2019 C.A. No. 486952

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

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

Appellants

-and-

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

Respondent

-and-

Nova Scotia Human Rights Commission

Respondent

-and-

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

Respondent

-and-

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

Intervenors

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PART I: OVERVIEW OF THE APPEAL

1. The Province relies on the Overview provided in its First Factum, filed on March 6th, 2020.

PART II: STATEMENT OF FACTS

2. The Province relies on the Statement of Facts provided in its First Factum, subject to some additional references to the Record which will be made throughout.

PART III: LIST OF ISSUES

3. The Province will address the following points arising from the factums of the Appellants[1]:

   (a) Arguments on discrimination

      (i) Defining the service

      (ii) Meaningful access/the "ramp" analogy

      (iii) The service at issue is residential support/housing

      (iv) Appellants' non-comparative approaches to the discrimination argument

   (b) Arguments that the Board should have found further instances of discrimination

      (i) Ms. MacLean's placement at Kings

      (ii) Ms. Livingstone's placement at Harbourside

   (c) Arguments as to systemic discrimination

[1] For convenience, the Province will use the term "the Appellants" when referring to the Individual Appellants, the Disability Rights Coalition, and the Intervenors together.

(d) Arguments as to remedy

(i) Factors considered in setting the quantum of damages

(ii) Human Rights decisions do not support an "amount-per-year" approach to damages

(iii) Reference to wrongful conviction/imprisonment and wrongful institutionalization cases is inappropriate

PART IV: STANDARD OF REVIEW OF EACH ISSUE

4. The Province relies on the arguments as to the standard of review provided in its First Factum. Errors of law are reviewed on a standard of correctness, and errors of fact, or mixed law and fact, are reviewed on a standard of palpable and overriding error. While the bulk of the arguments go to questions of law, the Province notes throughout several instances where the Appellants' arguments amount to challenging a finding of fact, or of mixed fact and law.

PART V

ARGUMENT

5. The factums of the Appellants review in great detail the evidence of the negative effects that flow from the fact that government has over-relied on large institutions as a resource for those who seek residential supports through the Disability Support Program ("DSP"). It is worth reiterating upfront that this evidence, which was summarized thoroughly in the Decisions under appeal, is largely undisputed. Government has recognized that there are negative effects from reliance on large institutions, and continues to engage in reform.

6. This case is not a debate about the existence or degree of those negative effects; there are many complex social issues where government arguably can do better to serve the needs of vulnerable populations. This case is about whether those negative effects amount to legal discrimination by government against the persons seeking those residential supports. Put differently, the case is about whether a complex social problem like the one raised here should be turned over to a Board of Inquiry, and now this Court, to resolve through the lens of discrimination, or whether it is one of the many social challenges that have only policy, and not legal, solutions.

ARGUMENTS ON DISCRIMINATION

Defining the service

7. All parties in this case are in agreement that the Board erred in defining the service, leading to a misapplication of the test for discrimination. However, the Appellants offer an alternate definition of the service which would equally lead to errors in applying the test.

8. While the Appellants continue, to some extent, to argue that no comparative analysis is necessary—an issue that will be addressed later in these submissions—it is clear from a review of the submissions that the real debate here is over the proper comparative analysis to apply. The Appellants attempt to define "the service" at issue in a way that forces a comparative analysis in their favour. However, the Province submits that "the service" proposed by the Appellants is overly vague and does not speak to the real issues raised in the Complaint. Furthermore, if "the service" truly is what the Appellants propose, then a comparative analysis would not show discrimination.

9. The Appellants seek to define the service alternatively as "social assistance" or "social services". While no specific definition of this term is offered by the Appellants, they generally seem to take it to mean the range or "continuum" of services offered to low-income Nova Scotians under the *Employment Support and Income Assistance Act* ("*ESIA*")[2] and the *Social Assistance Act* ("*SAA*")[3].

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[2] *Employment Support and Income Assistance Act*, SNS 2000, c 27, Appellants' Joint Book of Authorities, Vol, 2, Tab 40.
[3] *Social Assistance Act*, RSNS 1989, c 432, Appellants' Joint Book of Authorities, Vol, 2, Tab 42.

10. If "social services" means the various supports offered under those two Acts, then it must be noted that those amount to a wide and varied range of supports. These would include various financial supports (i.e. monetary payments to recipients) designed to address needs for shelter[4], basic comforts, and demonstrated "special needs" (including dental care, optical care, pharmacare, special diet, transportation, child care, funeral arrangement costs, maternal nutritional supplements, and school supplies.)[5] They would also include non-financial supports such as employment supports under *ESIA*[6] (defined as "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"[7]) and the residential supports of the DSP[8], which fall under the *SAA*. The majority of these services are available to varying degrees to persons with and without disabilities (with the exception of residential supports under the DSP, which are specific to the needs of persons with disabilities.) Other than the fact that they form a "continuum" of programs which make up a large part of the mandate of the Department of Community

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[4] *ESIA*, at s. 3(a)(i); *Program Policy, Employment Support and Income Assistance*, Appeal Book, Part II, Vol 3, Book 45, page 14995, at s. 5.4.1 at page 15061.
[5] *Program Policy, Employment Support and Income Assistance*, Appeal Book, Part II, Vol. 3, Book 45, page 14995, at Chapter 6, pages 15104 – 15152.
[6] *Program Policy, Employment Support and Income Assistance*, Appeal Book, Part II, Vol. 3, Book 45, page 14995, at pages 15152 – 15160.
[7] *ESIA*, at s. 3(c).
[8] DSP Program Policy, Appeal Book, Part II, Vol. 3, Book 33, Tab 5-E page 10734 at pages 10741 - 10743; DSP Alternative Family Support Policy, Appeal Book, Part II Vol. 3, Book 33, Tab 6-A, at pages 10815 – 10857; DSP Direct Family Support Policy, Appeal Book, Part II, Vol. 3, Book 33, Tab 6-B, at pages 10858 – 10880; DSP Independent Living Support Policy, Appeal Book Part II, Vol. 3, Book 33, Tab 6-C, at pages 10882 – 10908; DSP Flex Individualized Funding Policy, Appeal Book, Part II, Vol. 3. Book 34, Tab 6-E, at pages 11015 – 11037.

Services, "social services" do not all share the same features and are not designed to address the same needs.

