2020 C.A. No. 486952

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

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

Appellants

-and-

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

Respondent

-and-

Nova Scotia Human Rights Commission

Respondent

-and-

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

-and-

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

Intervenors

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

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Part 1 – Overview of the Appeal

"[A]pproaching disability discrimination in systemic terms is the most fundamental challenge that disability human rights law currently faces."[1]

1. The central focus of the Intervenors in this appeal is whether government policies, practices and attitudes that cause persons with disabilities who are eligible for social assistance (the "protected class") to "languish" in institutions[2] are a form of systemic discrimination.
2. Rather than determining whether the Nova Scotia system was a contributing factor in the denial, delay and disruption[3] of the supports necessary to live in the community for the protected class, the Board of Inquiry (the "Board") adopted an erroneous legal threshold requiring each member of the class to individually prove a denial of "meaningful access".
3. This flawed approach to the discrimination analysis would impair the ability of equality-seeking groups across Canada to advance substantive equality. It would require class members to challenge systemic barriers on a person by person basis. As a result, human rights decision makers would be inundated with individual complaints that would be more appropriately brought as systemic claims.[4]
4. The additional legal hurdle would deny meaningful access to justice for persons with disabilities whose ability to participate in the justice system is already compromised by entrenched patterns of discrimination, social exclusion and, for hundreds, segregation in institutions.[5]

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1 Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a *Systemic* Approach" (2010) 4:1 McGill JL & Health 17 at 18 [Tab 24].

2 *MacLean v Nova Scotia (Attorney General)*, [2019] NSHRBID No. 2 at paras 208, 273 [*BOI Decision*][Appellants' BOA Tab 1]; Evidence of Marty Wexler, Appeal Book, Book 7, Day 13 at 1934. The Intervenors acknowledge that the adverse impacts of systemic discrimination extend beyond those living in institutions and includes others who are also denied the right to the supports necessary for community living.

3 The Jordan's Principle Working Group, *Without denial, delay, or disruption: Ensuring First Nations children's access to equitable services thorugh Jordan's Principle* (Ottawa: Assembly of First Nations, 2015) at Executive Summary [Tab 12].

4 Anne Levesque, "Assessing Litigation Strategies by Government Respondents to Human Rights Complaints" (2020) [unpublished, available at https://ssrn.com/abstract=3550304] at 41 [Tab 18].

5 Law Commission of Ontario, "A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice" (Toronto: September 2012) at 36, 83 online:

5. Systemic discrimination is caused by policies, practices and attitudes "embedded in the normal operation of institutions" which create barriers to inclusion for members of a protected class.[6] Systemic remedies are intended to combat patterns of discrimination "that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available" in society.[7]

6. A finding of systemic discrimination does not require direct evidence that each and every individual in similar circumstances is adversely affected by a policy or program. Evidence that individuals have been adversely affected by a policy allows inferences that the policy impacts other individuals in similar circumstances and causes systemic barriers.

7. The Board's factual findings of discrimination support a determination that there is a *prima facie* case of systemic discrimination. The Board found that institutionalization may well lead to the loss of independence, loss of self-confidence, loss of self-esteem, loss of opportunity and loss of contact with community and friends.[8] It linked the segregation of Ms. MacLean, Ms. Livingstone and Mr. Delaney to the policies, practices and attitudes of the Province.[9] It determined that the individual appellants were not alone in their experience as "[s]uccessive governments of all political stripes simply ignored everyone over decades and condemned our most vulnerable citizens to a punishing confinement […]."[10]

8. The Board's factual findings in this case cannot be reconciled with its determination that a *prima*

<www.lco-cdo.org/wp-content/uploads/2012/12/persons-disabilities-final-report.pdf> [Tab 17].

6 Gwen Brodsky, Shelagh Day & Francis Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6 Can. J. Hum. Rts. 1 at 4 [Tab 4]. See also *R v Kokopenace,* 2015 SCC 28 at paras 126, 286 [*Kokopenace*][Tab 27]; *Brome v. Ontario (Human Rights Commission) (1999)*, 171 D.L.R. (4th) 538 (Ont. Div. Ct.) at 544 [*Brome*][Tab 5] cited with approval in *British Columbia v Crockford,* 2006 BCCA 360 at para 46 [*Crockford*][Tab 2]; *R v Spence*, 2005 SCC 71, [2005] S.C.J. No. 74 at para 32 [*Spence*][Tab 28]; *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at paras 33-34 [*CNR v Canada*][Tab 6].

7 *CNR v Canada, ibid* at para 34 [Tab 6].

8 *BOI Decision, supra* note 2 at para 357 [Appellants' BOA Tab 1]. See also the factum of the Appellant, the Disability Rights Coalition, at paras 71-81.

9 *BOI Decision, ibid* at paras 327-28, 343, 408 [Appellants' BOA Tab 1].

10 *Ibid* at paras 92, 93.

facie case for systemic discrimination was not established. The Board erred by failing to address whether the Province's policies, practices and attitudes (the system) were a factor in the denial, delay and disruption of the supports necessary to live in their community (the adverse impact) for the members of the class.

9. Had the Board employed the correct test, such an analysis would have led to the conclusion that the system was a contributing factor, if not in fact the direct cause, in the denial of the supports necessary to live in the community for persons with disabilities who are eligible for social assistance.

10. Direction is required by this Court to clarify the analysis for establishing systemic discrimination under the Nova Scotia *Human Rights Act*[11] and to support substantive equality for persons with disabilities who are eligible for social assistance.

