguments are inconsistent with human rights principles, while failing to adequately address the relevant jurisprudence with respect to wrongful imprisonment cases which the Complainants have raised.

PART 2 – CONCISE STATEMENT OF FACTS

10. While it is true to say that the evidence in this case is largely not in dispute, the Province's presentation of those facts to this Court needs to be corrected in several respects.

Re Provincial take-over of social services in 1995 coincided with Provincial Moratorium on Small Option Homes

11. In fact, the Province began its take-over of what had been municipal services in 1995 and, *contra* the Province,[1] it imposed the Moratorium or freeze on the approval of additional Small Option homes, in June 1995.[2]

12. The Moratorium on the approval of new Small Option homes has not really ended. Instead, it has evolved into what the Department of Community Services refers to as a "cap" on approved spaces. The *only* one of the DSP programs without a cap is called Flex in Home, under which persons with disabilities are required to reside with a willing family member—often with ill or aging parents. Small options homes continue to have the longest wait list of any DSP program.[3]

Re the Human Rights Complaint

13. While the Province is correct in its factum that the human rights Complainants sought "appropriate assistance which [they] need in order to live in the community", in their complaint the Complainants made it clear that this was the accommodation they required vis-a-vis the Province's provision of social assistance to all 'persons in need'.

14. The Province claims that the three Complainants "preferred" supportive housing in a Small Options home and were not offered it for a significant period of time. This euphemistic language is used to distract from the fact that the Province's own care coordinators had supported and approved small options homes as a form of community-based living. Nonetheless, all three Complainants were made to languish in a locked psychiatric ward for years/decades in a way that,

[1] Province's factum (filed March 2020) at para. 11
[2] Report of the Review of Small Options in Nova Scotia (DCS 1998) at Appeal Book, Vol. 35, p. 11392 and 'DCS Response' to the Auditor General's Departmental Audit at Appeal Book, Vol. 31, p. 10188
[3] Per Deputy Minister, Lynn Hartwell, cited by the Board of Inquiry, Prima Facie Discrimination Decision at para. 327.

at one point, the Board of Inquiry found to have been "soul-destroying". The Province freely concedes, and the Board found, that years-long waitlists characterize the experience of 'persons in need' under the *Social Assistance Act.*

Re The experience of Joey Delaney and Sheila Livingstone becoming trapped at Emerald Hall for years longer than was medically necessary

15. The Province referred to the two Complainants who required hospital treatment in Emerald Hall as a result of which, "their Small Options Home placements were no longer suitable, and no suitable placements were available." After cancelling their small options placements, the evidence established that the Province never contacted the small option service provider (RRSS) to make new small option arrangements to allow them to return to community living.[4] This was because the Moratorium prevented any such arrangements.

16. Similarly, the Province states that after Beth Maclean was discharged from Kings RRC in October 2000, "no other placement met her needs". The reality is that this discharge occurred at what was year-five of the Moratorium and, being unwilling to make an exception to the Moratorium in order to support Ms. MacLean in a small options home, the Province required her to be placed in a locked psychiatric ward at the NS Hospital, for no valid medical reason. She remained at the NS Hospital, unnecessarily, as the Province concedes, for over 16 years—until June 2016– when she was finally 'transferred' from Emerald Hall to CTP—an institution in Lower Sackville.

[4] Appeal Book, Vol. 10, pgs. 2945-2947, Testimony of Suzanne McConnell, March 12, 2018 and Appeal Book, Vol. 19, pp. 6169-6171, Testimony of Trish Murray, June 20, 2018.

PART 3 – LIST OF ISSUES

17. The issues in this appeal are:

ISSUE 1: Equality Rights Principles underlying the Province's discrimination analysis

ISSUE 2: What is 'the service' at issue in this case?

ISSUE 3: (The Second Step in *Moore*): Adverse Impacts

ISSUE 4: (The Third Step in *Moore*): 'the protected characteristic was a factor in the adverse impact'

ISSUE 5: 'Social Assistance is not the service at issue—Provincially supported housing is'

ISSUE 6: Remedy

PART 4 – STANDARD OF REVIEW FOR EACH ISSUE

18. The Complainants agree with the Province with respect to the standard of review. The issues raised concerning the interpretation and application of substantive equality rights law and its application to the issues herein; raise questions of law or, alternatively, disclose extricable legal issues. It is submitted that the question of remedy, too, readily discloses questions of legal principle or ones from which questions of law are readily extricable.

PART 5 – ARGUMENT

The Board's Fundamental Error

19. The Complainants and the Province agree that the Board of Inquiry applied a flawed discrimination analysis. We agree that the root of the problem is that the Board compared the situation of persons with disabilities to that of other persons with disabilities.

20. After hearing many weeks of evidence, the Board correctly identified the accommodative social assistance that the Complainants were seeking. However, the Board erred by failing to appreciate that this accommodation was what provided them with 'meaningful access' to the Province's broader "service" of social assistance. By focusing on the accommodation, rather than the overarching service, the Board inevitably fell into error.

21. Parenthetically, it appears that the Board may have gotten off on the wrong track by its misinterpretation of a passage from *Battlefords* v. *Gibbs* wherein the Supreme Court carried out an-intra disability comparison. In that case, it was considering the terms of a pension plan that were significantly harsher toward people with mental disabilities seeking long-term disability benefits compared to those with physical disabilities. While this disadvantageous intra-disability distinction (i.e., physically disabled v. persons with mental disabilities) was/is well known, the Board seems to have inferred that, applying *Battlefords*, it was open for it to consider and compare the experience of similarly-situated persons with disabilities with each other.[5]

22. This resulted in a formal-equality analysis where 'likes were compared with likes'. As the Province observes in its factum, the Board's reasoning resulted in a discrimination analysis in which a violation of the *Act* appears to have turned on the *severity* of the disadvantage experienced by the Complainants in comparison with other persons with disabilities who were already enjoying the benefits of, for example, living in a small option home.

23. Stated differently, the Board appears to have asked itself whether the human rights Complainants were categorically eligible for *disability supports and services* under the *Social Assistance Act*, and, given that they were eligible, it then considered what it called other

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[5] This phenomenon was commented on in a piece cited by the Supreme Court of Canada in *Moore* at para. 31 **MacLean et al. Reply Book of Authorities ("RBOA") Tab 18:** Gwen Brodsky, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (2012) (online), at p. 33, **RBOA Tab 28.**

'circumstantial factors'[6] to determine whether the Complainants' human rights had actually been violated.

ISSUE 1: Equality Rights Principles underlying the Province's discrimination analysis

24. The Complainants take issue with the Province's overarching submissions with respect to equality rights principles. The Province's argument begins with an overview of what it says are the principles animating human rights law. In doing so, it has drawn a far narrower outline of the scope and purpose of these quasi-constitutional protections than the Supreme Court prescribes.

Purpose of human rights

25. The Province frames the *Human Rights Act* as merely an anti-discrimination protection. However, the principle first stated in *Andrews* and repeated consistently thereafter makes clear that there is a dual purpose for equality rights guarantees; both i) the prevention of discrimination *and* ii) the promotion of equality:

> "[s]ubstantive equality, as contrasted with formal equality, is grounded in the idea that: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component."[7]
>
> -and-
>
> ... the purpose of s.15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.[8]

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[6] Toward the conclusion of its reasons, the Board explained what 'meaningful access' meant to it:

> **423** What, then, in summary, is "meaningful access"? I do not mean to be prescriptive, but the circumstances of the individual, time, the appropriateness of an existing placement, and the recommendations of professional staffs engaged with the people will each be important.

[7] *Andrews* at p. 171 **MacLean et al. Book of Authorities ("BOA") Tab 3** and *R. v. Kapp* at para. 15 **RBOA Tab 21**

[8] *Eaton* at para. 66, **BOA Tab 9** *Eldridge* at para. 65 **BOA Tab 10** *Vriend* at para. 72 **RBOA Tab 24**

Equal treatment and formal equality rejected

26. This leads to a further significant flaw in the Province's presentation of the scope and application of human rights protections. The Province states that the "crux" of its position regarding the limited reach of the protections in the *Human Rights Act* is that the *Act*'s protections are limited to merely "equal treatment".[9]

27. However, human rights protections demand considerably more than simply equal or identical treatment; "identical treatment may frequently produce serious inequality"[10]. While the same choice of words would likely not be used today, McIntyre J. in *Andrews* cited the US Supreme Court for the principle that is equally applicable to the Province's "equal treatment" approach: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals."[11]

Substantive Equality

28. Neither the term substantive equality nor the concept are mentioned by the Province in its factum despite the Supreme Court of Canada describing "substantive equality as the engine" for equality analysis.[12] Accordingly, far from the Province's narrow 'equal treatment' framework, the 'animating norm'[13] of human rights prescribed by the Supreme Court is far more 'substantive' than simply treating everyone the same.

29. The Province's failure means that it has failed to acknowledge "that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society."[14] The purpose of the [equality provision in the *Charter*] is thus to prevent conduct, such

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[9] Province's Factum, page 2, para. 4
[10] *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143, at p. 171(i) **BOA Tab 3**.
[11] *Andrews* at p. 164(j) **BOA Tab 3**
[12] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 25 **BOA Tab 27**
[13] *Withler* at para. 2 **BOA Tab 37**
[14] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 17 **RBOA Tab 13**

as the Province's in the present case, "that perpetuates those discriminatory disadvantages".[15] Thus, substantive equality is "concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group"[16]…and..."The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group:"[17] Substantive equality "eliminate[s] any possibility of a person being treated in substance as 'less worthy' than others".[18]

30. What is both relevant and importantly applicable for this case is the elaboration of substantive equality set out in the Supreme Court's judgment in *Quebec* v. *A,* (which this Court applied in the human rights case of *Adekayode).* Substantive equality considers the circumstances of groups "that have suffered serious and long-standing disadvantage", [and who] can be discriminated against [as a result of] "the denial to one group of goods that seem basic or necessary for full participation in Canadian society."[19]

31. Lastly, in *Adekayode,* (at para. 74), this Court cited *in extensio* Professor Hogg's discussion of substantive equality. Importantly, it includes indirect or 'adverse effects' discrimination where it is the effects of a law or practice that operate to disproportionately disadvantage members of an historically disadvantaged group—serving to perpetuate their disadvantage. Thus, Hogg explained,

> Substantive equality allows a court to drill beneath the surface of the facially neutral law and identify adverse effects on a class of persons distinguished by a listed or analogous personal characteristic.[20]

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[15] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 17 **RBOA Tab 13**
[16] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 18 **RBOA Tab 13**
[17] *Withler* at para. 39 **BOA Tab 37**
[18] *Law Society of British Columbia* v. *Trinity Western University*, 2018 SCC 32 at para. 95 **RBOA Tab 15**
[19] *International Association of Fire Fighters, Local 268* v. *Adekayode*, 2016 NSCA 6, paras. 64, 79 **BOA Tab 14**
[20] Cited in *Adekayode* at para. 74 **BOA Tab 14**

Accordingly, it is submitted that the Province's "equal treatment" approach leads it to a position where it fails to address the requirements of substantive equality.

Accommodation of differences

32. Building on the principles of substantive equality, the *Human Rights Act* demands that service providers take into account differences between people so that the particular needs of disadvantaged groups, too, will be met. However, neither the concept nor the word 'accommodation' appear *anywhere* in the Province's factum. Yet, accommodation is at the core of this case: "the accommodation of differences…is the essence of true equality".[21]

33. The Province's response to poverty, via its social assistance programming—whether those in poverty be single adults, families, persons with disabilities or the unemployed—must be one that takes into account and accommodates the different needs and abilities of persons with disabilities if discrimination is to be avoided:

> …in many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons
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> -and-
>
> The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.[22]

34. It will be appreciated that this is contrary to the position frequently stated by the Province,[23] that it has 'no positive obligations to alleviate the pre-existing disadvantage experience by persons with disabilities' so that they, too, may equally benefit from social assistance law. Consequently, the Province's position represents a:

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[21] *Andrews* v. *Law Society of BC*, 1989 1 SCR 143 at p. 169 SCR(a) **BOA Tab 3**
[22] *Eldridge* at paras. 52, 73 & 78 **BOA Tab 10**
[23] See, for example, its factum (filed March 2020) at paras. 89-90

> …failure of appropriate accommodation, [which] stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfilment in a world relentlessly oriented to the able-bodied.[24]

35. In terms of the content of accommodative steps required to ensure equality in social assistance, it is "what is required in the circumstances to avoid discrimination."[25]

Distinctions and Comparisons in Discrimination analysis

36. Within discrimination analysis, the concepts of: 'distinction', 'comparison' and, here, 'the service' are all linked. While the general principle from *Moore* is that a human rights claimant need only point to a ground-based distinction in the provision of a service that results in a disadvantage, it is recognized that both the ideas of *distinction* and *comparison* are closely related. Indeed, both of these, in turn, correspond to 'the service' that is at issue.[26]

Distinctions and Comparisons & Withler (SCC)

37. While equality is a comparative concept, the Supreme Court has insisted in the past few years that the first step in a discrimination analysis (identifying a distinction based on a ground of discrimination) is ***not*** meant to serve as a preliminary screening of discrimination cases:

> Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "**proper**" comparator group. At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?[27] (emphasis added)

38. Despite this direction from the Supreme Court, [and while the Province nods toward the Court's directive in *Withler* regarding the improper reliance on comparator groups and comparison to determine the outcome of discrimination claims], the Province's submissions are replete with

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[24] *Granovsky* at para. 33 **RBOA Tab 10**
[25] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) (Grismer)*, [1999] 3 SCR 868 at para 22 **RBOA Tab 3**
[26] See, for example, *Skinner* at para. 46 **BOA Tab 7**
[27] *Withler* (*supra*) at para. 2 **BOA Tab 37**

what it claims is the importance of comparisons and comparator groups to the equality analysis. There are some 50 reference to the role/importance of comparisons and/or comparator groups in its factum. Comparison, it argues is 'fundamentally important' "crucial" and "key".[28]

39. In *Withler,* after more than a decade of seeing equality claims (both under s. 15 of the *Charter* and under human rights statutes) dismissed on the basis that the 'wrong' or 'improper' comparison had been made (which served to "doom" the equality analysis), the Supreme Court issued a corrective vis-à-vis the proper role of comparison in discrimination claims. Post-*Withler*, comparison plays a much-diminished role in the substantive equality analysis; the focus is now simply on whether a distinction is identified which is based on a prohibited ground of discrimination.