11. This, of course, presumes that it is meaningful to define "social services" as referring to all the services provided pursuant to those two statutes, and only those services. That in and of itself is a narrow definition of "social services"; many other government activities in support of low-income Nova Scotians might be captured under a broad definition of "social services," including the programs of Housing Nova Scotia. In order to frame up a comparison that supports their argument, the Appellants artificially create a single "service" based on the fact that various services fall under two related statutes, not based on a meaningful analysis of the services themselves.

12. To say that the service in question is "social services" does not allow any meaningful comparative lens to be brought to the analysis, any more than it would to describe the services at issue in *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31 ("*Skinner*")[9] and *Auton (Guardian ad litem of) v. British Columbia (Attorney General),* 2004 SCC 78 ("*Auton*")[10] as "health". It would invite the Court to compare the design and accessibility of different services which, by their nature, address different needs.

13. This is borne out by the actual comparative analysis offered by the Appellants in their factums, where the comparison is drawn between financial supports under *ESIA* (which

[9] *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31, First Book of Authorities of the Respondent (AGNS), Tab 7.
[10] *Auton (Guardian ad litem of) v. British Columbia (Attorney General),* 2004 SCC 78, First Book of Authorities of the Respondent (AGNS), Tab 2.

according to the Appellants, are available as of right, without a waitlist, and in the community of the recipient's choosing,) and the residential support services under the DSP (which, it is acknowledged, have limited capacity, involve waitlists, and involve placements which may not be in the recipient's preferred community.) This is, however, inviting a comparison which sheds no light on the question of discrimination, it simply speaks to the two programs being very different in nature.

14. It is true that financial supports under *ESIA* are "as of right," meaning that there is no global legal cap on the availability of financial support (though there are limits on the amount an individual recipient can receive.) It flows from that fact that there is no waitlist for recipients. And because the "service" involves receiving a cheque, the recipient can receive the cheque in the community of his or her choice. These are simply features of a financial support program, as opposed to other kinds of social programs. Indeed, the comfort allowance available to participants in DSP is a similar financial support to that provided under *ESIA*, and has the same features.[11]

15. The Appellants go further, suggesting that because part of the financial support under *ESIA* is designed to cover costs of shelter, and because there are no restrictions on where an *ESIA* recipient can live, therefore the *ESIA* cheque amounts to assistance "permitting them to live in their communities". Without expressly saying it, the implication is that *ESIA* is somehow a complete system of support guaranteeing that the recipient can live in their

[11] Cross Examination of Denise MacDonald-Billard, Appeal Book Part II, Vol. 2, Book 18 Tab 28, at pages 5752 – 5753; 5757- 5758; DSP Basic and Special Needs Policy, Appeal Book, Part II, Vol. 3, Tab 5-C, at page 10645.

preferred form of housing and community of choice (the same kind of service that the Appellants wish were provided through DSP.) Suffice it to say, there is no evidence on the record that would allow this Court to infer that financial support through *ESIA* is substantial enough to allow recipients complete freedom to live in their preferred form and location of housing; it would be a very surprising suggestion indeed.

16. The residential supports provided through DSP are, for the most part, not financial support like the cheque provided to *ESIA* recipients. They involve finding and funding an actual place to live, and the staffing and other supports required in order to allow the recipient to live there. It is non-sensical to draw comparison with *ESIA* financial supports; the services are very different in nature. Residential supports could not possibly be "as of right" in the way financial assistance can be, since the supply of supports will have limitations that do not apply to purely financial supports. Limited supply will create the possibility of waiting lists, and limitations on the locations where supports are available. Pointing to these differences is not pointing out discriminatory deficiencies in the DSP; it is simply pointing out that the services are inherently different, to the point where a comparative lens will tell us nothing about discrimination.

17. If we do accept the Appellants' insistence that "social assistance" is the service on which the comparative analysis is to be founded, then the only meaningful analysis would be to make a comparison between financial supports only, which are at least truly comparable. Looking at the financial supports available to persons with disabilities and persons without disabilities, however, one could only come to the conclusion that there is no discrimination.

First, the evidence is that with respect to the financial supports provided to DSP recipients—for example, the comfort allowance[12] or the Flex Living with Family[13], or Direct Family Support for Children[14] designed to financially support those living at home—the distinctions drawn by the Appellants fall flat. Those financial supports, like *ESIA* payments, are provided without waitlists and are available in whatever living circumstances and community the individual chooses.[15] (Notably, the amount of financial support available under DSP programs such as Flex Living with Family greatly exceeds the financial support provided by *ESIA*.[16])

18. Secondly, and perhaps most importantly, there is no restriction preventing someone eligible for DSP from instead choosing the supports available to a non-disabled person under *ESIA*. The evidence is that this is both possible, and occurs with some frequency.[17] In other words, the distinction between *ESIA* and DSP benefits is not a distinction between disabled and non-disabled persons. The distinction is between disabled and non-disabled persons seeking the financial supports of ESIA on the one hand, and disabled persons who instead seek the residential supports of the DSP on the other hand. It is not a comparison based on disability *per se*, it is simply a comparison of two very different kinds of "social assistance".

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[12] DSP Basic and Special Needs Policy, Appeal Book, Part II, Vol. 3, Tab 5-C, at page 10645.
[13] Flex Individualized Funding Policy, Appeal Book, Part II, Vol. 3. Book 34, Tab 6-E, at pages 11015 – 11037.
[14] Direct Family Support Policy, Appeal Book, Part II, Vol. 3, Book 33, Tab 6-B, at pages 10858 – 10880
[15] Cross Examination of Deputy Minister Lynn Hartwell, Appeal Book, Part II, Vol. 2, Book 23, Tab 34, at pages 7308-7309.
[16] Flex Individualized Funding Policy, Appeal Book, Part II, Vol. 3. Book 34, Tab 6-E, page 11015, at page 11023; Direct Examination of Tricia Murray, Appeal Book, Part II, Vol. 2, Book 19 Tab 29, at page 6008-6009.
[17] Cross Examination of Lynn Hartwell, Appeal Book Part II, Vol. 2, Book 23, Tab 34, at pages 7291 – 7293.