Part 2 – Concise Statement of Facts

11. In August 2014, the individual appellants filed human rights complaints alleging the Province discriminated against them by denying, delaying and disrupting their access to community living supports and services. At the same time, the DRC filed a complaint claiming that the experience of Ms. MacLean, Ms. Livingstone and Mr. Delaney was emblematic of systemic barriers in Nova Scotia for adults with disabilities who are eligible for social assistance.

12. The individual appellants were all persons with disabilities in receipt of social assistance who were denied the supports necessary for a meaningful opportunity to live in their community.

13. When persons with disabilities have the financial means to pay for their own care, they are usually able to live in the community with private supports. In contrast, low-income persons with disabilities rely on social assistance both for income and for disability related supports.

14. In this proceeding, the Board found that Ms. MacLean, Ms. Livingstone and Mr. Delaney were left

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[11] *Human Rights Act*, RSNS 1989, c 214 [Appellants' BOA Tab 41].

to "languish" in institutions regardless of their actual mental health and medical needs.[12] It held that the individual appellants were not alone in being segregated in institutions while waiting for community placements.[13] Changes by the Province during the 1990s led to a moratorium on small option homes, increasing the backlog of persons waiting for community living options with appropriate supports.[14]

15. The Board determined that "[t]he 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."[15] The Board of Inquiry attributed this, in part, to the "dynamics of indifference."[16]

16. Throughout most of their time in institutions, the individual appellants were confined against medical advice in mostly locked facilities with an overall lack of control over their lives and limited access to community. They were excluded from opportunities for social interaction and exposed to the risk of assault.[17] Some were physically and emotionally abused.[18]

17. In its decision, the Board noted the recognition by Nova Scotia that institutional care is outmoded and the Province's admission that it must move towards closing down institutions.[19] It concluded that the Province was "impervious" to the fact that there was no medical basis for the individual appellants to remain in an institution but were not supported to return to their community.[20]

18. In assessing the individual complaints, the Board also found that successive governments had

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12 *BOI Decision, supra* note 2 at paras 342, 343 [Appellants' BOA Tab 1].
13 *Ibid* at para 361.
14 *Ibid* at para 177. The Intervenors note that the complaints with respect to unnecessary institutionalization extend back to 1986.
15 *Ibid* at para 412.
16 *Ibid* at para 413.
17 *Ibid* at para 355.
18 See, for example, *ibid* at paras 71-77, 355-357.
19 *Ibid* at para 43.
20 *Ibid* at paras 217, 242, 351, 411.

ignored the protected class condemning them to a "punishing confinement."[21]

19. Evidence before the Board demonstrated that persons living in institutions experience negative impacts on their psychological and emotional well-being. They experience a loss of their independence, sense of responsibility, confidence, sense of self-worth and self-esteem.[22]

20. The Board concluded that the "evidence was clear that living in a small options home is better than living in a larger facility" and that people are "at a disadvantage as long as they are not living in a small options home properly prepared for them."[23]

21. On 4 March 2019, the Board found that the Province had *prima facie* discriminated against the individual appellants by needlessly retaining them in institutions.[24]

22. However, the Board determined there was no *prima facie* case of systemic discrimination. It stated that it was not satisfied there was discrimination against all persons with disabilities "who reside in "institutions" *generally* or who are on a wait list for placement in a community living service such as "Independent Living Support" or a small options home."[25] It found that "[n]o general statement" could be made about the adverse effects of institutionalization.[26]

23. Rather than addressing the systemic impacts of the system on the protected class, the Board proposed that an assessment of adverse effects on "each individual" was required to determine whether there was a *prima facie* case of systemic discrimination.[27]

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21 *Ibid* at paras 92, 93.
22 *BOI Decision, supra* note 2 at para 189 [Appellants' BOA Tab 1].
23 *Ibid* at para 415.
24 *Ibid* at para 72.
25 *Ibid* at para 3 [emphasis added].
26 *Ibid* at 102.
27 *Ibid* at para 102.

Part 3 – List of Issues

24. The Intervenors' position is that the Board erred in law and fundamentally misapprehended the legal test in considering whether the denial, delay or disruption of the supports necessary to live in the community for the protected class constituted systemic discrimination.

Part 4 – Standard of Review

25. This is a statutory appeal on questions of law under section 36(1) of the *Act*.[28] Following the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, an appellate standard applies with the appropriate standard of review being correctness.[29]

26. When applying the correctness standard, this Court may choose to uphold the Board's decision or to substitute its own view. While it should consider the Board's reasoning, this Honourable Court is empowered to arrive at its own determination on whether there is a *prima facie* case for systemic discrimination.[30]

Part 5 – Argument

Overview

27. Systemic discrimination is caused by policies, practices and attitudes having the effect, "whether by design or impact"[31], of creating "barriers to participation" for a specific class.[32] Systemic discrimination can be "the result of historical attitudes, stereotypes and practices that have become embedded in the normal operation of institutions."[33] Systemic remedies are a means of combating historically entrenched and ongoing patterns of discrimination.[34] They are particularly important

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28 *Human Rights Act, supra* note 11 at s 36(1) [Appellants' BOA Tab 41].
29 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37 [*Vavilov*][Appellants' BOA Tab 6].
30 *Ibid* at para 54 [Appellants' BOA Tab 6].
31 *CNR v Canada, supra* note 6 at para 34 [Tab 6].
32 *Kokopenace, supra* note 6 at paras 126, 286 [Tab 27].
33 Brodksy et al, *supra* note 6 at 4 [Tab 4]; *Brome, supra* note 6 at 544 [Tab 5] cited with approval in *Crockford, supra* note 6 at para 46 [Tab 2]; *Spence*, *supra* note 6 at para 32 [Tab 28].
34 *CNR v Canada, supra* note 6 at para 34 [Tab 6].

for persons with disabilities who continue to experience impermeable barriers to full social inclusion on a daily basis.