40. The Supreme Court has rejected the approach that it itself adopted in cases such as *Hodge* and *Auton*—on the basis that it resulted in short-circuiting the discrimination analysis without getting to the second i.e., *disadvantage* stage of the analysis. By cutting off claims at the first stage, courts were failing to get at and consider substantive inequalities. Here, by rejecting the distinctions cited by the claimants, the Province seeks to cut off the claim at the first step, preventing any consideration of the claimants' grotesque experiences endured as poor persons with disabilities.

41. The Court in *Withler* prescribed that, in the future, a discrimination claim should be assessed on the merits (i.e., *Moore*'s 2nd stage) so long as the equality claimant merely identified a distinction based on a prohibited ground of discrimination:

> [62] The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

[28] Province's factum (filed March 2020) at paras. 37, 60 & 61.

> [63] It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited. (emphasis added)

42. After *Withler*, in one of the Supreme Court's 2018 pay equity cases from Quebec, the majority revisited the issue of comparison:

> [26] The first step of the s. 15(1) analysis is not a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases. Rather, its purpose is to ensure that s. 15(1) of the Charter is accessible to those whom it was designed to protect. The "distinction" stage of the analysis should only bar claims that are not "intended to be prohibited by the Charter" because they are not based on enumerated or analogous grounds …. The purpose, in other words, is to exclude claims that have "nothing to do with substantive equality".[29]

43. Returning to *Moore*, it will be recalled that the issue that had 'doomed' Jeffrey Moore's claim was the decision by the reviewing and appellate courts to switch services/comparators on the complainant. Moore had sought accommodation within the general education program. However, the lower courts had switched the service—and the corresponding comparators—to 'special education'. From there, it was inevitable that Moore would be unable to establish discrimination vis-à-vis other students with learning disabilities.

44. Just as in *Withler*, where the Supreme Court of Canada had to squarely reject government attempts to short circuit discrimination claims by having them dismissed at a preliminary stage through the device of 'comparator groups', the same objective lies behind the Province's attempt to have this Court avoid consideration of the Complainants' profound discrimination on the merits

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[29] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 26 **BOA Tab 28**

as set out in their human rights complaint.[30]

45. Despite the direction provided by *Withler*, governments have continued to try to derail equality claims by seeking to 'change the channel'; to have a different comparator considered—one that will show no discrimination. The Province contends that its preoccupation with the determinative role played by comparator group identification has been followed by lower courts since *Withler*. It refers to this Court's judgment in *Skinner* and that of the PEI Court of Appeal in *King*.

46. With respect, in *Skinner*, this Court merely stated that, post-*Withler*, there should still be "some kind of comparison" arising from a distinction.[31] No one questions this principle. With respect, to the *King* case from the PEI Court of Appeal, it is interesting that even though the Court had an extended discussion of comparator groups, there is not a single reference to *Withler*, nor the references in *Moore* to *Withler* regarding the current approach to distinctions and the reduced role of comparisons. Therefore, the Court's extended discussion of the "requisite comparator group analysis" raises questions about this aspect of the Court's reasoning.

47. On the other hand, and contrary to the Province's insistence on the 'fundamentally important' role of comparisons in discrimination analysis, several appellate decisions post-*Withler* make clear that many courts have embraced its more flexible approach to comparison.

48. Thus, in this Court's decision in *Adekayode* (*not* referred to by the Province), the Court discussed the reduced role played by comparisons, commenting as to how the Supreme Court had "loosened the vise of mirror comparison to re-animate substantive equality".[32]

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[30] See: Gwen Brodsky, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (2012) (online), at p. 36-38) **RBOA Tab 28**, this piece was cited in *Moore* at para. 31; Also, in a case comment on *Moore*, Gwen Brodsky has written instructively on this strategy and its rejection by the SCC in *Moore*: Brodsky, Gwen, *Moore v British Columbia: Supreme Court of Canada Keeps the Duty to Accommodate Strong*, 10 J. L. & Equal. 85 (2013) at 87 *et seq*. **RBOA Tab 29**

[31] *Skinner* at para. 51 **BOA Tab 7**

[32] *Adekayode* at para. 76 **BOA Tab 14**

49. In the well-known Federal human rights case involving discrimination in the provision of social services to Indigenous children living on a First Nation, both the Federal Court and the Federal Court of Appeal (*per* Stratas J.A.) commented on the reduced role of comparison:

> In *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court reiterated the existence of a comparator group does not determine or define the presence of discrimination, but rather, at best, is just useful evidence. It added that insistence on a mirror comparator group would return us to formalism, rather than substantive equality, and "risks perpetuating the very disadvantage and exclusion from mainstream society the [*Human Rights*] *Code* is intended to remedy" (at paragraphs 30-31). The focus of the inquiry is not on comparator groups but "whether there is discrimination, period" (at paragraph 60).[33] (emphasis added)

50. Most recently, the Manitoba Court of Appeal, in *Stadler* (May 2020), had before it a discrimination challenge to a condition in Manitoba's social assistance program requiring recipients aged 60-64 to apply for 'early' CPP retirement benefits. It conducted a close-analysis of *Withler* on the question and role of comparisons before going on to find that the provision not only adversely effected persons with disabilities, but in doing so, it perpetuated and exacerbates the burdens of an already disadvantaged group[34] and was discriminatory. It observed, *inter alia,* that;

a. Many equality claims have faltered because of a rigid reliance on the 'proper comparator group',
b. The selection of an appropriate comparator group should not be an 'important battleground' proving fatal for equality claimants.
c. Rather, the focus should be on the actual impact on the claimant group.
d. Provided the claimant establishes a distinction based on one or more grounds, the claim should proceed to the second step.
e. The tribunal whose decision was before the Court of Appeal, had made the mistake of treating "the first step of the s. 15 test as too high of a threshold…..dismissing cases at the first stage using comparators is a red flag for formalism".[35]

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[33] *Canada (Attorney General)* v. *Canadian Human Rights Commission*, 2013 FCA 75 at para. 18 **RBOA Tab 4**
[34] *Stadler* v *Director, St Boniface/St Vital*, 2020 MBCA 46 at para. 111 **RBOA Tab 22**
[35] *Stadler* at paras. 62-70

Conclusion Regarding Distinctions and & Comparisons in discrimination claims

51. It is submitted that the Supreme Court of Canada and jurisprudence which follows have made two things clear: 1) the identification of the service at issue is linked to the respective distinctions and comparisons that are to be drawn, and 2) comparators should not be used as the basis for screening out or eliminating discrimination claims without having evaluated substantive equality claims on the merits.

52. In the end, a member of an equality-seeking group need only identify *a* distinction in the provision of a service for the matter to pass to the second stage of the test in *Moore* (i.e., whether the distinction adversely impacts the complainant in a substantive sense e.g., by perpetuating disadvantage).

ISSUE 2: What is 'the service' at issue in this case?

'The Service'

53. The Complainants and the Province are in dispute, most sharply, on the identification of 'the service' that is the focus of the complaint.

54. As in *Moore* and as in *Eldridge*, it is submitted that the Complainants in this appeal will either be successful or they will lose depending upon how this Court determines the issue of what 'the service' is.

55. It is ironic, when one reflects, that this matter, which is so profoundly important for persons with disabilities; including those subject to segregation in institutions, endless waitlists, discretionary, ad-hoc provision of 'assistance' to persons who have already been found to be 'in need' and remote placements of person to communities that they have no attachment to, appears to turn on the preliminary question of what this Court accepts as 'the service' at issue.

56. Whether, via this complaint, there can be some vindication of their rights to inclusion, may well turn on how this Court defines the service they are seeking. The outcome of all this will, seemingly, depend on whether the Province is successful in its attempt to have the Court focus *not* on the Province's inferior treatment of social assistance recipients living with significant disabilities but, instead, on whether the Province's treatment of people seeking public housing are treated just as poorly as were the Complainants.

57. The Province's strategy here is a race to the bottom; that is, just 'find another group in the Province that is treated very poorly and then reframe the case to compare the two so as to be able to claim that there is no discrimination'.

58. Stated in these terms, it becomes clear that the question of the "service" must be driven, from beginning to end, by considerations of substantive equality.

59. From the time of the drafting and filing of the human rights complaint in this matter, the Complainants have made clear that *compared with* other people who are eligible for social assistance, the Province's provision of assistance to them has been profoundly inferior on the basis of disability in several important respects compared to the current "mainstream"[36] social assistance program. These are the 'distinctions' required by the first step of the *Moore* test.

60. In our factum filed in March 2020, we set out what we had identified in our complaint as 'the service' (i.e., 'social assistance') that the Province was providing on a discriminatory basis.[37] The Province acknowledges this as the basis of our claim.[38]

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[36] This is the term used by the Supreme Court of Canada in *Eaton* to refer to a society designed primarily by and for the non-disabled *mainstream*. (*Eaton* at paras. 66-69) **BOA Tab 9**

[37] See paras. 93-4; 107-114, 115 *et seq.* and 131-133

[38] Province's Factum, dated March 2020 at page 10, para 16. See also, its Pre-Hearing Brief at Appeal Book, pp. 20,727 and 20,728 (paras. 18 and 21); and its Post-Hearing Submission to the Board of Inquiry, Appeal Book, page 21,037 at para. 151

61. The connection between the service identified and the corresponding *distinctions*—for purposes of the *Moore* test—has been recognized by all parties. Starting with their complaints, the Complainants identified four key distinctions in the way that the Province treated persons with disabilities in their access to social assistance, compared to those without disabilities. In each case, a person without disabilities (or persons whose disability-related needs can be met within the current 'mainstream' social assistance program[39]) are provided far more beneficial access to 'assistance' than the Complainants. To be clear, *all* these distinctions relate to how social assistance is provided/not provided to 'persons in need' already determined to be eligible for assistance:

a. The provision of assistance to permit *community-based living*;

b. The province of assistance *virtually immediately* upon being determined to be eligible;

c. The provision of assistance *as of right*;

d. The provision of assistance in one's *community of choice* and *with whom one is to live*.[40]

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[39] The phenomenon of persons with disabilities who manage to succeed by striving to emulate those without disabilities while using services designed by and for non-disabled people was referred to by the Supreme Court in *Eldridge*:

> This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms… One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled." (*Eldridge*, para. 56). **BOA Tab 10**

See also the expert evidence of Professor Catherine Frazee, Professor Emerita, School of Disability Studies, Ryerson University, Appeal Book, Vol. 57, pp. 18941-2: "Ableism operates by degree. Persons with disabilities who are capable of "passing" in the ableist world by performing the expected self-care routines of daily life will be rewarded by a higher ranking than persons with dependencies that render them the antithesis of the ideal citizen."

[40] The Complainants created a table setting out these distinctions in their Pre-Hearing Submission filed with the Board of Inquiry (Appeal Book, page 20712) and which the Province made repeated reference to in the course of the hearing. It is attached as Schedule "B" at the end of this factum.

The Province's Attempt to Re-frame 'the service' and change what the complaint is about

62. As a matter of placing the experience of equality-seekers at the forefront of the analysis, particularly in a case by and for persons with disabilities, it is for the Complainants to frame their case as they see it and arising from their lived experiences. It is not for a government respondent to re-frame their case in an effort to undermine it. The Complainants have the right to have their case determined on the merits. At a minimum, the Board of Inquiry ought to have considered and determined on the merits the claim that the Complainants filed and the Commission referred before going on to either its own analysis or the Province's alternative claim.