Meaningful access/the "ramp" analogy

19. Another angle taken by the Appellants, towards the same flawed comparison, is an argument that the Individual Appellants seek an "accommodation" in order to obtain the service. They sometimes refer to the service as "accommodative social assistance" in order to frame the argument in those terms. This is an attempt to fit the issue within a "meaningful access" framework, as in cases like *Moore v. British Columbia (Education),* 2012 SCC 61 ("*Moore*")[18] and *Eldridge v. British Columbia (Attorney General),* [1997] 3 SCR 624 ("*Eldridge")*[19]. However, the arguments simply make little sense, as this case does not involve an accommodation in order to obtain a service; it involves the service itself.

20. It can be discrimination, in providing services, to fail to provide an accommodation to disabled persons in order to allow meaningful access to the service. Meaningful access can be helpfully explained using the "ramp" analogy, employed by the Appellants at several points[20]. If the service is a courthouse, then it is not enough to say the same set of stairs gives everyone equal access to the courthouse; a wheelchair user requires a ramp in order to have meaningful access. Thus, in *Eldridge*, the services were the hospital services available to all, and sign language interpretation was the "ramp" providing meaningful access to the Complainants. Similarly in *Moore*, the service was the general education

[18] *Moore v. British Columbia (Education)*, 2012 SCC 61, First Book of Authorities of the Respondent (AGNS), Tab 15.
[19] *Eldridge v. British Columbia (Attorney General),* [1997] 3 SCR 624, First Book of Authorities of the Respondent (AGNS), Tab 8.
[20] eg. DRC factum at para 104.

available to all students, and the "ramp" was the special education services that would allow Moore meaningful access to that education.

21. The same analogy cannot logically be drawn here. Residential supports are not a special form of accommodation that allows DSP recipients to access some other government benefit that is generally available to all. Residential supports *are* the government benefit being sought. The concept of "meaningful access," or the Appellants' reference to "accommodation," are misplaced. They are not arguing about how persons with disabilities "access" social assistance, they are arguing about the quality of the service being accessed.

The service at issue is residential support/housing

22. The Province reiterates the argument from its First Factum, that the service at issue is better understood as residential supports (or "housing," or "the supports required to live in community.") It should be clear that this is the service truly at issue in the case at hand—not simply a financial benefit, but an actual program designed to find and fund places to live and the supports required to facilitate the placements.

23. The Appellants point to the Complaint itself as an indication that the service at issue is "social services". However, an actual review of the Complaint[21] tells a different story; the Complaint addresses not "social services" in the abstract, but supportive housing specifically. Thus, the background facts in the Complaints lay out the history of how the Complainants have (or have not) been provided supportive housing by the Province. The

[21] Complaint under the *Human Rights Act*, Appeal Book, Part I, Vol. 1, Book 1, Tab 1.

specific requests made of the Board at paragraphs 48, 88, and 126 of the Complaint are all related to supportive housing. Similarly, the DRC at paragraph 134 of the Complaint describes the alleged discrimination as the "fail[ure] to provide adequate, supportive, community-based housing for people with disabilities." At paragraph 161 of the Complaint the DRC describes the "service" as:

> "access to social assistance or other public assistance or service required *in order to enable persons with disabilities who are in need to live in an appropriate care setting*".[22] (emphasis added)

24. The same theme is evident throughout the Appellants' factums, where despite the efforts to shift the "service" to something else, they simply cannot articulate the basis of the Complaint without making it about non-financial residential supports. Thus, the Individual Appellants' factum articulates the key distinction as being between "persons in need who simply require basic needs assistance" and "persons with disabilities requiring supports and services ("assistance") to live in community."[23] The DRC labels the service "access to social assistance or other public assistance or service," but then goes on to clarify that the "particular" services at issue are "those that enable them to live in the community".[24] In both cases, the distinction is not between disabled and non-disabled persons; the distinction is between the types of services and support being sought. The Intervenors, for their part, seem to clearly grasp that the service at issue is "community living supports and services".[25]

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[22] *Ibid.* at page 31.
[23] Individual Appellants' factum at para.129.
[24] DRC factum at para 94.
[25] Intervenors' factum at para. 11.

25. Even a casual attempt to understand this case through a comparative lens of discrimination shows that the service at issue is residential support. No other element of "social services" is identified in the Complaint or brief. As argued in the Province's First Factum, applying a comparative lens to that question involves either comparing how the Province provides supportive housing through the DSP to how it provides supportive housing to non-disabled persons through Housing Nova Scotia, or else comparing the Individual Appellants' experiences to what they would have experienced had they not had disabilities. Through either comparative lens, it is clear that the problems identified by the Appellants here are not issues of discrimination under the *Human Rights Act*. Indeed, the Appellants appear to concede that if this court properly views the "service" as residential supports, the argument leads to a "discrimination dead-end".[26]

Appellants' non-comparative approaches to the discrimination argument

26. As the Supreme Court of Canada has continually reiterated, a discrimination analysis is inherently a comparative exercise.[27] Despite this, the Appellants continue to propose that this Court can determine the question without any comparative evidence whatsoever.[28] The Appellants' failure to acknowledge the centrality of comparison to the question of discrimination renders suspect their entire argument.

[26] Individual Appellants' factum at para.108.
[27] First Factum of the Respondent (AGNS) at paras.37-39.
[28] DRC factum at para.119.

27. Two specific non-comparative approaches to the discrimination argument, coming from outside Canadian anti-discrimination law, are raised by the DRC and require a specific response.

28. First, the DRC cites the United States Supreme Court case of *Olmstead v. LC*, 527 US 581 (1999), ("*Olmstead"*)[29]. In *Olmstead*, the US Supreme Court considered facts similar to the present case, but against a statutory regime very different from the Nova Scotia *Human Rights Act*. The *Americans with Disabilities Act* ("*ADA*") also prohibits discrimination against persons with disabilities, but unlike the Nova Scotia *Human Rights Act*, the language of the *ADA* expands the general definition of "discrimination" by outlining certain examples of what the Act prohibits, which explicitly includes over-reliance on institutions as a residential setting.