28. This Appeal involves complaints by individuals and by the DRC relating to the failure of Nova Scotia to provide access to community living supports for adults with disabilities "in need" by restricting access to these supports and services through indefinite wait times and other arbitrary measures. Both the individual and class complaints attribute the cause of the alleged discrimination to the policies, practices and attitudes of the Province (the system). Ms. MacLean, Ms. Livingstone and Mr. Delaney seek individual relief while the DRC seeks systemic remedies.

29. Regardless of the remedy sought, the test for establishing a *prima facie* case of discrimination (the *Moore* framework) requires complainants to show that: (1) they have a protected characteristic under the *Act*; (2) they have experienced an adverse impact with respect to a service; and (3) the protected characteristic was a factor in the adverse impact.[35]

30. The identification of a service in the test for establishing *prima facie* discrimination is intended to assist in better understanding the nature of the allegation of discrimination.[36] To use this step as a means to narrow[37] or dismiss a claim would be to perpetuate the very disadvantage that the *Act* aims to protect against and prohibit.[38] As a general guiding principle, interpreting the service ('benefit' or 'assistance') at issue must be done in a liberal and purposive manner that gives effect to the principle of substantive equality inherent in the *Act*.[39]

31. Applying the *Moore* framework to the allegation of systemic discrimination against the Province

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35 *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 at para 33 [*Moore*][Appellants' BOA Tab 21].

36 *First Nations Child and Family Caring Society et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 30 [*Caring Society*][Appellants' BOA Tab 11]; *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571 at paras 55, 58 [*Gould*][Tab 10].

37 *British Columbia (Ministry of Education) v Moore,* 2010 BCCA 478 at paras 64-66 [*Moore BCCA*][Appellants' BOA Tab 22].

38 *Anne Levesque*, *supra* note 4 at 23 [Tab 18].

39 See, for example, *Caring Society, supra* note 36 at paras 43-45 [Appellants' BOA Tab 11]; *Gould, supra* note 36 at paras 6, 7 [Tab 10].

requires consideration of whether the Province's policies, practices and attitudes were a contributing factor in the denial, delay and disruption of supports necessary to live in the community for the individual appellants and for members of the protected class.

32. In making its decision, the Board failed to consider the appropriate legal test. It erred by:

- requiring each member of the affected class to individually prove a denial of meaningful access rather than assessing whether the practices and policies of Nova Scotia adversely impacted members of the protected class;
- incorrectly focusing on whether persons working within the system had the intent to discriminate rather than considering how patterns of discrimination impacted the creation of policies, practices and attitudes which serve as barriers to inclusion for persons with disabilities;
- comparing persons with disabilities "in need" in Nova Scotia against "other disabled people in Nova Scotia" to determine whether there had been differential treatment of similarly situated groups rather than considering whether the policies, practices and attitudes of Nova Scotia served as a systemic barrier to the substantive equality of persons with disability who are eligible for social assistance; and,
- incorporating aspects of the justification analysis into questions of whether a case of *prima facie* discrimination had been established for the class represented by the DRC.

1. Systemic discrimination is caused by systemic policies, practices and attitudes

33. The Board's conclusion that an assessment of adverse effects on "each individual" was required to determine whether there was a *prima facie* case of systemic discrimination[40] is contrary to the *Act* and to clear guidance from the Supreme Court of Canada that equality in Canada under human rights codes and the *Charter* is *substantive*.

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40 *BOI Decision, supra* note 2 at para 460 [Appellants' BOA Tab 1].

34. The *Act* recognizes that every individual in the Province must be "afforded an *equal opportunity* to enjoy a *full and productive life* and that failure to provide equality of opportunity threatens the status of all persons."[41] Under section 5(1)(a) of the *Act*, no person shall "in respect of or *access to services* or *facilities* discriminate against an individual or *class* of individuals" on account of the protected characteristics.[42]

35. To remedy discrimination with respect to services, the Board is authorized to order any party who has contravened the *Act* to "do any act or thing that constitutes full compliance".[43]

36. The analysis of discrimination must always flow from the claim. A practice can be found to be discriminatory in circumstances where it causes an unjustifiably adverse impact on a single individual. The systemic operation of policies, practices and procedures can also be found to be discriminatory when they cause an adverse impact on an individual or on members of a class.[44]

37. A finding of systemic discrimination is based on the connection between government policies and practices and the discriminatory impact – not on the number of individuals affected.

38. Systemic discrimination is not established through a mathematical formula relating to the number of individuals who are impacted by a given policy or program. It is established when it is shown that practices and policies adversely impact members of a protected class or group. The focus is "always on whether the complainant has suffered arbitrary adverse effects based on a prohibited ground."[45]

39. The Board's conclusion on systemic discrimination was inconsistent with its findings about the discrimination alleged by the individual complainants. In this case, the individual complainants were successful in establishing a *prima facie* case of discrimination based on the adverse impact

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41 *Human Rights Act, supra* note 11 at s 2 [emphasis added][Appellants' BOA Tab 41].
42 *Ibid* at s 5(1)(a) [emphasis added].
43 *Human Rights Act, supra* note 11 at s 34(8) [Appellants' BOA Tab 41].
44 *Moore, supra* note 35 at paras 58, 59 [Appellants' BOA Tab 21].
45 *Ibid* at para 59.

caused by the *system* while the DRC was unsuccessful in establishing a *prima facie* case of discrimination based on the adverse impact caused by the *very same system*. These contradictory findings cannot be reconciled.