63. The Supreme Court of Canada has repeatedly stated that equality-rights claimants get to identify what benefits and comparisons will be at issue; *their* distinctions and comparisons should be "the natural starting point".[41]

The Province's arguments against social assistance as 'the service' in this case

64. It would obviously be useful for this Court to have the Complainants' response to the Province's critique of the way that the Complainants identified the service at issue in this case. However, because the Complainants and the Province both filed their facta on the same day in March 2020, the Province's response to our position does not appear in its factum.

65. The Province has repeatedly stated that its position and arguments have been consistent since the pre-hearing Briefs were filed with the Board of Inquiry in early 2018. Accordingly, as a proxy for the Province's response (which will, no doubt, appear in its factum filed in September 2020) to the Complainants' position, we set out below the main points in the Province's arguments

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[41] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 58 **RBOA Tab 16**, *per* Iacobucci J: "When identifying the relevant comparator, the natural starting point is to consider the claimant's view. It is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge." See also *Lovelace* v. *Ontario*, 2000 SCC 37 at para. 62 **RBOA Tab 17**: "Generally, the claimant chooses the relevant comparator, however, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant".

as found in its Post-Hearing Brief[42] (filed with the Board in October 2018), followed by our replies thereto.

66. The Province's overarching criticism against social assistance being 'the service' is that:

> *The forms of assistance required by the Complainants are not comparable to the assistance provided under the ESIA.*

67. Forced to address the unavoidable fact that persons with disabilities such as the Complainants were subject to the four distinctions/disadvantages with respect to the social assistance services listed above (and set out at the end of this factum as Schedule "B"), and that this had "soul destroying" adverse effects on at least one of them (Beth MacLean), the Province retreats to the position of characterizing such supported living 'assistance' as "different" and "non-comparable".

68. Specifically, the social assistance *needed by the Complainants*, the Province has argued, is not comparable to mainstream social assistance under the *ESIA*. That is, "the aspects of DSP that are unique to DSP, and not comparable to ESIA",[43] result in it being "difficult to make sense of the umbrella concept of "social assistance" as a basis for comparing ESIA and DSP recipients"…."it is not an apples-to-apples comparison."[44]

69. The Province's position, is tantamount to arguing that the social assistance for persons with disabilities under the *Social Assistance Act* is not *true* social assistance and, as a result, there can be no fair comparison of the Complainants' four distinctions with assistance provided to non-disabled persons for purposes of the discrimination analysis. The accommodative *forms* of social assistance for persons with disabilities under the *Social Assistance Act* are, in the Province's view, not *real* social assistance. There is no legislative basis whatsoever for the Province's purported

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[42] Province's Post-Hearing Brief, Appeal Book, Vol. 64 starting at p. 20969
[43] Province's Post-Hearing Submission to the BoI, Appeal Book, Vol. 64, page 20969 at p. 21040, para. 159
[44] Province's Post-Hearing Submission to the BoI, Appeal Book, Vol. 64 page 20969 at p. 21039, para. 155

distinction between social assistance paid as a cash payment to person's in need or payment for supports and services to a service provider.

70. By relying on a formal equality approach (identical treatment = equal treatment), the Province feels that it is in a position to argue that the two forms of assistance are, therefore, non-comparable for purposes of the discrimination analysis. By way of a quick visceral reply, it is surely preposterous that the bulk of the Province's expenditures made under the *Social Assistance Act* during the entirety of the period covered by the complaint are somehow to be regarded as not *real* social assistance.

71. Superficially, some of the forms of accommodative assistance, that is, substantive equality-promoting social assistance, will naturally be different *in form* than some of the assistance provided to non-disabled people (e.g., costs for support workers). But this is no different than the specialized educational supports required by Jeffrey Moore in order for him to enjoy substantive equality in his right to education or the sign-language interpretation required by Eldridge in accessing substantively equal health care services in her case.

72. To argue, as the Province has done, that there is no discrimination here because some persons with disabilities may also need different forms of social assistance or differently configured assistance in order to permit them to live in community, is to reject the principle of substantive equality.

73. The Supreme Court of Canada affirmed in *Grismer* that the content of 'accommodation is what is required to avoid discrimination'.[45] Thus, the fact that accommodation may take different forms is irrelevant to the goal of ensuring 'meaningful access' to social assistance consisting of the means necessary to live in community. For the Complainants, non-discriminatory social

[45] *Grismer* at para. 22 **RBOA Tab 3**

assistance is assistance which takes into account their different needs to enable them to live in community. In each of their human rights complaints, they framed the problem as the Province's failure to accommodate their disabilities in their social assistance programs. In fact, the Board of Inquiry made explicit reference to the passages in the complaint where the Complainants cite the Province's failure to accommodate their needs for social assistance.[46]

74. The provision of social assistance services in a way or a form which takes into account and meets the needs of the Complainants and others with disabilities is simply "the accommodation of differences, which is the essence of true equality".[47] The Province makes no mention of its duty to provide accommodative social assistance anywhere in its submissions despite the fact that accommodation is at the epicentre of this appeal.

75. The Province's approach to understanding discrimination leaves it arguing that "the aspects of DSP that are unique to DSP, and not comparable to ESIA" means that these cannot be the service at issue. The identical treatment approach to equality leaves no space for differential treatment—required to meet the needs of substantive equality. By the same token, the Province's analytical approach would have resulted in Jeffrey Moore losing his case as he, too, had been offered 'equal treatment' in his school:

> [32] A majority of students do not require intensive remediation in order to learn to read. Jeffrey does. He was unable to get it in the public school. Was that an unjustified denial of meaningful access to the general education to which students in British Columbia are entitled and, as a result, discrimination?[48]

76. At the conclusion of the Supreme Court's analysis in *Moore*, the Court answered its own question in a way that is precisely applicable to the Complainants' needs for social assistance in this

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[46] BoI Decision, paras. 21, 30 and 32-34

[47] *Andrews* v. *Law Society of BC*, 1989 1 SCR 143 at p. 169 SCR(a) **BOA Tab 3**

[48] *Moore* at para. 32 **RBOA Tab 23**

appeal:

> [48] It was therefore the combination of the clear recognition by the District, its employees and the experts that Jeffrey required intensive remediation in order to have meaningful access to education, the closing of the Diagnostic Centre, and the fact that the Moores were told that these services could not otherwise be provided by the District, that justified the Tribunal's conclusion that the failure of the District to meet Jeffrey's educational needs constituted prima facie discrimination. In my view, this conclusion is amply supported by the record.[49]

Disability supports and services provided to 'persons in need' are "social assistance"

77. There are several additional reasons to accept that Provincially-provided social assistance (whether in the earlier period of 1986 to 2001 or since then) to persons with disabilities—however unique and different than the mainstream service social assistance' *is* social assistance and 'the service' at issue in this case—regardless of the *form* in which it is provided.

i) Same legislation and legislative purpose for 'all' persons in need—even those in institutions

78. The Early Period of the complaint (1986-2001):

a. Both general social assistance (e.g., for people who were not disabled but simply 'persons in need') and assistance for persons with disabilities were provided under the *same* legislation (*Social Assistance Act* and accompanying *Regulations*).

b. The *purpose* of the *SAA* and *Regulations* is to 'ensure that people in need are provided with the necessities of life'.[50]

79. Indeed, at the level of legislative purpose, this Court construed the purpose of the *Act*, in the context of 'assistance' provided to an intellectually-disabled woman who was institutionalized and supported under the *Social Assistance Act*, as simply to "furnish assistance to **all** persons in need" (emphasis added) and adopted the comments of Roscoe JFC (as she then was) that:

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[49] *Moore* at para. 48

[50] *Kings County* v. *Cogswell*, [1988] CanLII 5661 (NSCA) at para. 10 **RBOA Tab 7**. Interestingly, in Judge Hall's decision at the County Court level, His Honour noted that, unlike the Province's position here, "The parties acknowledge that Suzanne is a person in need within the meaning of section 23 of the the *Social Services Act* and that the appellant is obliged to furnish the assistance that is being provided subject to any right of recovery from her or others that it may have." *Kings (County of) v. Cogswell*, [1987] NSJ No. 116 **RBOA Tab 14**

> It is clear from the numerous amendments to the *Social Assistance Act* through the years and its present form that its object is to ensure that people in need are provided with necessities of life by municipal units…[51]

80. Moreover, the legislative definition of "assistance" in *both* the *SAA* legislation and the *ESIA* are substantively the same in their broad, overall scope: "assistance means the provision of money, goods or services to a person in need".[52] Contrary to the Province's contention,[53] the full range of supports and services provided to eligible persons with disabilities under the *SAA* are in fact referred to as "financial assistance".[54]

ii) International Human Rights Law obliges the Province to ensure no distinction in its provision of social assistance between assistance for people with disabilities and people without disabilities

81. In a case concerning the Province's obligations to provide social assistance for all family members as persons in need without distinction, this Court recently made reference to what it referred to as "Canada's (more specifically Nova Scotia's) international human rights obligations" to provide social assistance to all persons in need.[55] This case also raises the Province's obligation not to discriminate between persons with and without disabilities in the provision and conditions of that assistance.[56]

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[51] *Kings County* v. *Cogswell*, [1988] CanLII 5661 (NSCA) at para. 10 **RBOA Tab 7** and see s. 9(1) of the *SAA*: "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." (emphasis added) **BOA Tab 42**

[52] See s.1(d) of the *Municipal Assistance Regulations* **RBOA Tab 26** which uses inclusive wording and s. 3(a) of the *ESIA Act*. **BOA Tab 40**

[53] The Province argues that while eligible persons in need under the *SAA* are entitled to 'financial assistance' or 'financial supports' in the same way that *ESIA* recipients are, the Province had and has no obligation to provide supportive living assistance to eligible persons in need such as the Complainants in this appeal: see Province's Post-Hearing Submission to the BoI, Appeal Book, Vol. 63, page 20969, paras. 104, 106, 182, 198 and 200.

[54] See the definition of 'person in need' in s. 4(d) of the *SAA*. **BOA Tab 42**

[55] *Sparks* **BOA Tab 33** at paras. 50 and 51 relying on the International Covenant on Economic, Social and Cultural Rights, arts.9 and 11 **BOA Tab 44**

[56] See the UN Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights* E/C.12/GC/20 (10 June 2009), at para 28 (discrimination in the protection of the right to social security on the basis of disability prohibited) **RBOA Tab 27**

iii) The Continuum of Assistance between the SAA and the ESIA

82. After receiving very extensive evidence, both documentary and testimonial (including from the Deputy Minister), concerning the Province's social assistance programming for persons in need, the Board of Inquiry commented on the similarity between the two programs, including:

> (a) The basic needs allowance schedules are pretty much identical.
>
> (b) Both statutes and the administrative programs pursuant thereto base eligibility on the applicant being found to be a 'person in need'.
>
> (c) Both statutes and the administrative programs pursuant require that they be found to have a "budget deficit" under which their allowable expenses exceed their chargeable income.
>
> (d) Both legislative regimes have accommodative allowances which take into account and meet the needs of persons with disabilities and, finally,
>
> (e) Both regimes share the same statutory appeal system—located in the ESIA legislation.

83. The Deputy Minister testified that this synchronicity was intentional. The Board found that 'persons in need' can and do flow back and forth between the two programs as their needs change.[57] As the Deputy Minister put it:

> …from a…Provincial policy perspective, you want to make sure that those programs are working together and creating as much of a support system that makes sense and so it shouldn't actually matter which program you're in....Which program you're in so that you know you're – have access to the same types of supports.[58]

84. The Board concluded that the two legislative regimes formed "a continuum" of support for all persons in need, including people with disabilities "and that, as the Complainants have submitted, one cannot meaningfully distinguish the two."[59]

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[57] BoI *Prima Facie* Discrimination Decision, para. 458, **RBOA, Tab 1,** and Deputy Minister Hartwell testimony, Appeal Book, Vol. 23, pages 7291-7294
[58] Deputy Minister Hartwell testimony, Appeal Book, Vol. 23, page 7289
[59] BoI *Prima Facie* Discrimination Decision, para. 405, **RBOA, Tab 1**

85. Interestingly, because of the "distinctive similarity" and overlap between the two pieces of legislation, Nova Scotia Courts, at one point, struggled to determine whether supports and services for persons with disabilities were authorized under the *ESIA*, the *SAA* or both.[60]

86. All courts construing the legislation have confirmed that when people with disabilities have been supported in homes for special care under the *Social Assistance Act*, those supports are "assistance" or "social assistance", which is mandatorily provided under the *Act*.[61] These supports are provided to meet the living requirements of persons with disabilities—taking into account that the nature and range of their needs will vary and may well be different than those of persons without disabilities.