29. Thus, in passages "most relevant to this case" according to Ginsburg J, the *ADA* explicitly lists "isolation" and "segregation" as "forms of discrimination", and lists "institutionalization" as a "critical area" within which "discrimination against individuals with disabilities persists".[30] She characterizes these sections as:

> Congress for the first time referr[ing] explicitly to segregation of persons with disabilities as a form of discrimination, and to discrimination that persists in the area of institutionalization.[31]

[29] *Olmstead v. LC*, 527 US 581 (1999), Second Book of Authorities of the Respondent (AGNS), Tab 1.
[30] *Olmstead* at pp.588-589. Note that the DRC, at para.174 of its factum, chooses to quote the relevant section in its entirety, which tends to obscure the fact that Ginsburg J edited her quote to hone in on the specific words of the section that list institutionalization as a form of discrimination.
[31] *Olmstead* at p.589, fn1.

She clearly interprets these sections as adding something over and above the general prohibition on discrimination:

> Ultimately, in the *ADA*, enacted in 1990, Congress *not only* required all public entities to refrain from discrimination … *additionally*, in findings applicable to the entire statute, Congress *explicitly identified* unjustified "segregation" of persons with disabilities as a form of discrimination.[32]

30. She also distinguishes the *ADA* from another anti-discrimination statute, again, on the basis that "[u]nlike the *ADA* … the *Rehabilitation Act* contains no express recognition that isolation or segregation of persons with disabilities is a form of discrimination."[33]

31. She also cited Regulations requiring that programs be delivered "in the most integrated setting appropriate,"[34] which clearly bolsters her interpretation that the *ADA* uniquely characterizes institutionalization as a form of discrimination *per se*. The DRC, in dealing with this passage, suggests that Ginsburg J. described the Regulations as only providing "guidance" and that this Court should "presume" that she did not consider the Regulations to be binding.[35] This is simply inaccurate. Ginsburg J. characterizes that the "informed judgment" in the Department of Justice's "consistent advoca[cy]" is useful as guidance.[36] There is nothing indicating that she considered the Regulation to be non-binding (which would be a surprising conclusion to say the least.)

32. On the basis of this clear statutory language, invoked throughout the decision, Ginsburg J. rejects the State's argument about the lack of a comparative lens, on the basis that

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[32] *Olmstead* at p.600, references omitted, emphasis added.
[33] *Olmstead* at p.600, fn11.
[34] *Olmstead* at p.592.
[35] DRC factum at para.176.
[36] *Olmstead* at pp.597-598.

"Congress had a more comprehensive view of the concept of discrimination advanced in the *ADA*."[37]

33. It should be noted as well that the dissent in *Olmstead* clearly acknowledges that the majority finds a "more comprehensive definition of discrimination"[38] in these passages of the *ADA* than the "well-established understanding" of the term. Rejecting this "special definition," the dissent would have applied the normal comparative discrimination analysis. The claim would have failed, because it wrongly conflated the prohibition on discrimination with the "imposition of a standard of care".[39]

34. The DRC's interpretation of *Olmstead* suggests that the *ADA* does not "deem institutionalization to be discrimination,"[40] but is in fact substantially identical to human rights legislation found throughout Canada. This interpretation requires a willful blindness to the actual reasoning in the case, which very much emphasizes how different the *ADA* is from the usual comparative approach to discrimination. This marked difference in statutory language may explain why *Olmstead*, which has been a leading disability rights case in the US for over twenty years, appears to have never been cited in a Canadian anti-discrimination case.

35. The second non-comparative approach suggested by the DRC comes out of international treaty law. While the Board considered and rejected the DRC's arguments with respect to

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[37] *Olmstead* at p.598.
[38] *Olmstead* at p.620.
[39] *Olmstead* at p.623.
[40] DRC factum at para.178.

the *UN Convention on the Rights of Persons with Disabilities*, the DRC in its factum instead focuses on the *International Covenant on Civil and Political Rights ("ICCPR")*. Or, more precisely (as the DRC does not quote the ICCPR itself,) they focus on a 2005 statement by the UNHRC, which expressed that government

> should increase its efforts to ensure that sufficient and adequate community-based housing is provided to people with mental disabilities.[41]

36. It is difficult to respond to this argument. If there were a specific allegation that Nova Scotia were in breach of a specific obligation under the ICCPR, an argument could be made as to whether the placements under DSP amount to "detention" within the meaning of the ICCPR, and generally what it means to comply with a recommendation to "increase efforts," among other things.

37. However, that is not actually the argument being made, and properly so. As the Board rightly notes, international conventions are beyond the mandate of a human rights complaint. Neither the Board, nor this Court, has jurisdiction to consider an alleged treaty breach; international treaty obligations are not directly imported into Canadian law.[42] The cases cited by the DRC correctly note that international treaties are used as "a matter of statutory interpretation".[43]

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[41] DRC factum at para.196.
[42] *R v Myette*, 2013 ABCA 317 at 34, Second Book of Authorities of the Respondent (AGNS), Tab 2.
[43] DRC factum at p59, fn 211.

38. There is no issue of statutory interpretation here. The issue is the definition of "discrimination". That definition is well-established in Canadian case law, with no need to "ensure consistency" with international obligations (even if the DRC had presented robust arguments as to what those obligations are.) The obligations alluded to in the ICCPR are not even "non-discrimination" obligations, and the treaty makes no mention of disability; whatever obligations may be contained there, they provide no guidance to this court in interpreting the meaning of discrimination under the *Human Rights Act*.

39. For all of the reasons argued above, the Province submits that this Court should reject the discrimination analysis offered by the Appellants. The correct discrimination analysis is as argued in the Province's First Factum, and requires drawing a comparison between the way the Province provides housing support to persons with disabilities and persons without. On that analysis, the claim of discrimination must fail.

ARGUMENTS THAT THE BOARD SHOULD HAVE FOUND FURTHER INSTANCES OF DISCRIMINATION

40. The Province's position is that the Board erred in finding discrimination at all in this case, and further, that the Appellants offer an incorrect discrimination analysis overall. However, one argument by the Individual Appellants is that the Board should have found discrimination with respect to *additional* aspects of the Complaint—that is, that the Board correctly upheld the claim of discrimination, but failed to go far enough. It is difficult to respond to these aspects of the argument, in light of the significant errors made by the Board in finding discrimination in the first place. However, the Province offers these submissions in the alternative.