40. The Board erred in separating its consideration of adverse impacts on the individual appellants from the analysis of the impacts upon the broader affected group and by imposing an additional threshold in requiring each member of the affected class to individually prove a denial of meaningful access. This is contrary to the guidance by Supreme Court of Canada to avoid approaching individual and systemic discrimination in a binary way - "[t]he inquiry is into whether there is discrimination, period."[46]

41. Proving systemic discrimination simply requires showing that the adverse impacts suffered by individual claimants were the result of practices, attitudes, policies *or* procedures. Evidence that individuals have been adversely affected by a policy allows inferences that the policy impacts other individuals in similar circumstances and causes systemic barriers.[47]

42. A finding of systemic discrimination does not require direct evidence that each and every individual in similar circumstances is adversely affected by a policy or program. As the Supreme Court of Canada has stated:

> It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically. In nearly every instance of discrimination the discriminatory action is composed of various ingredients with the result that some members of the pertinent group are not adversely affected, at least in a direct sense, by the discriminatory action.[48]

43. The Board erred when it relied upon statements relating to individuals with disabilities who "did

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46 *Moore, supra* note 35 at paras 58-60 [Appellants' BOA Tab 21].

47 *Radek v Henderson Development and Securiguard Services (No 3),* 2005 BCHRT 302 at para 505 [*Radek*][Tab 29]; *Crockford, supra* note 6 [Tab 2] cited in *Kelly v British Columbia (Ministry of Public Safety Solicitor General) (No 2),* 2009 BCHRT 363 at para 12 [*Kelly v BC*][Tab 15].

48 *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252 at 1288-89 [*Janzen v Platy Enterprises*][Appellants' BOA Tab 17] cited in *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 354 (Abella J., Dissenting) [*Quebec v A*][Appellants' BOA Tab 27].

not express dissatisfaction with the services [they] obtained"[49] to argue that no "general" finding of discrimination could be made.[50] With due respect, this form of reasoning ignores the reality of many individuals confined to institutions who may not be able to express dissatisfaction, or if they are able to do so, will have their opinions discredited or ignored.

44. Establishing systemic "discrimination does not require uniform treatment of all members of a particular group."[51]

2. **Intent is not required as proof of discrimination**

45. The Board erred by focusing on whether persons working within the system had the intent to discriminate rather than considering how stereotyping and historical disadvantage impacted the creation of systemic barriers to community living for persons with disabilities.

46. The Supreme Court of Canada has confirmed that an intention to discriminate is not a necessary condition for a finding of systemic discrimination.[52] Section 4 of the *Act* makes this clear by describing a distinction "*whether intentional or not*."[53] Rather than considering the intent, the focus must be on the *effects or outcomes* of the discrimination.[54]

47. The focus on effects extends to circumstances where systemic patterns of discrimination are alleged.[55]

48. In its decision, the Board incorrectly focused on the need to prove the intent to discriminate. It

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49 *BOI Decision, supra* note 2 at para 113 [Appellants' BOA Tab 1].
50 *Ibid* at para 3.
51 *Janzen v Platy Enterprises, supra* note 48 [Appellants' BOA Tab 17], cited in *Quebec v A, supra* note 48 at para 354 [Appellants' BOA Tab 27].
52 *CNR v Canada, supra* note 6 at para 30 [Tab 6]. More generally, see *Ontario (Human Rights Commission) v Simpson-Sears Ltd.,* [1985] 2 SCR 536 at para 14 [Tab 22]; *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 SCR 591 at para 24 [Tab 34]; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789 at para 40 [Tab 25]; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467 at para 126 [Tab 32].
53 *Human Rights Act*, *supra* note 11 at s 4 [emphasis added][Appellants' BOA Tab 41].
54 *BOI Decision, supra* note 2 at para 60 [Appellants' BOA Tab 1].
55 *CNR v Canada, supra* note 6 at para 33 [Tab 6].

defended the "good people"[56] who "devoted their lives to the support of [people with disabilities]."[57] In becoming side tracked by intent, the Board failed to consider how evidence relating to "ableist" attitudes and systems fit within the legal analysis to prove discrimination.

49. Courts have found that "even where an individual has the best of intentions he or she may still be found to have contravened provincial human rights legislation."[58] In cases of systemic discrimination, "it is important to look at the *results* of a system (emphasis added)."[59]

50. Determining whether there is discrimination in a substantive sense requires "[...] taking into account the full social, political and legal context of the claim."[60] By focusing on the *individuals* working *within* the "system", the Board ignored how stereotyping and historical disadvantage of persons with disabilities can impact the creation of policies, practices and systems that have the effects of creating barriers for persons with disabilities to participate in society. As stated in *Eldridge*:

> It is an unfortunate truth that the history of disabled persons in Canada is *largely one of exclusion and marginalization*. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and *relegated to institutions*…. 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.[61]

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56 *BOI Decision, supra* note 2 at para 60 [Appellants' BOA Tab 1].
57 *Ibid* at para 284.
58 *Ayangma v The French School Board*, 2002 PESCAD 5 at para 36 [Tab 1].
59 *CNR v Canada, supra* note 6 at para 34 [Tab 6].
60 *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 at para 30 [Tab 16].
61 *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 56 [emphasis added][Appellants' BOA Tab 10].