87. The goal of accommodation, after all, is 'to render those services and facilities to which the public has access equally accessible to people with and without disabilities'.[62]

88. In this case, many accommodative social assistance services are found in the *Social Assistance Act* and *Municipal Assistance Regulations*.[63] As with general social assistance under the *SAA* (in the 1986 to 2001 period) and under the *ESIA* thereafter, all social assistance legislation serves the same purpose, to ensure that persons in need are provided "assistance" to have their needs met.

89. In conclusion, it is simply beyond dispute that all 'assistance'—whether provided under the authority of the *ESIA* or the *SAA* is social assistance. Differences in the forms of assistance required by person with disabilities renders them no less comparable as 'assistance'.

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[60] See Nova Scotia (Community Services) v. E.M., 2011 NSSC 12 at paras. 23-4 and 27, **RBOA Tab 20,** and *Nova Scotia (Community Services)* v. *Boudreau*, 2011 NSSC 126 at paras. 39, 43, 44, 60, 69, 70, 77 and 80**, RBOA Tab 19**

[61] See *Cogswell* **RBOA Tab 7** and *Boudreau* **RBOA Tab 19**

[62] *Council of Canadians with Disabilities v. Via Rail Canada Inc.* (SCC) at para. 162 **RBOA Tab 9**

[63] However, the Board found that the *ESIA* program, too, has accommodative features for persons with disabilities: Board's *prima facie* Discrimination Decision, para. 320 **RBOA Tab 1**

90. The Province has also claimed that any distinctions which the Complainants have established are, actually, 'not based on disability but on the nature of the benefit sought',[64] arguing that while 'financial assistance' is mandatory under the *SAA*, 'residential supports' are not. [This position ignores the important point that the *Social Assistance Act* states that a 'person in need': "means a person who requires financial assistance"[65]]. In its Pre-Hearing submission to the Board, the Province's position is succinctly set out:

> 31. The distinction between benefits available under ESIA and those available under DSP is not a distinction based on disability. It is a distinction based on whether the person requires financial benefits, or supportive housing. That is not a protected ground covered by the *Human Rights Act*.[66]

91. The distinction drawn by the Province based on the type of benefits required holds only superficial appeal. In the words of Professor Hogg, substantive equality allows a court to 'drill down' "beneath the surface of the facially neutral law and identify adverse effects on a class of persons distinguished by a listed or analogous personal characteristic."[67]

92. Here, when the question is asked: who are the people who need the supports and services of the Disability Support Program established under the *Social Assistance Act*, the question answers itself. The DSP Policy Manual provides that only people with four specific disabilities are eligible for the program.[68] Who are the qualified 'persons in need' who have been put on years-long waitlists for supports and services—despite the applicable legislation providing that they "shall" be granted assistance effective the date that they meet all eligibility requirements?[69] Who

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[64] Province's Post-Hearing Submission, Appeal Book, Vol. 64 at pages 21041 & 21044, paras. 54 and 189
[65] *SAA*, s. 4(d) **BOA Tab 42**
[66] AGNS Pre-Hearing Brief, Appeal Book Vol. 63, pp. 20719 at p. 20731, para. 31. See also, the Province's Post-Hearing Submission, Appeal Book, Vol. 64 at pages 20997 & 21053, paras. 160 and 168
[67] *Hogg* cited in *Adekayode* (*supra*) at para. 74 **BOA Tab 14**
[68] See, the DSP Program Policy Manual (Exhibit 58), Policy 4.1 "Disability Requirement", Appeal Book, Vol. 58, pages 19138-9 which specifies the four specific disabilities required for program eligibility.
[69] *Municipal Assistance Regulations*, **RBOA Tab 38** s. 2(1)(k)(i) and (ii):
2 (1) The Social Services Director of the Committee shall…..
(k) grant assistance to those persons who are eligible effective

are the 'persons in need' made to languish harmfully in psychiatric wards or remote institutions because the Province has chosen not to offer community-based assistance? As an exit from needless and harmful life in a psychiatric ward, who is offered a place to live in an institution attached to the Yarmouth Hospital, hundreds of kilometers from her closest family? Who are the only persons offered 'residential supports' in the Kings Regional Rehabilitation Centre in Waterville or Quest institution in Sackville?

93. The answer is that they are not just disproportionately but *exclusively* persons with disabilities.

94. The Province's claimed distinction seeks to erase the disability-based distinction when it tries to characterize the differences experienced by the Complainants as based on 'kind of benefit sought' under the *Social Assistance Act*. The claim is akin to the trial level rulings in the recent Quebec pay equity cases addressed by the Supreme Court where the lower court rulings were compared to the formal equality approach tragically accepted by the Court in *Bliss*. The Court cited a passage from *Withler* to the effect that distinctions—such as the one raised by the Province here—need to be situated in a way that assesses the broader context: "What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and . . . the impact of the impugned law."[70]

95. It is submitted that, once account is taken of the group actually impacted by the Province's purported distinctions together with the reality of those distinctions being based on disability, any suggestion that the distinctions at the centre of this Complaint are merely ones based on the 'kind

(i) the date of the application, if the person meets the eligibility requirements of the Act, these regulations and the municipal social services policy on that date, or
(ii) the day the person meets the eligibility requirements of the Act, the regulations, and the social services policy;

[70] Centrale des syndicats du Québec *v.* Quebec (Attorney General), 2018 SCC 18 at para. 27 **RBOA Tab 8**

of benefit being sought', must be summarily dismissed.

Conclusion on 'the service' at issue

96. For the reasons presented above, the Province's desperate attempts to redefine the service reflect an outdated formal approach to equality that should be rejected. The service at the core of this complaint, and the disadvantageous distinctions that the Complainants have experienced, are in the Province's response to poverty: its provision of social assistance.

ISSUE 3: (The Second Step in *Moore*): Adverse Impacts

97. The Province has made two submissions to the effect that the Complainants were not subjected to an adverse impacts regarding the four cited distinctions in the way that they were provided/not provided social assistance.

i) '*Flex in Home mirrors ESIA*'

98. The Province has argued that one of the eight sub-programs within the Disability Support Program (i.e., Flex in Home, in which qualified persons with disabilities live with family members) is essentially a "mirror" copy of Income Assistance under the *ESIA*. There are, however, four caveats to even this claim that are worth noting: i) While the amount of dollars provided by the Province is not disputed, it needs to be understood that the person must live with a family member and the family member actually receives the assistance; ii) the fact that Flex in Home no longer has a wait list and will be provided on request to qualified applicants is only a recent development, iii) the fact that having an adult dependent continue to live with ill or aging parents may not meet their own needs for independence and autonomy (nor that of the DSP recipient) is evidenced by the fact <u>over 50%</u> of DSP "participants" who are waiting for a different living situation are 'Flex in Home' recipients—far more than any other DSP living situation.[71] The Board of Inquiry

[71] See Exhibit 85, Appeal Book Vol. 62, p. 20650

commented on this phenomenon, calling it:

> ….a recurrent theme through the hearings - parents, often aging and becoming infirm themselves, caring for grown disabled children in their own homes and looking to the Province for their children's future support…..I can see that a failure to provide another residence to the disabled person, and leaving them in the care of increasingly disabled parents or other care givers, may constitute a failure to provide meaningful access.[72]

Flex in Home is mostly a temporary and imperfect solution; iv) Finally, Flex in Home has nothing whatsoever to do with the supports and services which the Complainants needed or had sought. Small Options homes are, by far, the assistance which is most sought after by persons seeking DSP services under the *SAA* and they also experience extremely long wait times.[73]

'It is not clear that DSP 'participants' are worse off than ESIA recipients

99. The Province has also argued, in passing, that it is not clear that DSP "participants" are worse off than persons in need under the ESIA. The Province has claimed that there would be no clear difference/disadvantage between the experience of a non-disabled person and one of the Complainants upon being discharged from hospital; "They had precisely the same options as persons without disabilities."[74] The Province means that they could both apply for social assistance under the *ESIA* and make their own way as best they can. On the one hand, the non-disabled person would typically obtain housing in the private market;[75] on the other hand, one shudders to contemplate any of the three Complainants being left to fend for themselves in the private market,

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[72] Board of Inquiry Decision, paras. 131-2

[73] See Exhibit 85, Appeal Book Vol. 62, p. 20650 and the Board's summary of the evidence of Deputy Minister Hartwell who "agreed that the largest waitlist is for small options homes. She agreed that the formal waitlist may be shorter than the total of those who actually want placement. There may be parents who are looking after disabled offspring who may be discouraged by the length of the waitlist and may not be applying. The growing waitlist is an expression of a need that the Province is not meeting, but she says the Department is making inroads into moving people into the community." *Prima Facie* Discrimination decision, para. 327 **RBOA Tab 1**

[74] Province's factum, para. 64. The same argument was made in the Province's Post-Hearing Submission, paras. 164-65, Appeal Book, Vol. 64, p. 20969 at p.21039, paras. 164-5

[75] In its Post-Hearing Submissions, the Province itself admits that "The vast majority of Nova Scotians, even those of low income, provide for their housing themselves without looking to government for support (beyond the financial allowance for shelter provided under both ESIA and DSP)." Appeal Book, Vol. 64, p. 20969 at p. 21045, para. 170

equipped only with general social assistance to meet their needs. This hypothetical scenario makes a mockery out of substantive equality—not to mention the norm mentioned in *Adekayode* that discrimination includes "the denial to one group of goods that seem basic or necessary for full participation in Canadian society."[76]

100. As the Province appears to concede, it is outlandish to even contemplate any of the three Complainants being asked to live unsupported and living on general social assistance. However, this "cruel" [77] hypothetical is the logical result of the Province's 'formal equality' approach which is satisfied by identical or "equal treatment"[78] of persons regardless of their differing needs and abilities, in short, regardless of context. Any suggestion by the Province that this scenario makes it somehow clear that there have been no adverse effects, can be dismissed out of hand.

101. Apart from Flex in Home, *every* other program under the *Social Assistance Act:*

a. Has a very substantial waiting list.[79]

b. Is *regarded* by the Province as one which it has no legislative obligation to provide and/or is provided as a matter of discretion/voluntarily.[80]

c. Imposes requirements on qualified persons in need as to where, near whom and with whom they will live.

d. Continues to have people living in outmoded and outdated institutions under which "continued reliance on large congregate care facilities, very much a model of the past, is not appropriate for the present or the future."[81]

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[76] *International Association of Fire Fighters, Local 268* v. *Adekayode*, 2016 NSCA 6, paras. 64, 79 **BOA, Tab 14**
[77] This is the Province's characterization of the scenario, Province's factum (filed March 2020) at para. 64
[78] It will be recalled that the Province's position is that this is all the *Human Rights Act* guarantees (Province's factum, para. 4)
[79] See waitlist info from 2014 (total number on waitlist = 1071) up to 2019 (total number on waitlist = 1560) in the Appeal Book, Vol. 43, pp. 14355-6 (waitlist graph covering 2010-2015); Appeal Book, Vol. 57, p. 18977
[80] Province's Post-Hearing Brief, Appeal Book, Vol. 64 starting at p. 21057, para. 198
[81] This is an admission made by the Province at the close of its Post-Hearing Submissions: Appeal Book, Vol. 64 at p. 21058

None of these adverse distinctions are experienced by people without disabilities in receipt of social assistance under the ESIA.

102. In the end, the Province appears to concede that the Complainants and other persons in need are disadvantaged as 'persons in need', initially under the *SAA* and, since 2001, under the *ESIA*:

> On the one hand, it would be impossible to deny that the historical and current limitations of the DSP result in negative outcomes for those who are unable to obtain the kind of support that allows them to live good lives in a supportive community of their choice….Certainly with respect to all three individual complainants, a more perfect DSP might have better enabled each to move more quickly out of Emerald Hall, for example, and thus avoided the negative affects on their lives that come from remaining hospitalized beyond what was medically necessary.[82]

ISSUE 4: (The Third Step in *Moore*): 'the protected characteristic was a factor in the adverse impact'

103. Under the third and final step of the test in *Moore* for *prima facie* discrimination, the Complainants need only show that the disadvantageous distinctions (established in the previous step in the *Moore* test) are linked to disability. That is, all that the Complainants must show is that disability was "a factor" in these disadvantages.