Ms. MacLean's placement at Kings

41. First, the Individual Appellants ask this Court, in addition to upholding the finding of discrimination with respect to Ms. MacLean's DSP supports since 2000, to also find that she was discriminated against when placed at Kings RRC as a teenager in 1986. The Province's position is that the Board was correct to dismiss this aspect of the claim, although, in part, for different reasons.

42. Kings is a long-term care facility and its residents are typically there for years; it is, in that sense, their home. This is different from the hospital setting that formed the basis for the Board's finding of discrimination. Although the evidence established that Ms. MacLean was placed at Kings in 1986, there was little evidence as to why she was placed there. In 1986, the Province was just beginning its "deinstitutionalization" efforts,[44] and the DRC's expert witness, Dr. Michael Bach, acknowledged that during this period, there was no consensus on the most appropriate model for supporting individuals with disabilities.[45] There was no evidence as to the circumstances surrounding her admission, including whether community-based options were available or were explored. Ironically, several

[44] See, for example: "The Mentally Disabled Population of the Halifax County Region, report of the Officials Committee," Appeal Book, Part 2, Vol. III, Book 35, Tab 1, page 11275; "Moving Towards Deinstitutionalization A Discussion Paper, Appeal Book, Part 2, Vol, III Book 35, Tab 3, at page 11341 "Historical Context;" and untitled paper "The Community-Based Options Program," Appeal Book, Part 2, Vol. III, Book 35, Tab 2, that notes at pages 11324-11325, "In addition, in the early 1980s, there were a number of officials committee processes…The Officials Committees strongly advocated the development of services for these individuals based on the least intrusive model and one which, where possible, advocated for deinstitutionalization of large facilities providing services for the mentally handicap and mentally disabled in those particular regions."

[45] Direct Examination of Dr. Michael Bach, Appeal Book, Part II, Vol. 2, Book 5, Tab 10 at pages 986-987; 1052-1053; 1102, 1110; Cross Examination of Dr. Michael Bach, Appeal Book, Part II, Vol, 2, Book 5, Tb 11, at pages 1236-1239.

witnesses spoke about the period from about 1986 to 1995 as being the “golden age” for community-based options, during which time many small options homes were developed.[46] Crucially, 1995 was the year that the Province took over responsibility for the administration and funding of placements under what is now known as the DSP.[47]

43. The Board concluded that, on the evidence, it could not determine what disadvantage Ms. MacLean faced while placed at Kings. It also correctly assessed that, given the evidence that the consensus as to best practice evolved over time, it could not make the same conclusions as to disadvantage in 1986 that it might make for a later point in history. The Province argues that the Board incorrectly concluded that proving disadvantage was sufficient to prove discrimination. However, in the alternative, if disadvantage is sufficient to prove discrimination, the Board correctly assessed that disadvantage was not proven given the evidence as to this aspect of the claim. The argument on this point is a challenge to the Board’s factual finding that the evidence did not support an inference of disadvantage, which should be reviewed only if that finding involves a palpable and overriding error.

44. Furthermore, the Province claims that the Board had additional reasons to reject this aspect of the discrimination claim, and this Court should reject it for those reasons as well.

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[46] Decision of the Board of Inquiry on Prima Facie Discrimination, Appeal Book, Part I, Vol. 1, Book 1, Tab 2, at page 95.
[47] Community Based Options Program Small Options Review, Appeal Book, Part II, Vol. 3, Book 31, Tab 2 at page 10173; DCS Briefing Note, Appeal Book, Part II, Vol, 3, Book 31 Tab 9, at page 10233.

45. First, the Individual Appellants fail to address the time limitation in the *Human Rights Act* with respect to discrimination claims. The *Human Rights Act* has established a 12-month limitation period:

> **29(2)** Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

46. This claim was filed in 2014, twenty-eight years after Ms. MacLean entered Kings, and a full fourteen years after she left Kings. Kings, as noted, is a different residential setting, and the specific incidents that led to her placement at Kings and her removal from Kings are discreet actions and not part of any continuing breach. Therefore, this aspect of the claim is well-beyond the limitation period established in the *Act,* a fact that is not addressed by the Individual Appellants or the Board.

47. Secondly, the Board's discrimination analysis is grounded in the fact that the Province had what came to be referred to as a "moratorium" on construction of new small options homes, therefore limiting the possibility of placements outside of larger settings like Kings. However, as noted, the moratorium was only in place after 1995, and the prior period was described as the "golden age" of small options homes. Therefore, the lack of small options homes does not explain Ms. MacLean's placement at Kings; the Board's discrimination analysis cannot be extended to periods before 1995.

48. Lastly, of critical importance is the fact that the Province took over the administration and funding of all residential settings in 1995.[48] The Province therefore cannot be liable for a

[48] *Supra* note 22..

period in which it had no control over the administration of community residential options. This fact was not addressed by either the Board or the Individual Appellants in their factum. Therefore, it would be erroneous for this Court to find the Province responsible for Ms. MacLean's placement at Kings, even if that placement were found to be discriminatory.

Ms. Livingstone's placement at Harbourside

49. Similarly, the Individual Appellants ask this Court, in addition to upholding the finding of discrimination with respect to Ms. Livingstone's DSP supports since 2000, to also find that she was discriminated against after she was transferred to Harbourside Lodge in Yarmouth in January of 2014. The Province's position is that the Board was correct to dismiss this aspect of the claim, although, in part, for different reasons.

50. Harbourside is an Adult Residential Centre and is connected to a hospital. It was thought that this placement would benefit Ms. Livingstone given her myriad of physical health issues in addition to her intellectual disability.[49] The Board found as a fact that Harbourside was a "good placement" and that Ms. Livingstone "was content there," that she "received proper care," and that she "coped quite well".[50]

51. As with the situation above, the Province argues that the Board incorrectly concluded that proving disadvantage was sufficient to prove discrimination. However, in the alternative, if disadvantage is sufficient to prove discrimination, the Board clearly and correctly

[49] Direct Examination of Renee Lockhart-Singer, Appeal Book, Part II, Vol 2, Book 21, Tab 31, at pages 6634 – 6635.
[50] Decision of the Board of Inquiry on Prima Facie Discrimination, Appeal Book, Part I, Vol. 1, Book 1, Tab 2, at page 140.

assessed as a matter of fact that disadvantage was not proven given the evidence as to this aspect of Ms. Livingstone's claim. Thus, if the Board's overall approach to finding discrimination is correct, it was also correct to dismiss this aspect of the claim. The argument on this point is a challenge to the Board's factual finding that the evidence did not support an inference of disadvantage, which should be reviewed only if that finding involves a palpable and overriding error.