3. The Board's findings cannot be reconciled with its conclusions on systemic discrimination

51. The flaws in the Board's analysis are made palpable by the disconnect between its factual findings and its conclusion that there was no *prima facie* case of systemic discrimination. Its determination on systemic discrimination cannot be reconciled with its findings of the links between Nova Scotia's policies, practices and attitudes and the adverse effects experienced by the individual claimants, similarly situated individuals and the broader class of persons with disabilities who are eligible for social assistance.

52. A complaint of systemic discrimination requires establishing patterns of discrimination and showing of practices, policies, procedures or attitudes that have disproportional impact on a protected class.[62]

53. The types of evidence required to prove adverse impacts will necessarily vary depending on the nature and context of a particular complaint.[63] Demonstrating patterns of discrimination can be done through use of statistics, similar fact evidence, circumstantial evidence or expert reports.[64] There is no singular type of evidence required.[65]

54. The Board had before it a wealth of provincial government documents admissible for the truth of their contents[66] as well as testimony from individuals with in-depth knowledge of the system. In considering the complaints, the Board heard evidence alleging "the system in Nova Scotia is broken",[67] with the Provincial moratorium[68] contributing to a backlog of people waiting to move

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62 *Radek, supra* note 47 at para 513 [Tab 29]; *Crockford, supra* note 6 at para 49 [Tab 2].
63 *Kelly v BC, supra* note 47 at para 21 [Tab 15].
64 See, for example, *Murray v Canada (Immigration and Refugee Board)*, 2009 LNCPSST 33 at para 39 [Tab 20]; *Radek, supra* note 47 at para 513 [Tab 29]; *Crockford, supra* note 6 at para 49 [Tab 2].
65 *Radek, supra* note 47 at para 504 [Tab 29]. For example, in *Radek*, it was found that "the absence of reliable statistical evidence of disproportionate result is not fatal to a claim of systemic discrimination."
66 Factum of the Appellant Disability Rights Coalition at para 11.
67 *BOI Decision, supra* note 2 at paras 208, 258 [Appellants' BOA Tab 1]; Evidence of Dr. Michael Bach, Appeal Book, Book 5, Day 10 at 1077-1078; Evidence of Marty Wexler, Appeal Book, Book 7, Day 13 at 1978.
68 Factum of the Appellant Disability Rights Coalition at paras 32 and 42.

out of hospitals or forced to stay with their elderly and aging parents.[69] It heard evidence suggesting "hundreds" of people were "not being properly supported"[70] with individuals being left to "languish" in institutions while waiting to obtain community living.[71]

55. In its decision, the Board expressly found clear links between the "deleterious effects of life"[72] in institutional settings such as Emerald Hall and the "obdurate" refusal of the Province to act:

> The Province knew that it should not hold people in Emerald Hall who were not mentally ill. The Province's own staff repeatedly told the Province it should not. The Province's outside consultants repeatedly told the Province it should not. The involvement of counsel and indeed this proceeding, now four and a half years old, moved it not. I refer to Dr. Griffiths' specific report of April, 2006. The Province knew then that it should move people who were disabled, but not acutely ill mentally, out of Emerald Hall. The Province, year in and year out, was simply obdurate.[73]

56. The Board made findings regarding other individuals in similarly situated circumstances who were adversely impacted by the system. It concluded that these witnesses were "illustrative of the lives of the disabled and their interaction with the care system the Province provides."[74]

57. The Board also drew a clear link between the Province's policies, practice and attitudes over many decades and the calamitous effects of segregation on the class of persons with disabilities. It held that "[s]uccessive governments of all political stripes simply ignored everyone over decades and condemned our most vulnerable citizens to a punishing confinement […]."[75]

58. The disconnect between the powerful factual findings of the Board and its failure to find a *prima facie* case of systemic discrimination can only be attributed to a fundamental error of law. The

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69 *BOI Decision, supra* note 2 at para 131 [Appellants' BOA Tab 1].

70 Evidence of Marty Wexler, Appeal Book, Book 7, Day 13 at 1930; *BOI Decision, supra* note 2 at para 207 [Appellants' BOA Tab 1].

71 *BOI Decision, supra* note 2 at paras 172, 187, 189, 208 [Appellants' BOA Tab 1]; Evidence of Marty Wexler, Appeal Book, Book 7, Day 13 at 1934, Evidence of Joanne Pushie, Book 6, Day 11 at 1377, 1389. See also the evidence of *Ms Louise Bradley*, President and Chief Executive Officer of the Mental Health Commission of Canada and *Dr Scott Theriault*, Clinical Director of Mental Health and Addictions Programs for the Nova Scotia Health Authority as cited in *BOI Decision, supra* note 2 at paras 269 and 273 and Evidence of Dr. Scott Theriault, Book 17 at 5194-95. The Intervenors also note that the longstanding reliance by the Province on institutions appears to be undisputed.

72 *Ibid* at para 357 [Appellants' BOA Tab 1].

73 *BOI Decision, supra* note 2 at para 360 [Appellants' BOA Tab 1].

74 *Ibid* at para 100.

75 *Ibid* at paras 92, 93.

factual findings by the Board about the role of the system in the adverse impacts suffered by the class are clear. If systemic discrimination could not be found in this case, when could it be found?