104. For convenience, the distinctions listed earlier are reproduced here (and are found in a table at the end of this factum as Schedule "B"):

a. The provision of assistance to permit *community-based living*; (i.e., re institutionalization)

b. The province of assistance *virtually immediately* upon being determined to be eligible; (i.e., re seemingly endless waitlists for assistance)

c. The provision of assistance *as of right*; (i.e., assistance for persons with disabilities

[82] See the Province's Post-Hearing Submissions: Appeal Book, Vol. 64 at pp. 21041-2, para. 162

provided on an *ad hoc*, discretionary basis)

d. The provision of assistance in one's *community of choice* and *with whom one is to live*.[83] (i.e., remote placements with strangers)

105. In the same way that the Complainants have easily satisfied the test of disadvantages/adverse effect, it is also plain that these disadvantages in the Province's provision of social assistance are strongly linked to disability. This is clearly the case because only persons with disabilities who have been qualified as 'persons in need' under the *Social Assistance Act* are subject to these disadvantages:

a. The only 'persons in need' receiving 'assistance' in Department of Community Services segregated institutions are persons with disabilities (including the Complainants).

b. With the recent exception of the Flex in Home program, all persons with disabilities (including the Complainants) under the Province's Disabilities Support Program (authorized under the *SAA*) are placed on waitlists for assistance—typically for years, sometimes decades, at a time. This has never happened to 'persons in need' under the *ESIA* or, previously, under the *SAA*.

c. In contrast to the treatment of 'persons in need' under the *ESIA*, the Province (with the recent exception of the Flex in Home program) *treats* persons with disabilities (including the Complainants) who are 'persons in need' as though they have no entitlement to social assistance.[84]

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[83] The Complainants created a table setting out these distinctions in their Pre-Hearing Memorandum filed with the Board of Inquiry (in the Appeal Book, Vol. 63 at p. 20712) and which the Province made repeated reference to in the course of the hearing. It is attached as Schedule "B" to this factum.

[84] On this point, see the Province's explicit statement to this effect in its Post-Hearing Submissions: Appeal Book, Vol. 64 at p. 21057, para. 198: "As argued above, the Complainants are simply in error in their argument that the *Social Assistance Act* requires residential supports to be provided on an as-of-right basis".

d. In contrast to the treatment of 'persons in need' under the *ESIA*, the evidence establishes that the Province regularly makes 'placement offers' to persons with disabilities (including Beth MacLean at Kings RRC and Sheila Livingstone in Harbourside Lodge in Yarmouth) in communities that are a significant distance away from family, friends and social connections. ESIA recipients never have the provision of assistance to them conditioned on their willingness to move away to (sometimes) remote communities.

106. Starting with the decades-long reliance on institutionalization as a response to poverty for persons with disabilities, to the Province's imposition of a Moratorium on the opening of additional Small Option Home space in 1995 (with only *ad hoc* exceptions thereafter for high profile cases[85]) to the offering of placements hundreds of kilometres from family and their communities, the Province' implementation of its obligations under the *Social Assistance Act* to 'persons in need' who are persons with disabilities are a sketch in many stark contrasts based on disability. The disadvantageous distinctions highlighted above are exclusively accorded to persons with disabilities.

107. As the Supreme Court stated summarily in *Moore* with respect to the link between the failure to offer Jeffery Moore accommodative educational supports and his disability: "There is equally no question that any adverse impact he suffered is related to his membership in this group."[86] This is precisely the Complainants' situation.

108. The Province's response at this stage of the test is, once again, to insist that the Complainants' comparisons are flawed by having focused on the 'wrong' service; "This faulty

[85] See the Board's *prima facie* decision **RBOA Tab 1** at paras.126, 140 and 208 re how 'squawking loud enough and long enough'/or meeting with the Premier increased one's chances of being offered a Small Options placement.
[86] *Moore* at para. 34 **RBOA Tab 23**

comparison flows from the Complainants' mischaracterization of the service as 'social assistance'."[87] The Province urges the Court not to pay any attention to the evidence of disparities in the way that the Province treats persons in need based on whether or not they have disabilities.

Institutionalization is not, per se, discriminatory

109. Finally, the Province appears to situate an argument under the third step in *Moore* that the provision of social assistance to persons with disabilities in segregated institutions is not a human rights problem.[88] It argues that the *Human Rights Act* has nothing to say about the Province's provision of social assistance in segregated institutions when those people are persons with disabilities.[89] The *Human Rights Act* is indifferent, according to the Province, to the past and continuing 'exclusion of persons with disabilities from the social mainstream' (*per* the SCC in *Eldridge*[90]) as illustrated by segregated institutionalization.

110. This breathtaking claim is made against a background where the evidence establishes (and the Province concedes[91]) that institutionalization is harmful *per se* to persons with disabilities. Indeed, in its closing submissions to the Board of Inquiry, the Province admitted that:

> Although the model of care for individuals in facilities has evolved, the continued reliance on large congregate care facilities, very much a model of the past, is not appropriate for the present or the future.[92]

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[87] Province's Post-Hearing Submissions to the Board of Inquiry: Appeal Book, Vol. 64 at pp. 21044-5 at para. 169
[88] Province's Post-Hearing Submissions Appeal Book, Vol. 64 at pp. 21051-2 at paras. 185-187 & p. 21058, para. 202
[89] Province's Post-Hearing Submissions, Appeal Book, Vol. 64 at pp. 21051 *et seq.*, at paras. 185 *et seq.*& p. 21058, para. 202
[90] *Eldridge* at paras. 56, 57 and 65 **BOA Tab 10**
[91] See, for example, the Province's Post-Hearing Submissions to the Board of Inquiry: Appeal Book, Vol. 64, p. 20990 at para. 41: "The Respondent does not disagree that living in community is the preferred model of delivering residential support, or that "institutionalization" has the effects that the Complainants outline."
[92] Province's Post-Hearing Submissions, Appeal Book, Vol. 64, pp. 21057-8, para. 201

111. The Deputy Minister testified to this,[93] the Joint Government-Civil society *Roadmap* addressed it at multiple points[94] and the Board of Inquiry took note of the fact that congregate, institutionalized support for the Complainants was harmful and unacceptable.[95] In short, the Province itself concedes the adverse effect but states that these have not been shown to be "based on" the grounds of disability.

112. With respect, for the Province to come before this Court and argue that Nova Scotia's quasi-constitutional protection to substantive equality is silent when the Province chooses to respond to poverty for persons with disabilities by segregating them in institutions while assisting persons without disabilities wherever they may choose to live, simply cannot be accepted. Under the Province's vision of equality, segregating persons with disabilities in institutions amounts to it saying that they are being treated as "separate but equal".[96] If, for example, 'persons with disabilities' in this case is substituted with 'racialized people', or members of an ethnic or religious minority, it can be immediately seen that the Province's contention of human rights indifference regarding segregated institutionalization must and would be immediately rejected.[97]

Additional Specific Claim by the Province re No Adverse Effects Established

113. The Province has also made a more abstract argument, unconnected to any of the steps in the *Moore* test, to the effect that: 'quality of living circumstances are not discrimination issues'.[98]

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[93] See the observations to this effect by the Board of Inquiry in its *Prima facie* discrimination decision at paras. 43, 301 and also her own testimony: Appeal Book, Vol. 22, pp. 7061 and 7226

[94] See, for example, *Roadmap* in the Appeal Book, Vol. 38 at pp. 12430 and 12452

[95] BoI Decision **RBOA Tab 1**, para. 43, 259-266, 272, 353, **355**-**9** and 427

[96] *Per* McIntyre, quoting the infamous US Supreme Court decision in *Plessey* v. *Ferguson* in *Andrews* at page 166(g) **BOA Tab 3** and repeated in *Moore* at para. 30 **RBOA Tab 23**

[97] The Province also claimed that in order to find institutionalization of persons in need with disabilities to be discriminatory, the Board "would need to determine that the concept of "discrimination" requires adherence to a specific model of delivering residential supports to the community served by the DSP, define with specificity the parameters of that model, and find the Respondent has failed to meet those parameters. (Appeal Book, Vol. 64, pp. 21051, para. 185). With respect, this is not the burden that must be met. Rather, it is to hold that the provision of "accommodative assistance" to persons with disabilities in terms that are inferior to those provided to recipients without disabilities is discriminatory.

[98] Province's factum (filed March 2020), paras. 75 and 84

The cases cited in support of the Province's argument, however, all make clear that this claim is only correct *if* the allegations of poor quality or flawed assistance programs are not linked to discrimination prohibited by the *Act*.

114. Here, *every* one of the four distinctions (for ease of reference, these are reproduced in Schedule "B" at the end of this factum) raised by the Complainants alleges a comparison to the quality of assistance provided to non-disabled people or people with disabilities whose needs can be met by the 'mainstream' social assistance system. With each disadvantageous distinction raised, the Complainants have made clear the way in which they, as persons with disabilities, experience inferior access to social assistance.

115. Accordingly, any argument by the Province that the Complainants are seeking to have the Court accept 'quality of treatment' claims, unconnected to the quality of assistance provided to non-disabled persons, is baseless.

ISSUE 5: 'Social Assistance is not the service at issue—Provincially supported housing is'

Overview

116. The Province's entire 'service' argument regarding the service being 'government provided housing' appears to be based on it having seized on a short-hand term that is sometimes used to refer to community-based supportive living (i.e., 'supportive housing') and then scaled it up and out of proportion to its actual role in an attempt to persuade the Court that this is, at its core, a case about "housing". The reality is that the human rights complaint, the dozens of witnesses—both called by the Complainants and the Province—all made clear that the accommodative services which the Complainants sought were those which would permit them to end their segregation and afford a chance to enjoy community-based supportive *living*.

117. In their complaint, the individual Complainants stated that what they sought, remedially,

from the Board of Inquiry was an Order against the Province requiring it to provide "the help and supports that I need to live in the community."[99] The witnesses—both called by the Complainants and those called by the Province—agreed that the 'pith and substance' of what is at issue in the case are 'supports and services' for community-based living.[100]

118. Even though the Board mistook the accommodation for 'the service' in its analysis, it, too, readily understood that what the Complainants were seeking by way of accommodative assistance were 'provincially-provided services for persons with disabilities'.

119. In response to the Province's attempt to characterize this as a case about housing, the simple, undisputed reality is that housing represents a fragment (less than 8%) of the total costs to support a person with significant intellectual disabilities in a small option home. Far and away, the single largest line-item for costs are for staff to support and assist the person with a disability. When the long-serving Executive Director of service-provider RRSS, was asked under oath what proportion of the monthly or yearly cost for a supported individual in a small options home was allocated to the actual cost of housing—she quickly replied that it was around 7.5%. In her evidence, the Deputy Minister of Community Services basically agreed with this assessment; staffing costs are the "most significant by far" cost component of supporting a person in the community.[101]

120. The pith and substance of the Complaint, the oral and documentary evidence about the *Social Assistance Act* and the DSP program is that they are all concerned with the supports and services required to support person with disabilities to live in community.

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[99] Human Rights Complaint filed August 1, 2014: Appeal Book, Vol. 1, p. 10, para. 48(b) (*per* Beth MacLean)
[100] See, for example the evidence of the Province's witnesses: Patricia Murray, Specialist, DSP program, Appeal Book, Vol. 20 at p. 6448; Renee Lockhart-Singer, Care Coordinator, DSP program, Appeal Book, Vol. 21 at p. 6599-6600 and at pp. 6658-9; and (then) Deputy Minister, Lynn Hartwell, at Appeal Book, Vol. 22 at pp. 7223, 7356-7 and 7361
[101] Testimony of Deputy Minister, Lynn Hartwell, Appeal Book, Vol. 22, at pp. 7357 and **7361**

The Complaint

121. The individual Complainants the range of supports and services they required. Beth Maclean's complaint is typical:

- "I have very little of my own money and so cannot pay for the supports that I need to live in the community."

- "However, in contrast to how the Province provides housing assistance to people in need without disabilities so that they can live in their communities, the Province has failed to provide the appropriate assistance which I need in order to live in the community."

- "Ongoing support in learning how to live in the community, travel and shop and access services in the community"

- "I feel that I am entitled to and should have been given the help and supports that I need to live in the community. The Province does provide assistance for people without disabilities who have no money; they are given the help they need by the Province to live in the community. The Province's failure, since 1986, to take into account and accommodate my different needs in offering supports for me to live in the community is discriminatory and a violation of s. 5(1)(a), (o) and/or (t) of the *Human Rights Act*."[102]

The Roadmap

122. This centrally important, reform-oriented document, jointly drafted and agreed to by the Province and disability-rights stakeholders in 2013 and which the parties and the Board relied on was 'the *Roadmap'*.[103] It discusses at length the problems that have accumulated with the Province's disability supports programs and it 'mapped' the way forward. Among its *key* assumptions is that: "All people can be supported to live in community".[104] The *Roadmap* uses the term "supported living" on 29 occasions to refer to the bundle of supports and services provided

[102] Human Rights Complaint filed August 1, 2014: Appeal Book, Vol. 1, pp. 6-8, paras 28, 37-39.
[103] *Choice, Equality, and Good Lives in Inclusive Communities, a **Roadmap** for Transforming the Nova Scotia Services to Persons with Disabilities Program*, (June 2013), Appeal Book, volume 38, p. 12427.
[104] The Board of Inquiry cited and relied on this principle, Prima Facie Decision, para. 335 **RBOA Tab 1** and see also the principle in the *Roadmap* itself: Appeal Book, volume 38, at p. 12437

to some persons with disabilities in order to assist them to live in community. Not once does it refer to "supportive housing."