52. These additional arguments made by the Individual Appellants with respect to certain aspects of Ms. MacLean's and Ms. Livingstone's claims, only go to illustrate the problems with the Board's, and the Appellants', discrimination analyses to begin with. The Board's approach would require a placement-by-placement review to assess the degree of "disadvantage", with no clear sense as to how to measure that disadvantage, what the disadvantage is compared to, or what degree amounted to discrimination. The Appellants instead would conclude that every placement which is not a small options home (so long as the individual desired a small options home) is discriminatory, while ignoring that "support to live in a small options home" is not a service available to the general public which could ground the kind of comparative analysis at play in *Moore*. This further illustrates that what the Appellants are asserting is a free-standing right to the placement of one's choice under the DSP, not an analysis of whether the placement is actually discriminatory.

ARGUMENTS AS TO SYSTEMIC DISCRIMINATION

53. The DRC, and the Intervenors, argue that having found discrimination, the Board erred by not also making a finding of systemic discrimination. Again, in light of the serious errors in the Board's discrimination analysis, it is difficult to respond to this argument. The Province argues that there should have been no finding of discrimination in the first place. However, in the alternative, the Province argues that if the Board's discrimination findings were correct, then it was also correct not to find systemic discrimination.

54. The argument here is similar to that made above with respect to Ms. MacLean and Ms. Livingstone. The Board incorrectly concluded that proving disadvantage was sufficient to prove discrimination. However, in the alternative, if disadvantage is sufficient to prove discrimination, the Board clearly and correctly assessed as a matter of fact that disadvantage is an issue that cannot be presumed across the whole system; it must be assessed on a case-by-case basis. The argument on this point is a challenge to the Board's factual finding that the evidence did not support an inference of disadvantage, which should be reviewed only if that finding involves a palpable and overriding error. Given the Board's version of discrimination it would almost be impossible to make a finding of systemic discrimination; with respect, this says more about the flaws in the Board's discrimination analysis than it does about the concept of systemic discrimination.

55. The DRC's argument in favour of a finding of systemic discrimination serves to further illustrate the flaws in the DRC's discrimination arguments to begin with. The systemic argument would lead to a conclusion that every participant in the DSP, across the province and since the dawn of the *Human Rights Act*, has experienced discrimination because of

the limitations of the supports available. It becomes even clearer, in that light, that the comparative aspect of the discrimination analysis has gone missing completely. This is not an argument about persons with disabilities being denied a benefit that the government provides to persons without disabilities; it is an assertion of a free-standing right to community living for persons with disabilities. Whatever the merits of that asserted right, it is not a claim of discrimination under the *Human Rights Act*.

ARGUMENTS AS TO REMEDY

56. Finally, the Individual Appellants argue that the Board erred by setting the quantum damages for discrimination too low, despite the quantum being the highest amount ever awarded in Nova Scotia and among the highest cases of damages awarded by a human rights tribunal in Canada. The Province, of course, argues that no damages are merited as no case of discrimination has been made out; and in the alternative, argues that the quantum of damages was higher than supported by the appropriate principles. However, in the further alternative, the Province also argues that the Individual Appellants are incorrect in arguing that the quantum of damages was too low.

Factors Considered in Setting the Quantum of Damages

57. At several points in their factum, the Individual Appellants reference the Board “reducing the award” for a variety of reasons.[51] However, this is not an accurate depiction of what

[51] Individual Appellants’ factum at paras. 173, 174, 183, 186.

the Board did in this case. The Board considered a number of relevant factors in setting this award. Nowhere in the Board's analysis can it be said that the awards were "reduced;" in fact, as noted, these awards are the largest general damage awards made by human rights tribunals in Nova Scotia and are among the highest in Canada.

58. There is no limit as to the factors that a Board of Inquiry may find relevant in fashioning an award of general damages. The factors considered in the within situation include the fact that the Individuals had been dependent on the Province for their care for some time, and would be for the rest of their lives. This consideration does not "mitigate the significance of the human rights violation" as the Individual Appellants state. It does, however, highlight the distinction between the situation of the three Individual Appellants and the plight of those who are wrongfully convicted and incarcerated. Whereas those who have been wrongfully incarcerated have lost their ability to live independent lives, the Individual Appellants will always rely on the Province for their support and care (unless they choose to no longer seek the voluntary supports offered by the DSP.)

59. The Individual Appellants state that the Board erred in considering that many people would meet the definition of being "disabled" and thus would have a claim. They argue that the number is actually limited to those who have been "found to be persons in need and who have been forced to wait, in institutions, etc."[52] In fact, based on the Appellants' categorizations of the service and the "denial of the service," the number of potential claimants would include, at a minimum, all those current and past participants in the DSP

[52] Individual Appellants' factum at para.185.

who do/did not have the placement that they want, in their community of choice, immediately. In other words, the number of potential claimants is in no way diminished by the Individual Appellants' manner of framing the complaint.

60. The Individual Appellants state that it was an error of law for the Board to reject the principle of deterrence in setting the award. However, the Province submits that at the Remedy phase the evidence was clear that, with respect to Ms. MacLean and Mr. Delaney, the Province is committed to providing them with small options homes.[53] Moreover, on a systemic level, the Province is also committed to transforming the system and moving away from larger facilities into smaller community-based options.[54] Therefore, this Court should find that the Board was correct in minimizing the need for deterrence to as a relevant factor in assessing damages.

[53] Direct and cross examination evidence of Lisa Fullerton, Appeal Book, Part II, Vol. 2, Tab 43, 44, at pages 9033, 9197, 9318-9319.
[54] Direct examination of Deputy Minister Lynn Hartwell, Appeal Book, Part II, Vol. 2, Tab 33, at pages 7193-7195.