4. Substantive equality illuminates the impacts of the policies, practices and attitudes on the class

59. The Board erred in adopting a strict comparator group analysis rooted in formal equality (treating likes alike). It drew the comparison between persons with disabilities "in need" in Nova Scotia and "other disabled people in Nova Scotia".[76]

60. The Board's approach is contrary to the clear direction of the Supreme Court of Canada which characterizes the equality guarantee at the root of human rights as substantive.[77] The "concept of equality does not necessarily mean identical treatment" because "the formal 'like treatment' model of discrimination may in fact produce inequality."[78]

61. A formalistic comparator group analysis "may fail to capture substantive inequality, may become a search for sameness, [and] may shortcut the second stage of the substantive equality analysis."[79] A search between the adverse effects of persons with disabilities in need and other persons with disabilities in Nova Scotia prevents a full analysis of the barriers that exist for all persons with disabilities.

62. A comparative component may be helpful for persons with disabilities who are eligible for social assistance if it is used as a reference point "to illuminate the unequal impacts of [the policies, practices and attitudes] on [the class]"[80] or an examination of the detrimental impact of intersecting

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76 *Ibid* at para 269.

77 *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at para 62 [*Withler*][Appellants' BOA Tab 37].

78 *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 15 [Tab 26] citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 43 at 165 [Appellants' BOA Tab 3]; see also *Withler, supra* note 77 at para 39 [Appellants' BOA Tab 37].

79 *Withler, supra* note 77 at para 60 [Appellants' BOA Tab 37], cited in *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 SCR 464 at para 27 [Appellants' BOA Tab 28].

80 Maneesha Deckha, "A Missed Opportunity: Affirming the Section 15 Equality Argument Against Physician-Assisted Death" (2016) 10:1 McGill JL & Health S69 – S121 at para 1, citing The Honourable Claire L'Heureux Dubé, "Preface" in Fay Faraday, Margaret Denike, & M Kate Stephenson, eds, "Making Equality Rights Real" (Toronto: Irwin Law, 2006) 3 at 4 [Tab 9].

disadvantages (i.e. disability and poverty). A more appropriate comparator may be between persons with disabilities and non-disabled persons more generally.

63. Failing to adopt this approach ignores the real needs of the protected class and the outcomes of the discriminatory policies, practices and attitudes. It effectively renders substantive equality - accommodating disadvantage and difference – meaningless. Applying "a model of comparator group analysis that is intended to determine whether there has been differential treatment of similarly situated groups is antithetical to the duty to accommodate. It is guaranteed to result in defeat for the claimant [...]."[81]

5. Implications for access to justice of the flawed approach to meaningful access

64. Access to justice is "fundamental to our constitutional arrangements".[82] It is a precondition to the rule of law.[83] A requirement that each person's circumstances "be assessed individually"[84] imposes unworkable complexities and significant barriers for those seeking to challenge systemic patterns of discrimination.

65. Such a requirement would be particularly onerous for persons with disabilities given the historically based and entrenched patterns of discrimination they face on a daily basis.[85] This appeal has implications for hundreds of persons who have been denied the supports necessary for community living. Requiring an individualized assessment would oblige each individual either to bring evidence through existing human rights hearings or to file new claims to establish discrimination.

66. Administrative tribunals such as human rights commissions offer individuals the ability to enforce

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81 *Moore BCCA, supra* note 37 (Factum of the Intervener, Council of Canadians with Disabilities at para 44, online: http://www.ccdonline.ca/en/humanrights/litigation/moore-factum) [Tab 3].

82 *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 214 [*NFLD v Uashaunnuat*][Tab 21] citing *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31 at para 41 [Tab 35]. See also *Hryniak v Mauldin*, 2017 SCC 7, [2014] 1 SCR 87 at para 1 [Tab 13].

83 *NFLD v Uashaunnuat, ibid* [Tab 21].

84 *BOI Decision, supra* note 2 at para 3 [Appellants' BOA Tab 1].

85 Law Commisison of Ontario, *supra* note 5 at 36, 83 [Tab 17].

their legal rights through accessible forums. They are designed to be "less cumbersome, less expensive, less formal and less delayed."[86]

67. The Board's approach would severely disadvantage persons with disabilities who are unable to bring individual claims, as well as other individuals who may not have the opportunity and means to advance their own claims in similar situations.

68. If accepted, this approach would not only impact the class of persons upon which the DRC's claim was brought in this case, but will hinder future claims for systemic remedies across Canada. It would result in already overburdened human rights decision-makers being inundated with individual complaints all raising the very same issue and undermine the broad remedial purpose of systemic complaints.[87]

69. The Supreme Court of Canada recently confirmed the importance of arriving at solutions that promote access to justice.[88] It stated that "requiring the claimant to litigate the same issues in separate courts multiple times erects gratuitous barriers to potentially valid claims."[89] The Board's proposed approach would waste administrative and judicial resources and goes against the very nature of human rights law, which are generally aimed at promoting access to justice.[90]

6. The importance of systemic remedies for people with disabilities

70. The Board erred in incorporating aspects of the justification analysis into questions of whether a case of *prima facie* discrimination had been established for the class represented by the DRC.