The Testimony

123. The former Manager of the DSP program and the (now former) Deputy Minister both agreed that at the core of the DSP program, its essence, was about the provision of "supports and services" for person with disabilities.[105] Former Deputy Minister, Lynn Hartwell testified:

> Q. So [the Province's DSP program]– it's primarily about the supports and services and not really about the housing?
>
> A. That's right.[106]

The Province's Policy Papers and Briefing Notes to the Minister of Community Services

124. The record contains numerous DCS Ministerial Briefing notes which refer to persons with disabilities needing community based "supported living" options.[107] Conversely, there are many references in Provincial government documentation where the term 'supportive housing' is actually used to refer to the full range of supports and services that may be required to assist someone to live in community.

125. In summary, the Complainants identified the service at issue as social assistance and the accommodation required as the supports and services required for them to be able to live their lives in community.

Government Provided Housing is not "the actual service in question"

> *Urging the Court to compare groups of tenants in public housing to DSP clients is what Withler said that litigants and Courts should <u>not</u> do.*

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[105] See the testimony of Denise MacDonald-Billard, Appeal Book, Vol. 18 at p. 5757 and Deputy Minister, Hartwell Appeal Book, Vol. 22 at pp., 7223, 7356-7 & **<u>7361</u>**

[106] Evidence of Deputy Minister, Hartwell Appeal Book, Vol. 22 at p. 7361

[107] For example, many Briefing Notes to the Minister of Community Services contained in the record refer to the Department's disability supports program in terms of it providing "supportive living": Appeal Book, Vol. 42, p. 13794; Vol. 46, p. 15344; Vol. 47, pp. 15790-1 and 15813 and Vol. 50, pp. 16709

126. *Withler* held that while comparison remains a part of the discrimination analysis, a claimant need only point to a "distinction" that is based on a prohibited ground of discrimination—not more. And yet, the Province seeks to have this Court compare the group made up of DSP applicants with those who are public housing tenants so as to dismiss the claim. This is yet another way in which the Province seeks to backslide on the post-*Withler* rules by having the Court adopt, as 'fundamentally important',[108] a more stringent approach to the first step of the analysis than the Supreme Court's direction of simply proceeding to the second stage of the analysis once the claimant has pointed to a distinction based on a ground.

Comparing Provincially provided public housing to DSP is comparing unrelated benefits from completely different legislative regimes

127. The Province's proposed 'service' would have the Court consider a very different regime from an entirely unrelated legislative environment. The eligibility and conditionality of the two programs have entirely separate roots and criteria. For example, eligibility for public housing has an income threshold that is several times higher than social assistance (under both *SAA* and *ESIA*).[109] Conversely, the *SAA*'s Disability Support Program is deliberately tightly integrated into and part of the provincial social assistance regime.

Supports and services (including residential supports) under the Social Assistance Act are provided on the basis of legislated eligibility criteria, importantly including a strict 'needs test'/budget deficit system and maximum allowable asset limits which are completely absent from the public housing eligibility criteria.

128. The eligibility criteria for social assistance (whether *SAA* or *ESIA*) are very strict, relying on a needs test and asset limits. Neither of these are part of eligibility for public housing.[110] Contrary to the Province's proposal of 'comparing the experience of DSP applicants with public

[108] Province's factum (filed March 2020) at para. 37
[109] See the evidence of Neil MacDonald, Appeal Book Vol. 19 at p. 5968
[110] See the evidence of Neil MacDonald, Appeal Book Vol. 19 at p. 5969-70

housing applicants', in terms of the government's intended 'service', the two programs are fundamentally different.

Applicants/Recipients under the SAA have an array of procedural protections which do not exit on the PH side

129. Applicants and/or recipients of social assistance benefit from several important statutory protections. These include the right to be assisted once determined to be a person in need and the statutory obligation on the Province to provide assistance to a person found to be 'in need'.[111] Persons also have a legislated right to appeal adverse decisions made against them. None of these rights/protections are available to public housing tenants. Once again, the policy objectives of the two programs, in terms of accountability, are fundamentally inconsistent.

Contra the Province, public housing never squeezes several people together into a single bedroom nor forces them to use a communal bathroom.

130. When one explores the realities of living in segregated institutions for persons with disabilities, for example, the fact that the Province will have several persons living in a single bedroom who are forced to use communal toilets is simply *not* comparable to any reality in public housing.[112]

In fact, the majority of persons receiving DSP 'assistance' are <u>not</u> living in provincially provided housing: 'Government provision of residential support' is not what the case is about

131. The Deputy Minister also testified that a very high proportion of participants in the DSP program actually live in housing that they have obtained; "we are not providing the housing".[113] Thus the Flex program, the Independent Living Support program, virtually all the Small Option

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[111] In fact, and of relevance to this appeal, the *SAA Regulations* specify that a 'person in need' is to be assisted effective the day that their eligibility has been confirmed: *Municipal Assistance Regulations*, s. 2(1)(k)(i) and (ii) **RBOA Tab 26**.
[112] Evidence of Joanne Pushie, Appeal Book Vol. 6 at pp. 1460 and 1660
[113] Evidence of Deputy Minister, Hartwell Appeal Book, Vol. 22 at pp. 7369-7370

homes and Group Homes are *not* provided by the Province. Of the first five DSP programs listed in the table on page 8 of the Province's factum[114] (filed March 2020), (amounting to almost 70% of all DSP participants) live in dwellings *not* provided by the Province. This includes the Small Option homes which the Complainants sought, were found to be eligible for and waitlisted—for years—while they remained institutionalized. Accordingly, the Province's proposed comparators are fanciful—not grounded in the actual evidence that was before the Board concerning the DSP scheme.

132. The Province's suggestion is founded on a claim that housing—in the bricks and mortar sense—is the core of the complainant's case. The reality is that housing is at best a modest component of what the claimants have sought. Were it at the core of the claim, the individual appellants and/or their advocates could simply have gone into the private market and rented housing, using their social assistance entitlement. Housing, physical housing, is a small detail in these claims. In the same way that this case is not, at its core, about the Complainants' needs for food, clothing or utilities, nor is it about their needs for housing: Former Deputy Minister, Lynn Hartwell testified:

> Q. So [the Province's DSP program]– it's primarily about the supports and services and not really about the housing?
>
> A. That's right.[115]

ISSUE 6: Remedy

133. The Province argues that the award was arbitrary and contrary to human rights damage award principles. What the Province actually appears to contemplate, here, is that damage awards

[114] Not including the Adult Service Centres (i.e., daytime programming).
[115] Evidence of Deputy Minister, Hartwell Appeal Book, Vol. 22 at p. 7361

should be kept fairly low.[116] The "principle" appears as nothing more than a bare claim that the quantum of damages awarded here is too high, that is, not in keeping with other (completely unrelated) human rights cases in Nova Scotia.

The Principled Approach to Human Rights Compensation Awards: 'Arbitrariness'

134. In its factum, the Province cites the Board's own admission that the amounts it awarded ($100,000 for each of the two surviving Complainants and $10,000 for each of Sheila Livingstone's sister and niece) was 'arbitrary'.[117] By the same token, the Complainants also argued in their factum (filed March 2020) that the Board's identical $100,000 figure for *both* Joey Delaney and Beth Maclean was arbitrary—given the dramatically different periods for which these two Complainants were institutionalized. It will be appreciated that this reasoning is equally applicable to the Province's proposed identical compensation payments ($50,000) for both Mr. Delaney and Ms. MacLean.

135. Expressed in raw terms of 'dollars per year of institutionalization', the Province's proposal means that Ms. MacLean's compensation payment would be approximately 1/2 as much as Mr. Delaney's; it also means that Beth Maclean would be awarded approximately **$3-4 Thousand dollars for each year** of her discriminatory institutionalization. This cannot be countenanced and reflects the Province's failure to have applied a principled approach to the assessment of damages.

Damages not appropriate: *Wynberg*

136. The Province relies on *Wynberg* v. *Ontario* (Ontario CA 2006) to say that a significant damages award would create not just significant liability but this, in turn, could divert funding from other priorities.

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[116] Province's Factum (filed March 2020) at paras. 97-98 and 100
[117] Province's Factum (filed March 2020) at paras. 98 and 116

137. In response, the Court should understand that these remarks from the *Charter* case of *Wynberg* (2006), were said in explicit *obiter dicta* vis-à-vis a *Charter* s. 15 case in which the claim was actually dismissed.[118] Moreover, in 2010, the Supreme Court in *Ward* made clear that *Charter* damages *were* in fact available as a result of wrongful government action. Indeed, the SCC made clear that deterrence damages—both specific and general—were appropriate to deter future government rights violations.[119]

138. Finally, in *Conseil scolaire francophone de la Colombie-Britannique* v. *British Columbia*, the Supreme Court of Canada very recently clarified that the limited immunity from *Charter* damage awards which governments enjoy when legislation is subsequently found to violate the *Charter*, does *not* apply to claims regarding violative government policies. In fact, the Court said that awarding general deterrent damages can *promote* good governance in these circumstances.[120]

139. In short, *Wynberg* is not even good *obiter*.

140. In the present case, the violation of the Complainants' human rights occurred *not* as a result of any legislation. Rather, what makes this matter even more egregious is that Provincial policies such as the Moratorium were implemented despite obligations under the *Social Assistance Act* to provide assistance to persons determined to be 'in need'.

Deterrence Damages

141. As stated in the Complainants factum (filed in March 2020), the Courts have held, and the Province appears to concede in principle, that proper consideration in the awarding of damages should be given to both general and specific deterrence.[121] Here, that means that the Province

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[118] See *Wynberg* v. *Ontario*, 2006 CanLII 22919 (ON CA) at para. 191

[119] See, for example, *Ward v. Vancouver* (SCC 2010) at para. 38 **BOA Tab 35**

[120] *Conseil scolaire francophone de la Colombie-Britannique* v. *British Columbia*, 2020 SCC 13 **RBOA Tab 8** at paras. 171 *et seq*.:

> "On the contrary, the possibility of damages being awarded in respect of *Charter*-infringing government policies helps ensure that government actions are respectful of fundamental rights."

[121] Complainants' Factum (filed March 2020) at para. 102.

would be deterred from repeating its discrimination toward the Complainants or, more generally, continue its policies so as to carry out discrimination against others.

142. In its factum, the Province supports the Board when it expressed skepticism at the effectiveness of general deterrence in influencing the Province to change its policies to end its multi-faceted discrimination against persons with disabilities (e.g., moratorium, endless wait lists, treating persons determined to be in need with 'contempt' etc.). In its remedy decision, the Board, stated:

> **68** I doubt the deterrent effect of larger awards against government. It seems to me that governments are likely to be relatively impervious. In the end, damages as such do not impact the decision-makers as individuals and, above a certain amount, lose meaning as a public deterrent. I daresay the findings I have made and am delivering about their indifference towards Ms. MacLean, Mr. Delaney and Ms. Livingstone will affect them more than a money award. My findings affect them politically and in their self-regard as people concerned about the disabled.
>
> -and-
>
> **69** It also seems to me that if I were to award the kinds of damages the Complainants seek, then I would be, in effect, positing a systemic remedy. I would be imposing a remedy that seeks to force systemic change by applying what may almost be said to be fines on the Province.[122]

143. The Province, too, endorses this view when it argues:

> 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;[123]

144. There are two related points here; i) there was considerable evidence before the Board regarding the decades-long history of the Province's many unfulfilled "plans" to transform the system, and ii) an assumption that a general deterrence award will not "speed up" the Province's efforts.

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[122] *MacLean v. Nova Scotia (Attorney General)*, [2019] NSHRBID No. 5, **RBOA Tab 2**
[123] Province's Factum (filed March 2020) at para. 103

Plans to Transform the System

145. As set out in Schedule "A" to this factum, the Province has published many plans to transform the system over the past **35** years. It appears that every few years, a new set of plans for reform are announced and, put simply, the wait-lists for community supports just keep growing.[124] The Board heard that, after 35 years, parents and community advocates are skeptical and lack faith in the Province's announcements to end the segregation and devaluation of people with disabilities.[125] The Deputy Minister, herself, agreed that skepticism on the part of families and stakeholders was reasonable and well-placed.[126]

146. Most recently, when, in October 2017, the Minister of Community Services referenced the failure to make any new investments in community-based Small Option homes for "over 15 years",[127] she announced that the Province was, in fact, opening eight new small option homes over the following two years. However, at the remedy hearing in September 2019, the Province's Director of Disability Supports, admitted that, in fact, at the end of the two-year period, the Province had, actually, only opened *one* small option home.[128] Indeed, for the 2019-2020 budget year, the Province had announced *no* further small option homes for adults.[129] On the other hand, the same witness spoke to and confirmed that by August 2019, the wait list of persons who had been qualified and determined to be 'persons in need' had, in fact grown to 1,560 persons from 1,490 in November 2017.[130]

147. It is submitted that the lack of trust on the part of persons with disabilities, their families

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[124] See waitlist info from 2014 (total number on waitlist = 1071) up to 2019 (total number on waitlist = 1560) in the Appeal Book, Vol. 43, pp. 14355-6 (waitlist graph covering 2010-2015); Appeal Book, Vol. 57, p. 18977
[125] Board of Inquiry, *Prima Facie* Discrimination Decision, para. 315 **RBOA Tab 1**
[126] Testimony of Deputy Minister, Lynn Hartwell, Appeal Book, Vol. 22, at pp. 7193-4 and 7209
[127] Minister of Community Services in *Hansard* (October 10, 2017) Appeal Book, Vol. 58 at 19064 and **19068**
[128] Testimony of Lisa Fullerton, Appeal Book Vol. 28, pp. 9245-6
[129] *Ibid* at 9248
[130] See Exhibit 45 (dated November 2017), Appeal Book, Vol. 57, p. 18977 and Exhibit 85 (dated August 2019), Appeal Book, Vol. 62, p. 20650

and advocates is well-placed. Conversely, the Province's submissions about the Province's Transformation of its Disability Supports Program are fanciful and ring hollow in light of the evidence covering the past thirty years, including the past three years.