Human Rights decisions do not support an "amount-per-year" approach to damages

61. In *Vancouver v Ward*, 2010 SCC 27 ("*Ward*"),[55] the Supreme Court of Canada states that an appropriate award of compensation must be fair to the party against whom the order is made.[56] It is submitted that this is a consideration that must be borne in mind when deciding the appropriate quantum of damages. As noted in *Ward*, courts must be judicious in ordering significant damages against the state and thereby diverting funds from government programs:

> [53] Just as private law damages must be fair to both the plaintiff and the defendant, so s. 24(1) damages must be fair — or "appropriate and just" — to both the claimant and the state. The court must arrive at a quantum that respects this. Large awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective. In considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests.

This is a relevant consideration in this situation in which, based on the Appellants' arguments, the number of claimants is significant, as are the damages being sought.

62. The Individual Appellants request that this Court take an approach to the determination of general damages for a human rights breach that would see each of the three individuals receive $275,000 - $500,000 per year, for every year that they were not in a small options home. This would equate to the following awards:

- Beth MacLean – $9,075,000 - $16,500,000 (1986 – 2019)
- Joseph Delaney – $2,750,000 - $5,000,000 (2010 – 2020)

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[55] *Vancouver v Ward*, 2010 SCC 27, Appellants' Joint Book of Authorities, Vol. 2, Tab 35.
[56] *Ibid*, at para. 20.

- Sheila Livingstone – $3,300,000 - $6,000,000 (2004 – 2016)

63. It is submitted that these amounts are not consistent with human rights awards across Canada, and the "amount per year" approach is not in keeping with human rights awards, wrongful institutionalization cases, and many wrongful conviction/incarceration cases referenced by the Individual Appellants.

64. As stated in the Province's First Factum, the largest human rights award in Canada is $200,000.00, awarded to the Complainant in *AB v. Joe Singer Shoes,* 2018 HRTO 107[57] for years of egregious sexual harassment. The amounts being sought by the Individual Appellants would dwarf that award. As noted in our First Factum, should this Court uphold findings of discrimination, an award of $50,000.00 to each of Ms. MacLean and Mr. Delaney would be an appropriate award. Such an amount would reflect both the principles and amounts of other human rights general damages awards, as well as the situations of the Individuals, including the voluntary nature of the DSP, and the fact that although waitlisted for supportive community-based housing for many years, the Board found that they continued to receive quality care from the Province during that time.

65. In human rights cases in which significant general damage awards have been awarded, Tribunals have generally not awarded damages on the basis of an amount per year. For example:

[57] *AB v. Joe Singer Shoes*, 2018 HRTO 107, First Book of Authorities of the Respondent (AGNS), Tab 1.

- In *YZ v. HRM*, 2014 CanLII 67576[58] the Complainant was awarded $80,000 in general damages (with interest) as a global amount.
- In *O.P.T. v. Presteve Foods Ltd.,* 2015 HRTO 675[59] the Complainant was awarded a global sum of $150,000 for enduring significant sexual harassment.
- In *AB v. Joe Singer Shoes*, *supra*, the Complainant was awarded the global amount of $200,000 for egregious sexual harassment occurring over approximately 18 years.

66. As well, in *King* v *Government of Prince Edward Island,* 2016 CanLII 21171[60] the only case found in which damages were awarded based on an inability to access a province's DSP, the Complainant was awarded $15,000.

67. In fact, the Province was able to find only two cases in Nova Scotia in which general damages were awarded on a per year basis. In *David v. Sobeys Group Inc.*, 2016 CarswellNS 1109,[61] the Board Chair ordered the amount of $3,000 per year for the seven years before the matter came before her. As well, in *Willow v. Halifax Regional School Board, ("Willow"),* 2006 NSHRC 2[62] the Board Chair awarded general damages of $5,000 per school year in which the perpetrator of discrimination was principal. These amounts are far more modest than those being sought by the Individual Appellants.

68. Furthermore, there was no evidence proffered during the hearing that any harm experienced by Ms. MacLean was any greater or less than that of Mr. Delaney, despite the fact that Ms.

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[58] *YZ v. HRM*, 2014 CanLII 67576, First Book of Authorities of the Respondent (AGNS), Tab 30.
[59] *O.P.T. v. Presteve Foods Ltd.,* 2015 HRTO 675, First Book of Authorities of the Respondent (AGNS), Tab 19.
[60] *King v. Government of Prince Edward Island (Disability Support Program),* 2016 CanLII 21171, First Book of Authorities of the Respondent (AGNS), Tab 13.
[61] *David v. Sobeys Group Inc.,* 2016 CarswellNS 1109, Second Book of Authorities of the Respondent (AGNS), Tab 3.
[62] *Willow v. Halifax Regional School Board*, 2006 NSHRC 2, First Book of Authorities of the Respondent (AGNS), Tab 24.

MacLean had been at the Nova Scotia Hospital for a longer period of time. Therefore, the Individual Appellants' arguments that Ms. MacLean's award ought to have been twice as much as Mr. Delaney's has no basis in the evidence.

Reference to wrongful conviction/imprisonment and wrongful institutionalization cases is inappropriate

69. One overall theme of the Individual Appellants' approach to damages is their argument by analogy to tort cases of wrongful imprisonment. This argument is flawed in several ways. First and foremost, it is simply wrong in principle to import damages from the world of a tort claim of wrongful imprisonment into a human rights claim of discrimination. If the Individual Appellants had brought tort claims of wrongful imprisonment, the Province would have had a complete defence in that placements under the DSP, unlike the incarcerative detentions at issue in wrongful imprisonment cases, are entirely voluntary. It is simply not reasonable to compare the situation of someone imprisoned against their will to the Individual Appellants, who voluntarily sought the Province's support in finding a suitable residential placement and unfortunately came up against limitations in the kinds of support the Province could provide.

70. A look at the cases actually cited by the Individual Appellants further illustrates the problems with the argument. The two "wrongful institutionalization" cases cited are clearly distinguishable from the situation of the three individuals in this case. In *Muir v.*

Alberta, 1996 CanLII 7287 ("*Muir")*[63] Ms. Muir was improperly detained under Alberta's *Mental Defectives Act* as a child, after being misdiagnosed as having an intellectual disability and without the requisite pre-screening, during which time she was involuntarily sterilized. In *H (J) v. British Columbia* ("*HJ*"), 1998 CarswellBC 2786[64] the Plaintiff was made a ward of the Superintendent of Child Welfare for the Province of British Columbia and was placed in a number of foster homes and facilities as a child; one of these was determined by the Court to have been inappropriate. Neither of these involve the sort of voluntary residential supports that the Individual Appellants sought under the DSP.