71. The Board found that "even if we narrowed the discussion to those disabled people in need seeking services through the Department of Community Services, we would still be confronting the needs

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86 *Rasanen v Rosemont* [1994] OJ No 200, (1994), 17 OR (3d) 267 (CA) at para 35 [Tab 30].
87 Anne Levesque, supra note 4 at 40, 41 [Tab 18].
88 *NFLD v Uashaunnuat, supra* note 82 at para 237 [Tab 21].
89 *Ibid* at para 237.
90 Yves-Marie Morissette, "What is a 'reasonable decision'?" (2018), 31 C.J.A.L.P. 225 at 23 [Tab 19] cited in *Vavilov, supra* note 29 at para 242 [Appellants' BOA Tab 6].

of thousands of people at a cost of hundreds of millions of dollars."[91] It concluded that while the purpose of the Act is to "recognize that all public agencies have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life [...] it may, however, cost tens of millions a year to fulfill these aspirations for the disabled."[92]

72. In relying on factors of costs at this early and premature stage of the analysis, the Board improperly imported financial considerations into the *prima facie* analysis. These considerations belong in the justification analysis.

73. In any event, the Supreme Court has determined that even at the justification analysis, governments cannot rely solely on financial considerations to discriminate against disadvantaged groups.[93] Cost benefit analysis "are not readily applicable to equality violations because of the inherent incomparability of the monetary impacts involved. Remedying discrimination will always appear to be more fiscally burdensome than beneficial on a balance sheet."[94]

74. Systemic remedies are essential to "destroy those [past patterns of discrimination] in order to prevent the same type of discrimination in the future."[95] It is an error in law to find that a *prima facie* case for systemic discrimination does not exist on the basis that the implementation of systemic remedies would be either too difficult or too costly to implement.[96] That allegation is properly addressed at the justification stage in the event that a claim of undue hardship are advanced.

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91 *BOI Decision, supra* note 2 at para 365 [Appellants' BOA Tab 1].

92 *Ibid* at para 476.

93 *Schachter v Canada,* [1992] 2 SCR 679 at 709 [Tab 33].

94 *Rosenberg v Canada (Attorney General)*, [1998] OJ No 1627, 38 OR (3d) 577 at para 42 [Tab 31]; Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can. Bar Rev 433 at 463-65 [Tab 8]; Isabel Grant & Judith Mosoff, "Hearing Claims of Inequality: Eldridge v. British Columbia (A.G.)" (1998) 10:1 CJWL 229 at 242-43 [Tab 11].

95 *CNR v Canada, supra* note 6 at para 44 [Tab 6]; Brodsky, Day & Kelly, *supra* note 6 at 4 [Tab 4]. Also see *Hughes v Elections Canada,* 2010 CHRT 4, [2010] CHRD 4 at para 71 [Tab 14].

96 Dianne Pothier explains that *Moore* ignored the issue with resource reallocation and with the scope of Tribunal authority by finding that the discriminationwas not systemic in the first place. See Dianne Pothier, "Adjudicating Systemic Inequality Issues: The Unfulfilled Promise of Action Travail des Femmes" (2014) 18:1 CLELJ 177 at 206 [Tab 23].

7. Conclusion

75. Systemic remedies are essential if persons with disabilities, particularly those living in poverty, are to have meaningful access to justice through the human rights system. The right to the necessary supports to live in the community is among the most basic of all human rights.[97] The Board in this case made ample findings to demonstrate that the province of Nova Scotia has systemically denied people with disabilities on social assistance this fundamental right. We ask this Court to recognize the importance of systemic remedies for some of Canada's most marginalized citizens and to vindicate the importance of community living.

Part 6 – Order or Relief Sought

76. The Intervenors seek a determination that the Board erred in finding that no *prima facie* case of discrimination was established for the class represented by the DRC. It seeks a finding that the denial of supports necessary to live in the community for persons with disabilities who are eligible for social assistance constitutes discrimination on a *prima facie* basis.

77. The Intervenors do not seek costs and asks that no costs be awarded against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of March, 2020.

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[97] See, for example, the *Convention on the Rights of Persons with Disabilities,* 24 January 2007, UNGA A/RES/61/106 at Article 19 [Tab 7], which recognizes "the equal right of all persons with disabilities to live in the community, with choices equal to others" and to have access to the community support services "necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community."

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APPENDIX A – LIST OF CITATIONS

Cases

1. *Ayangma v The French School Board*, 2002 PESCAD 5.
2. *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143.
3. *British Columbia v Crockford,* 2006 BCCA 360.
4. *British Columbia (Ministry of Education) v Moore,* 2010 BCCA 478.
5. *Brome v Ontario (Human Rights Commission) (1999),* 171 DLR (4th) 538.
6. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.
7. *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114.
8. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.
9. *First Nations Child and Family Caring Society et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.
10. *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571.
11. *Hryniak v Mauldin*, 2017 SCC 7, [2014] 1 SCR 87.
12. *Hughes v Elections Canada,* 2010 CHRT 4, [2010] CHRD 4.
13. *Kelly v British Columbia (Ministry of Public Safety Solicitor General) (No 2),* 2009 BCHRT 363.
14. *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.
15. *MacLean v Nova Scotia (Attorney General)*, [2019] NSHRBID No. 2.
16. *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360.
17. *Murray v Canada (Immigration and Refugee Board)*, 2009 LNCPSST 33.
18. *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020] S.C.J. No. 4.
19. *Ontario (Human Rights Commission) v Simpson-Sears Ltd.,* [1985] 2 SCR 536.

20. *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61.

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

22. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39, [2015] 2 S.C.R. 789.

23. *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483.

24. *R v Kokopenace,* 2015 SCC 28.

25. *R v Spence*, 2005 SCC 71, [2005] S.C.J. No. 74.