A general deterrence award will not "speed up" the Province's efforts.

148. This part of the Province's argument is, perhaps, the most troubling. The Province comes before this Court and formally states that no award will influence *its* decision-making with respect to the provision of assistance to persons with disabilities—that is, people who have *all* been determined to be 'persons in need' and, therefore, entitled to assistance under the *Social Assistance Act*.

149. It will be recalled that in its *prima facie* discrimination decision, the Board's review of the years of Beth MacLean languishing in Emerald Hall, left it astounded at the indifference on the part of top government officials which would have permitted such situations: "The Province met their [i.e., the Complainants and others with disabilities] pleas with an indifference that really, after time, becomes contempt."[131] The Board repeatedly characterized as "indifferent", government attitudes which would leave the most vulnerable in this way:

> The uppermost echelons of government were, by all the evidence, utterly impervious to it all. The Province would not find or create a solution. They could have done something. They chose not to. The moratorium prevailed.
>
> -and-
>
> Successive governments of all political stripes simply ignored everyone over decades and condemned our most vulnerable citizens to a punishing confinement. I cannot think in systems here. The "system" through its people knew well what had to be done and strenuously recommended it. People with the final authority were blind, deaf and especially dumb to the effects of what they were doing.[132]

[131] Board of Inquiry *Prima Facie* Discrimination, para. 62 **RBOA Tab 1**
[132] Board of Inquiry *Prima Facie* Discrimination, paras. 412 and 413 **RBOA Tab 1**

150. Seen in this context, the Province's contention that 'no award made for purposes of general deterrence will influence its decision making,' amounts to a statement of impunity by the Province to the rule of law. It is tantamount to a statement that it is 'above' the *Human Rights Act* and its remedial authority.[133] Given that deterring future human rights violations is one of the core purposes of human rights law, it is submitted that this is a situation in which a significant deterrence award ought to form part of the overall award made—indeed, in the interests of good governance.[134]

No air of malice or ill will toward the Complainants…..the discrimination was 'more institutional than personal'

151. With respect, and bearing in mind the Board's statements cited above regarding the indifference and contempt shown by the Provincial government toward persons with disabilities, the fact that, as the Province argues, individual case workers or institutional staff may have properly carried out their duties, is irrelevant vis-à-vis the crucial focus of equality claims—the impact of the respondent's actions/inactions on the Complainants.[135] Indeed, for the Board and the Province to have focused on whether the Complainants had been singled-out for any animus is, as in a direct discrimination claim, again, indicative of its formalistic approach to equality under which, if everyone is treated identically, there can be no discrimination.

152. Moreover, the tacit admission by both the Board[136] and, in the Province's factum (at para. 104), that the discrimination experienced was the result of "institutional" rather than individual

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[133] The Province's statement flies in the face of the *Human Rights Act* provision that binds the Crown "and every servant and agent of Her Majesty" (s. 21 of the *Act*).
[134] See *Conseil scolaire froncophone* (*supra*) at paras. 171 *et seq*. **RBOA Tab 8**
[135] *Quebec (Attorney General) v. A*, 2013 SCC 5 **BOA Tab 27** at paras. 327-8, *Moore* **RBOA Tab 18** at para. 61. See also Centrale des syndicats du Québec *v.* Quebec (Attorney General), 2018 SCC 18 at para. 35 **RBOA Tab 6**
[136] Board of Inquiry Remedy Decision, para. 66. Recall, too, the Board's statement in its Remedy decision that the Complainants' profound human rights violations actually 'fall into the general category of disabled people waiting placement'…which, in the Board's view, …"is very common, ordinary." BoI Remedy Decision, para. 63 **RBOA Tab 2**

decisions (i.e., the source of the discrimination was systemic in its origins and scope), absolutely points to the appropriateness of an award directed at "influencing government behaviour in order to secure state compliance with the *Charter* in the future."[137]

Quantum of Damages

153. After its preliminary arguments, the Province made a series of claims concerning the actual assessment of the damage award granted.

'The award is well beyond the range of other damage awards in Nova Scotia'

154. Despite criticizing the Board's award for being contrary to human rights principles, the Province's ultimate contention -- that human rights awards within the jurisdiction should be in the same range,[138] represents an abandonment of the core compensatory principle that the nature and size of an award must reflect the gravity of the violation. In short, the Province's efforts to compare awards irrespective of harm suffered is pointless and not useful to the Court.

155. As noted above, the amount proposed by the Province (i.e., $50,000 to both Mr. Delaney and Ms. MacLean[139] i.e., a paltry award of just a few thousand dollars for each of the 'soul destroying' years of institutionalization) was made without an articulated rationale and is inherently arbitrary, given the different durations of discrimination experienced by both Complainants.

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[137] *Ward* (*supra*) at para. 29 **BOA Tab 35** and *Conseil scolaire francophone* (*supra*) at paras. 171 *et seq*. **RBOA Tab 8**

[138] Province's Factum (filed March 2020) at para. 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 entitle the Board to ignore the general damages awards made in other cases in Nova Scotia." (emphasis added)

[139] Province's Factum (filed March 2020), para. 108

Wrongful imprisonment inappropriate analogy

156. The Province first argues that the wrongful imprisonment awards are not useful comparators because, it states, unlike prison, DSP institutionalization was/is a 'voluntary' program. While perhaps having some validity in a very abstract/theoretical sense, it is conceded by all parties that for families of persons with disabilities, who were unable to support their disabled child at home any longer, the Province too often conditioned its offer of any 'assistance' on it being in an institutional setting. As the Board found at several points in its *prima facie* discrimination ruling, the living situations were, fundamentally, custodial in nature.[140]

157. From there, the Province argues that there is a fundamental distinction between the situation of those wrongfully imprisoned as compared to persons with disabilities who need supports and services—observing that the Complainants "have always been and always will be dependent upon others for support with all aspects of their personal care and living arrangements."[141] This blanket statement about the needs of people with disabilities is clearly an exaggeration—as illustrated in the case of Beth MacLean. Expert evidence called from Dr. Scott Theriault at the remedy hearing to substantiate the harm caused to her by years of discriminatory institutionalization confirmed that, had Ms. MacLean not been institutionalized, she could have expected to live independently in her own accommodation—albeit with external supports coming in to assist her on a regular basis.[142]

158. Moreover, while ambiguous, it is assumed that the Province does not mean to argue that the greater need a person with disabilities has for supports, the lesser value should be assigned to

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[140] See the Board's *prima facie* decision **RBOA Tab 1** at paras. 171, 361 and the Board's Remedy decision **RBOA Tab 2** at paras. 11 (twice) and 13. See also a comprehensive list of the Board's related findings that institutionalization is *de facto* custodial in the Complainants, Post-Hearing Submissions Appeal Book, Vol. 64, pp. 21158-21160 (paras.17-19) through confinement.

[141] Province's Factum (filed March 2020) at para. 110

[142] See the testimony of Dr. Scott Theriault, Appeal Book, Vol. 27, pp. 8886-8888

their having been discriminatorily institutionalized. The fact that Mr. Delaney and Ms. Livingstone both lived successfully for many years in small option homes—and thrived while living there—is devalued in the Province's contention that their autonomy 'has been and always will be' compromised.

159. Lastly, the Province seeks to distinguish the situation of a wrongfully imprisoned person to the Complainants by claiming that the fact that the Complaints were well-cared for during their institutionalization and that staff bore no ill-will toward them is, somehow, in contrast to an imprisoned person.[143] With respect, presumably a wrongfully imprisoned person, who is subsequently compensated, has also been treated properly by prison staff and, yet, this doesn't serve to diminish the amount of the award. There is certainly nothing in the record nor judicially noticeable that would permit any other conclusion. These are *not* bases to distinguish the experiences of wrong fully imprisoned people from the Complainants' discriminatory institutionalization.

Comparison to civil awards for wrongfully institutionalized persons

160. The Province seeks to diminish the appropriateness of the factually similar case of *Muir* in which a person, wrongfully institutionalized in a 'training school' for persons with mental disabilities, sued civilly and was granted two separate award amounts; one for wrongful sterilization ($250,000—"the maximum amount allowed by law" plus an additional amount of $125,000 in aggravated damages) and, *separately*, for wrongful institutionalization for which she was awarded an *additional* $250,000.

161. The Province makes no substantive argument for distinguishing the awards. It says that in *Muir*, the plaintiff was wrongly labelled as having an intellectual disability. This is not a basis for

[143] Province's Factum (filed March 2020) at para. 110

distinction. It further argues that Muir was not properly tested before admission to the institution. Here, it has been admitted by the Province[144] and the Board found that there was never a medical basis for the Complainants' detention in Emerald Hall.

162. Moreover, the Province completely fails to address the important judicial determination in *Muir* that, for purposes of assessing damages, it is fair and proper for a Court to be informed by wrongful imprisonment awards in making an award for wrongful/discriminatory institutionalization.

163. From there, the Province makes no attempt at all to address the British Columbia SC decision which followed and applied *Muir*. Thus, the BC Supreme Court in *J.H. v. R.*[145] agreed with the concept of making an award that was informed by wrongful imprisonment awards[146]. (Again, the Complainants are anxious to remind the Court that both *Muir* and *J.H.* are about 25 years' old and the amounts awarded are similarly out of date.)

164. At the remedy hearing, the Complainants' submissions reviewed human rights case law holding that compensation by tribunals ought to be informed by both tort principles and quanta.[147] Thus, in the recent NS Board of Inquiry remedy decision of YZ v. *HRM*, the Board followed case law from the BC Supreme Court and the Federal Court of Appeal to find that tort case law applies in the assessment of compensatory damages, because goal is the same: to make the complainant whole.[148]

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[144] Factum of the Province (filed March 2020) at para. 18, (second bullet)
[145] J.H. v. R., 1998 CanLII 15125 (BC SC) **RBOA Tab 12**
[146] See para. 127 of *J.H*
[147] Submissions by counsel at the Remedy hearing: Appeal Book, Vol. 29, pp. 9437 *et seq*.
[148] *Y.Z. v. HRM*, **RBOA Tab 25** (Board of Inquiry, May 2019) at paras. 12-14, citing Sulz v. Attorney General et al, 2006 BCSC 99 (BCSC) **RBOA Tab 23** at paras. 87-89, affirmed *Sulz v. Minister of Public Safety and Solicitor General*, 2006 BCCA 582 (CA) and *Canada (A.G.) v. Morgan*, **RBOA Tab 5** 1991 CanLII 8221(FCA) *per* Marceau, J.A. at paras. 16 -21: "the assessment of the damages recoverable by a victim [of a *Human Rights Act* violation] cannot be governed by different rules". See, also, *Hogan v. Ontario (Minister of Health & Long-Term Care)*, 2006 HRTO 32 at paras. 160-173, cited by the Province for other principles. **RBOA Tab 11**

165. Lastly, the Province fails to address the fact that in line with human rights compensation cases which mostly apply tort law compensation principles, and which call for expert evidence to be adduced to substantiate the harm caused by the discrimination, the Complainants arranged for and called expert evidence from two psychiatrists regarding the harms caused. The Crown did not attempt to call its own expert evidence nor did it undermine the evidence of doctors Theriault or Sulyman.

166. Also, the Province makes a bid to overturn the Board's many factual findings that the Complainants were 'retained in a custodial setting.' In response, it must be remembered that the Board actually 'took a view' and toured the locked ward which is Emerald Hall, as well as the locked institutions Quest and CTP (Lower Sackville) and the RRC in Kings. It heard days of evidence concerning these locked premises and the restraints used in these institutions, had dozens of Provincial government documents which themselves describe the Province's institutions as 'custodial'. It is submitted that far more than labels, the actual facts and practices were what drove the Board to its factual determinations.