71. In addition, in neither of the wrongful institutionalization cases relied on by the Individual Appellants did the courts adopt the approach advocated for by the Individual Appellants in this case. In *Muir*, a global sum of $250,000 was awarded for inappropriate institutionalization. In *HJ*, the Plaintiff was awarded $100,000 in general damages for being inappropriately placed at a facility for three- and one-half years as a child.

72. The Province argues that cases related to wrongful imprisonment are not an appropriate analogy to the within situation. The underlying basis for such compensation is the fact that the individual was convicted of a crime that they did not commit and was sentenced to a period of incarceration, with the accompanying losses of freedom and privacy, threats, and stress. The significant trauma that accompanies such an experience is simply not present

[63] *Muir v. Alberta*, 1996 CanLII 7287, Appellants' Joint Book of Authorities, Vol 2, Tab 23.

[64] *H (J) v. British Columbia*, 1998 CarswellBC 2786, Appellants' Joint Book of Authorities, Vol. 1, Tab 15.

in the situation of the three Individual Appellants. They and their families voluntarily sought the benefits of the DSP; and with their profound disabilities, they will likely always seek the support of the Province to provide care to them.

73. Of the wrongful conviction/incarceration cases relied on by the Individual Appellants, only one of them references an amount per year basis for awarding compensation. For example:

- Donald Marshall Jr. was awarded $225,000 plus interest for the 11 years he spent incarcerated.[65]
- Thomas Sophonow received $1,750,000 for the approximately 40 months that he spent in prison.[66]
- Stephen Truscott received $6,500,000 for the ten years he spent in prison and 38 years he spent on probation. In determining the quantum, Justice Honourable Sydney L. Robins, considered, but ultimately rejected the "amount per year" approach. He did recommend an amount roughly equivalent to $250,000 per year for the ten years he spent in prison, and $100,000 per year for each year Mr. Truscott spent on parole.[67]
- Ivan Henry received $6,500,000 for 27 years spent in prison after being wrongfully convicted and incarcerated. The judge in this case declined to take an amount per year approach, noting that such an approach is "inapt" and is largely based on the approach taken in the United States.[68]
- David Milgaard was awarded $10,000,000 for the approximately 22 years he spent in prison.[69] This remains the high-water mark in compensation for wrongful imprisonment.

74. Of note is that, on the approach and with the quanta put forth by the Individual Appellants, Ms. MacLean would receive a minimum of $9,075,000. Even accounting for inflation, the

65 *Supra*, note 63, at page 43.
66 *Henry v. British Columbia*, 2016 BCSC 1038, at para. 441, Appellants' Joint Book of Authorities, Vol. 1, Tab 16.
67 *Ibid*, at para. 464.
68 *Ibid*, at paras. 445, 411.
69 *Ibid*, at para. 438.

maximum award advocated for by the Individual Appellants for Ms. MacLean is higher than that awarded to David Milgaard.

75. The suggestion that this Court ought to adopt an approach that awards compensation on a per year basis is inconsistent with the general approach taken in both the inappropriate institutionalization and wrongful conviction/imprisonment cases on which the Individual Appellants themselves rely.

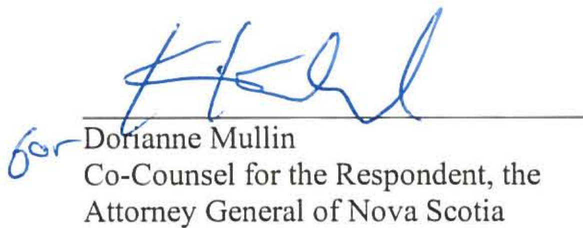
76. In summary, the Province maintains its alternative position that, should the Board's decision with respect to discrimination be upheld, this Court should reject the Individual Appellants' appeal on the quantum of damages, and find for the Province's cross-appeal on this point as argued in its First Factum.

PART VI

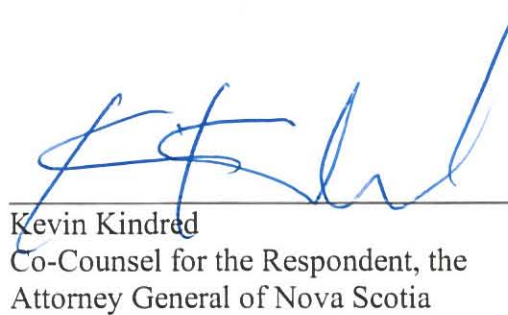
ORDER

77. The Province relies on the Order sought in its First Factum, filed on March 6th, 2020.

78. All of which is respectfully submitted.



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



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

Halifax, Nova Scotia
September 4, 2020

APPENDIX A

LIST OF CITATIONS

Citations:

1. *AB v. Joe Singer Shoes,* 2018 HRTO 107
2. *Auton (Guardian ad litem of) v. British Columbia (Attorney General),* 2004 SCC 78
3. *Canadian Elevator Industry Welfare Trust Fund v. Skinner,* 2018 NSCA 31
4. *David v. Sobeys Group Inc.,* 2016 CarswellNS 1109 (NSHRBOI)
5. *Eldridge v. British Columbia (Attorney General),* [1997] 3 SCR 624
6. *Henry v. British Columbia,* 2016 BCSC 1038
7. *H (J) v. British Columbia,* 1998 CarswellBC 2786 (BCSC)
8. *King v. Government of Prince Edward Island (Disability Support Program),* 2016 CanLII 21171 (PEIHRC)
9. *Moore v. British Columbia (Education),* 2012 SCC 61
10. *Muir v. Alberta*, 1996 CanLII 7287 (ABQB)
11. *Olmstead v. LC,* 527 US 581 (1999)
12. *O.P.T. v. Presteve Foods Ltd.,* 2015 HRTO 675
13. *R v. Myette,* 2013 ABCA 317
14. *Social Assistance Act,* RSNS 1989, c 432
15. *Vancouver v Ward*, 2010 SCC 27
16. *Willow v. Halifax Regional School Board,* 2006 NSHRC 2
17. *YZ v. HRM,* 2014 CanLII 67576 (NSHRBOI)

APPENDIX B

STATUTES AND REGULATIONS

Statutes and Regulations:

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

Procedure on complaint

29(2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.