26. *Radek v Henderson Development and Securiguard Services (No 3),* 2005 BCHRT 302.

27. *Rasanen v Rosemont*, [1994] OJ No 200, (1994), 17 OR (3d) 267 (CA).

28. *Rosenberg v Canada (Attorney General)*, [1998] OJ No 1627, 38 OR (3d) 577.

29. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467.

30. *Schachter v Canada,* [1992] 2 SCR 679.

31. *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 SCR 591.

32. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2014 SCC 59, [2014] 3 SCR 31.

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

Texts

34. Anne Levesque, "Assessing Litigation Strategies by Government Respondents to Human Rights Complaints" (2020) [unpublished, available at https://ssrn.com/abstract=3550304]

35. *British Columbia (Ministry of Education) v Moore,* 2010 BCCA 478. (Factum of the Intervener, Council of Canadians with Disabilities at para 44, online: http://www.ccdonline.ca/en/humanrights/litigation/moore-factum).

36. *Convention on the Rights of Persons with Disabilities,* 24 January 2007, UNGA A/RES/61/106.

37. Dianne Pothier, "Adjudicating Systemic Inequality Issues: The Unfulfilled Promise of Action Travail des Femmes" (2014) 18:1 CLELJ 177 at 206.

38. Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a *Systemic* Approach" (2010) 4:1 McGill JL & Health 17.

39. Gwen Brodsky, Shelagh Day & Francis Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies” (2017) 6 Can. J. Hum. Rts. 1.

40. Isabel Grant & Judith Mosoff, “Hearing Claims of Inequality: Eldridge v. British Columbia (A.G.)” (1998) 10:1 CJWL 229.

41. Shelagh Day & Gwen Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996) 75 Can. Bar Rev 433.

42. The Jordan's Principle Working Group, *Without denial, delay, or disruption: Ensuring First Nations children's access to equitable services thorugh Jordan's Principle* (Ottawa: Assembly of First Nations, 2015).

43. Law Commission of Ontario, “A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice” (Toronto: September 2012), online: <www.lco-cdo.org/wp-content/uploads/2012/12/persons-disabilities-final-report.pdf>.

44. Maneesha Deckha, “A Missed Opportunity: Affirming the Section 15 Equality Argument Against Physician-Assisted Death” (2016) 10:1 McGill JL & Health S69 – S121.

45. Yves-Marie Morissette, “What is a 'reasonable decision'?” (2018), 31 CJALP 225.

APPENDIX B – LIST OF STATUTES AND REGULATIONS

***Human Rights Act*, RS NS 1989, c 214.**

Purpose of Act

2 The purpose of this Act is to

(a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family;

(b) proclaim a common standard for achievement of basic human rights by all Nova Scotians;

(c) recognize that human rights must be protected by the rule of law;

(d) affirm the principle that every person is free and equal in dignity and rights;

(e) recognize that the government, all public agencies and all per sons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons; and

(f) extend the statute law relating to human rights and provide for its effective administration. 1991, c. 12, s. 1; 2008, c. 59, s. 1.

Meaning of discrimination

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

Prohibition of discrimination

5(1) No person shall in respect of

(a) the provision of or access to services or facilities;

(b) accommodation;

(c) the purchase or sale of property;

(d) employment;

(e) volunteer public service;

(f) a publication, broadcast or advertisement;

(e) membership in a professional association, business or trade association, employers' organization or employees' organization,

discriminate against an individual or class of individuals on account of

(h) age;

(i) race;

(j) colour;

(k) religion;

(l) creed;

(m) sex;

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

(2) No person shall sexually harass an individual.

(3) No person shall harass an individual or group with respect to a prohibited ground of discrimination. 1991, c. 12, s. 1; 2007, c. 41, s. 2; 2012, c. 51, s. 2.

Public hearing

34(1) A board of inquiry shall conduct a public hearing and has all the powers and privileges of a commissioner under the Public Inquiries Act.

(2) A member of a board of inquiry shall not communicate directly or indirectly in relation to the complaint, except regarding arrangements for a hearing, with any person or with any party or the party's representative unless all parties are given notice and an opportunity to participate, but the board may seek legal advice from an adviser independent from the parties and in such case the nature of the advice should be made known to the parties in order that they may make submissions as to the law.

(3) A board of inquiry shall give full opportunity to all parties to present evidence and make representations.

(4) Oral evidence taken before a board of inquiry at a hearing shall be recorded and copies or a transcript thereof shall be furnished upon the same terms as in the Supreme Court.

(5) Where the complaint referred to a board of inquiry is settled by agreement among all parties, the board shall report the terms of settlement in its decision with any comment the board deems appropriate.

(6) Where the complaint referred to a board of inquiry is not settled by agreement among all parties the board shall continue its inquiry.

(7) A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.

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

(9) A board of inquiry shall file with the Commission the record of the proceedings, including the decision and any order of the board and the Com- mission may publish the decision and any order in any manner it considers appropriate.

R.S., c. 214, s. 34; 2007, c. 41, s. 8.

Appeal

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

(2) Where notice of an appeal is served pursuant to this Section, the Commission shall forthwith file with the Nova Scotia Court of Appeal the record of the proceedings in which the decision or order appealed from was made and that record shall constitute the record on the appeal.

(3) The Minister is entitled to be heard, by counsel or otherwise, upon the argument of an appeal pursuant to this Section.

(4) The Nova Scotia Court of Appeal shall hear and determine an appeal based upon the record on the appeal. R.S., c. 214, s. 36; 2007, c. 41, s. 11.