167. Accordingly, it is submitted that the Province has not established the inapplicability of wrongful imprisonment and wrongful institutionalization awards and that this Court has all the relevant evidence required to substitute an award in accordance with applicable human rights compensation principles in the range of **$275,000-$500,000 per year** for **each year** in which the Complainants' human rights were violated.

Award made to Olga Cain and Jackie McCabe-Sieliakus

168. In its factum, the Province makes no arguments concerning the Board's failure to grant an award to Ms. Livingstone's estate. Rather, the Province argues that no award can be made to anyone other than a person whose rights have been violated can be compensated. The NS Human

Rights Commission made submissions to the Board's Remedy hearings which cited Nova Scotian human rights case law to the contrary where relatives and family members were granted awards by Boards of Inquiry.[149]

169. It is submitted that the authorities cited by the Human Rights Commission should be followed and applied by this Court.

PART 6 – ORDER AND RELIEF SOUGHT

170. The Complainants humbly request that this Honourable Court:

a. Allow the appeal of Ms. MacLean with respect to the Board of Inquiry's ruling that she had not established *prima facie* discrimination with respect to the period of her residence at the Kings RRC and that the matter be remitted to a differently constituted Board of Inquiry for the Phase Two hearing in this aspect of her case.

b. Allow the appeal of Ms. Livingstone with respect to the Board of Inquiry's ruling that she had not established *prima facie* discrimination with respect to her period of residence at the Harbourside Lodge in Yarmouth and that the matter be remitted to a differently constituted Board of Inquiry for the Phase Two hearing in this aspect of her case.

c. Allow the appellants' appeal with respect to the damages awarded and for this Court to substitute its determination for that of the Board regarding damages for the violations found.

d. With respect to the request that the matter be remitted as necessary to a differently constituted tribunal, it is submitted that this is appropriate for the following reasons:

(a) The Board's remarks during the hearings and in its decision make clear that the Board is opposed, on a personal, political level, to the concept of disability-based systemic

[149] See the Submissions of the NS Human Rights Commission (August 23, 2019), Appeal Book Volume 64, pp. 21205 at 21207 and 21208

discrimination, including: “If I am speaking from a position of privilege and am "un-woke", then so be it.”[150] This goes considerably beyond a statement regarding the Board’s understanding of the law to one of personal antipathy to it.

(b) Based on the fact that the written record in this matter is complete, a differently constituted tribunal can effectively assume jurisdiction.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of September, 2020.

Vincent Calderhead
Counsel for the Appellants,
Beth MacLean, Olga Cain on behalf of Sheila Livingstone, Tammy Delaney on behalf of Joseph Delaney

[150] BoI *Prima Facie* Discrimination Decision, para. 282, **RBOA Tab 1**

APPENDIX A - LIST OF CITATIONS REFERRED TO IN PART 5

Cases

1. *MacLean v. Nova Scotia (Attorney General)*, [2019] NSHRBID No. 2
2. *MacLean v. Nova Scotia (Attorney General)*, [2019] NSHRBID No. 5
3. *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143
4. *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 SCR 868 [Grismer]
5. *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75
6. *Canada (Attorney General) v. Morgan* (C.A.), 1991 CanLII 8221 (FCA), [1992] 2 FC 401
7. *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31
8. *Centrale des syndicats du Québec v. Quebec (Attorney General*), 2018 SCC 18 (CanLII), [2018] 1 SCR 522
9. *Cogswell v. Kings (County)*, 1988 CanLII 5661 (NS SC)
10. *Conseil scolaire francophone de la Colombie Britannique v. British Columbia*, 2020 SCC 13
11. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 (CanLII), [2007] 1 SCR 650
12. *Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 SCR 241
13. *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624
14. *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 SCR 703
15. *Hogan v. Ontario (Health and Long-Term Care*), 2006 HRTO 32
16. *International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6
17. *J.H. v. R.*, 1998 CanLII 15125 (BC SC)
18. *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 SCR 548

19. *Kings (County of) v. Cogswell*, [1987] NSJ No. 116

20. *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497

21. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293

22. *Lovelace v. Ontario*, 2000 SCC 37 (CanLII), [2000] 1 SCR 950

23. *Moore v. British Columbia (Education*), 2012 SCC 61, [2012] 3 SCR 360

24. *Nova Scotia (Community Services) v. Boudreau*, 2011 NSSC 126

25. *Nova Scotia (Community Services) v. E.M.*, 2011 NSSC 12

26. *Quebec (Attorney General) v. A*, 2013 SCC 5

27. *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 (CanLII), [2018] 1 SCR 464

28. *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41

29. *Sparks v Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82

30. *Stadler v Director, St Boniface/St Vital*, 2020 MBCA 46

31. *Sulz v. Attorney General et al*, 2006 BCSC 99

32. *Vancouver (City) v. Ward*, 2010 SCC 27 (CanLII), [2010] 2 SCR 28

33. *Vriend v. Alberta*, [1998] 1 SCR 493

34. *Withler v. Canada (Attorney General*), 2011 SCC 12, [2011] 1 SCR 396

35. *Y.Z. v. HRM*, (Board of Inquiry, May 2019)

United Nations Sources

36. *International Covenant on Economic, Social and Cultural Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27

37. UN Committee on Economic, Social and Cultural Rights, General Comment 20: *Non-Discrimination in Economic, Social and Cultural Rights*, E/C.12/GC/20 (10 June 2009)

Legal Literature

38. Brodsky, Gwen, Shelagh Day and Yvonne Peters: *Accommodation in the 21st Century (2012)* (online)

39. Brodsky, Gwen: *Moore v British Columbia: Supreme Court of Canada Keeps the Duty To Accommodate Strong*

APPENDIX B – STATUTES AND REGULATIONS

1. *Employment Support and* Income *Assistance Act,* 2000, c. 27, s. 1 .

An Act to Encourage the Attainment of Independence and Self-sufficiency through Employment Support and Income Assistance

WHEREAS independence and self-sufficiency, including economic security through opportunities for employment, are fundamental to an acceptable quality of life in Nova Scotia;

AND WHEREAS individuals, government and the private sector share responsibility for economic security;

AND WHEREAS some Nova Scotians require help to develop skills and abilities that will enable them to participate as fully in the economy and in their communities so far as it is reasonable for them to do;

AND WHEREAS the Government of Nova Scotia recognizes that the provision of assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance are the concern of all Nova Scotians;

AND WHEREAS it is necessary that income assistance be combined with other forms of assistance to provide effectively for Nova Scotians in need;

AND WHEREAS employment support and income assistance must be effective, efficient, integrated, co-ordinated and financially and administratively accountable:

Short title

1 This Act may be cited as the Employment Support and Income Assistance Act. *2000, c. 27, s. 1* .

Purpose of Act

2 The purpose of this Act is to provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency. *2000, c. 27, s. 2* .

Interpretation

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;

(b) "deferred income" includes retroactive pay, retroactive pension or other benefits and any form of compensation for loss of income, including compensation paid for insufficient notice of termination of employment;

(c) "employment services" means services and programs to assist recipients in enhancing their employability and quality of life, including programs provided by other departments, agencies or governments in partnership with the Minister;

(d) "Minister" means the Minister of Community Services;

(e) "municipality" means a regional municipality, incorporated town or municipality of a county or district;

(f) "overpayment" means any assistance paid pursuant to this Act that was paid in error, was overpaid or was paid based on false or misleading information supplied by an applicant or that otherwise ought not to have been paid according to this Act and the regulations, and includes sums paid to a person who receives deferred income with respect to any period for which assistance was provided and sums paid to a person that were agreed to be repayable, whether out of the proceeds of the deferred sale of an asset, from deferred income or otherwise;

(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. *2000, c. 27, s. 3* .

*** *** *** ***

Assistance to persons in need

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

(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.

2000, c. 27, s. 7 .

2. *Social Assistance Act*, c. 432 RSNS, 1989 amended 1994-95, c. 7, ss. 105-106, 150; 2000, c. 27, s. 22

An Act to Provide for Social Assistance

Short title

1 This Act may be cited as the *Social Assistance Act*. R.S., c. 432, s. 1.

PART I

MUNICIPAL ASSISTANCE

INTERPRETATION

Interpretation of Parts I and II

4 In this Part and in Part II,

(a) "council" means the council of a municipal unit;

(b) "designated residence" means a residence designated pursuant to Section 8;

(c) "home" means a home for special care as defined in the Canada Assistance Plan and includes a home for the aged or the disabled, a licensed nursing home, a licensed boarding home and a social services institution designated by the Minister;

(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;

(e) "social services committee" means a social services committee of a municipal unit or, where no social services committee is appointed pursuant to subsection (3) of Section 5, a council meeting as a committee of the whole. R.S., c. 432, s. 4; 2000, c. 27, s. 22.

GRANT OF ASSISTANCE

Duty of committee to assist person in need

9 (1) 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.

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

Municipal Assistance Regulations

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

1 In these regulations

(a) "Act" means ~~Part II~~ [Part I] of the Social Assistance Act;
[Note: Part I of the Act was repealed by S.N.S. 1977, c. 63, s. 1; Part II was renumbered Part I as part of the statute revision of 1989.]

(c) "applicant" means a person who applies for assistance under the Act;

(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;

(j) "home" means a home for special care as defined in the Homes for Special Care Act;

(k) "income" means earned income as defined by the municipal social services policy and includes unearned income as defined in these regulations;

(m) "municipal social services policy" means written directives relating to the granting of assistance issued by a Municipal Council and approved by the Minister;

(n) "recipient" means a person who qualifies for and receives assistance under the Act, these regulations and the municipal social services policy;

(o) "resident" means a person in need who is being cared for in a home;

(q) "unearned income" shall include income maintenance payments such as Old Age Security, Guaranteed Income Supplement, Canada Pension, Family Benefits, Workers' Compensation, War Veteran's Allowance, Unemployment Insurance, income from insurance, income from alimony and maintenance payments, income from stocks and bonds, income from training allowances, and any other income not directly resulting from employment.
Clause 1(q) amended: O.I.C. 84-321, N.S. Reg. 58/84.

Standards of administrative organization
2 (1) The Social Services Director of the Committee shall

(a) provide applications for assistance in the form prescribed or approved by the Minister;

(b) record on a budget form prescribed or approved by the Minister, the financial information required to be recorded on such budget form;

(c) determine the immediate and continuing eligibility of each applicant;

(d) provide assistance in accordance with the provisions of the Act, these regulations and the municipal social services policy;

(e) interview the applicant and keep a written summary on file of the interview;

(f) give the applicant a clear indication of his responsibility to inform the Social Services Director of any change in his circumstances;

(g) give the applicant notice of his right to appeal and a copy of the procedures for filing an appeal;

(h) require an applicant who is employable to produce acceptable evidence that he has made a reasonable effort to obtain employment;

(i) require an applicant to provide the information required to determine his eligibility for assistance;

(j) ensure that the applicant has no other reasonable source of income which can be used for his financial needs;

(k) grant assistance to those persons who are eligible effective

(i) the date of the application, if the person meets the eligibility requirements of the Act, these regulations and the municipal social services policy on that date, or

(ii) the day the person meets the eligibility requirements of the Act, the regulations, and the social services policy;

(l) review semi-annually a recipient's circumstances to determine if the recipient continues to be eligible for assistance and keep a written summary of the review on file;

SCHEDULE "A"

Government Reports on Deinstitutionalization & the Need for Community-Based Options

1. *Report of the Task Group on Homes for Special Care* (Department of Community Services ("DCS"), **1984**) Appeal Book, volume 49, page 16209

2. *The Mentally Disabled Population of the Halifax County Region—Needs and Direction* (DCS **1989**) Appeal Book, volume 35, page 11275

3. *Memorandum to Cabinet*: Minister of Community Services, Honourable Guy LeBlanc (November **1990**) Appeal Book, volume 31, page 9984

4. *Review of Children's Training Centres—Report & Recommendations to the Minister of Community Services*, (DCS **1994**) Appeal Book, volume 31, page 9997

5. *Moving Towards Deinstitutionalization: A Discussion Paper*, (DCS **1995**) Appeal Book, volume 35, page 11339

6. *Report of the Review of Small Option Homes*, (DCS **1998**) Appeal Book, volume 35, page 11377

7. *An Independent Evaluation of the Nova Scotia Community Based Options Community Residential Service System*, (aka 'the Kendrick Report', Commissioned by the Department of Community Services, Published January **2001**) Appeal Book, volume 36, page 11743

8. *Report of Residential Services*, (DCS **2008**) Appeal Book, volume 37, page 12197

9. *Choice, Equality, and Good Lives in Inclusive Communities, a Roadmap for Transforming the Nova Scotia Services to Persons with Disabilities Program*, (the Nova Scotia Joint Community-Government Advisory Committee on Transforming the Nova Scotia Services to Persons with Disabilities Program) (**2013**) Appeal Book, volume 38, page 12427

SCHEDULE "B"

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