SCC File No. 39951

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA)

BETWEEN:

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)

APPLICANT
(Respondent)

-and-

DISABILITY RIGHTS COALITION

RESPONDENT
(Appellant)

-and-

NOVA SCOTIA HUMAN RIGHTS COMMISSION, and J. WALTER THOMPSON, Q.C., sitting as a Board of Inquiry

INTERVENERS
(Respondents)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL (DISABILITY RIGHTS COALITION, RESPONDENT)

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I OVERVIEW OF RESPONDENT'S POSITION

1. No credible issues of public importance are raised in this application. The Attorney General of Nova Scotia's analysis seeks to ignore principles of substantive human rights in favour of highly formalistic approaches and to resurrect a discredited strict comparator group analysis. Both arguments have been recently rejected by the SCC in *Fraser* in favour of a substantive approach to equality rights and require no further clarification at this time.[1]

2. The Nova Scotia Court of Appeal (NSCA) decision in *Disability Rights Coalition v Nova Scotia* most importantly stands for the principle that the Province of Nova Scotia, in its provision of statutorily mandated social assistance to persons with disabilities who are in need, discriminates by forcing those individuals to reside in institutions as a condition of receiving social assistance.

3. In addition, applying those same principles of substantive equality, the Court found that the Province, based on longstanding and pervasive government practices, discriminated against people with disabilities in need by failing to provide social assistance in accordance with its own legislative obligations and thus treated people with disabilities in an inferior manner to non-disabled recipients of social assistance.

4. The issues raised by the AGNS in their application for leave do not engage issues of public importance for the following reasons:

   A. This application at the *prima facie* stage of this discrimination case is premature: in fact, many of the AGNS's arguments belong to the justification stage of the discrimination analysis, which after 8 years of proceedings, still has not yet been heard.

   B. The Province's application leads to an analytical distinction between individual and systemic human rights claims which is flawed. In seeking to appeal the systemic discrimination ruling while leaving the individual complaints rulings intact, the AGNS is implicitly asking this Court to make a distinction that is contrary to the proper approach to discrimination endorsed by this Court.[2]

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[1] *Fraser v Canada* 2020 SCC 28 para 42-48, 94.
[2] *Moore v B.C.* [2012] SCC 61 para 58.

C. The identification of the service and corresponding comparators are settled areas of law, based on this Court's equality and human rights jurisprudence. This attempt to defeat a discrimination claim by substituting its own inferior and repeatedly rejected definition of the "service," thus twisting the comparison to achieve its desired result, is a recognized, well-worn and discredited tactic used by a government respondent in equality rights claims that has been rejected by this Court.

D. The question whether a specific program for persons with disabilities in a particular province is discriminatory does not raise issues of public importance, given the unique legislative foundations and reliance on institutional models of the Nova Scotia system, which stand apart from other provinces' disability supports programs.

E. There is no conflicting provincial appellate authority to justify intervention by this Court. The authorities cited by the AGNS are distinguishable. They either pre-date or ignore this Court's ruling in *Withler*, the leading case on comparators, and *Moore*, the leading case on the identification of the service in human rights cases.

5. The Application for Leave to Appeal should be dismissed with costs.

PART II QUESTIONS IN ISSUE

6. Does the Attorney General of Nova Scotia meet the test set out in s. 40(1) of the *Supreme Court Act* for leave to appeal?[3]

PART III ARGUMENT

Application for leave premature

7. The AGNS claims that this case has public importance because it may limit government's social policy alternatives and how other social programs are delivered. These arguments are premature. They are in the nature of justifications that belong at the second stage of this human

[3] *Supreme Court Act*, RSC 1985 c S-26 at s 40(1).

rights proceeding, not yet heard or decided.[4] They also reflect discredited arguments from long ago about whether human rights should be permitted to hold governments accountable.

8. Despite the fact that the case has been ongoing for almost eight years, we are only at the *prima facie* violation of the systemic discrimination claim and issues of justification have yet to be litigated, let alone decided.[5] The Board's decision to bifurcate the hearing process between the *prima face* and justification stages, means that we reach this Court without the Province bearing the evidentiary burden to justify the discrimination at the second stage.[6] The Province will have the opportunity to seek leave again should they fail to justify their discrimination under section 6 of the Nova Scotia *Human Rights Act*.

9. The alleged impact on other social programs is not relevant at the *prima facie* stage and does not form part of the *prima facie* analysis. If it is relevant at all, the alleged impacts of having to change the discriminatory treatment of people with disabilities is a matter for a justification hearing.

10. The AGNS' arguments that the Court must show deference to government in its social policy or that social programs are subject to a less rigorous standard for compliance with human rights legislation do not belong at the *prima facie* violation stage. Any consideration of deference to government that exists will occur at the second stage of this proceeding, when the Province will have an opportunity to prove its thus far unsubstantiated allegations to justify the discrimination, which has yet to be heard and decided. It would be misplaced to grant leave on any of the Province's floodgates arguments in relation to the alleged impact of the discrimination on other government social programs at this first step of the discrimination case.

11. The AGNS' floodgates arguments, for example, that this case will restrict the delivery of other government programs that rely on waitlists and budgetary constraints, has no evidentiary

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[4] AGNS Argument, para 53; the Province still has the option under s 6 of the *Human Rights Act* to try to justify the *prima facie* violation; see *DRC v NS* 2021 NSCA 70, para 223, 311.

[5] The history of this case includes two prior appeals filed by the AGNS at the interlocutory stage one of which was dismissed by the NSCA and the other withdrawn before being heard; see *AGNS v MacLean* 2017 NSCA 24

[6] *DRC v NS, Supra* Note 5, para 52, 89-90.

basis and, in any event, only becomes relevant at the justification stage. Again, this demonstrates that this application for leave is premature—the litigation is not yet ripe for this Court to review.

12. Aside from its prematurity, the importance of an evidentiary foundation for this argument further diminishes any impact of national importance on social programs that would warrant intervention by this Court.

13. The lack of evidentiary foundation can also be found in the NSCA's crucial findings that that, since 1984, Nova Scotia has lagged behind all other provinces in Canada where, unlike Nova Scotia, active measures have been taken to deinstitutionalise persons with disabilities has been largely abandoned in favour of community-based settings. The segregation and exclusion of persons with disabilities in institutional settings in Nova Scotia is unique in Canada. The Province's contention that this case could have widespread implications for other social programs in light of its very particular, fact-based Nova Scotia context is unfounded and premature and if relevant belongs at the justification stage.[7]

14. The AGNS's claim that its "Disability Supports Program" is "unable to provide" programs to persons with disabilities is unfounded, highly misleading and is relevant only at the justification stage.[8] Contrary to this claim, is the NSCA's ruling, which held that a significant impediment to the provision of social assistance to persons with disabilities, unlike the non-disabled, is the Province's own cap on funding. That funding cap has frozen the development of community-based options since 1995 and resulted in unnecessary institutionalization and large and growing delays in accessing social assistance for people with disabilities:

> Despite the integrated and interrelated nature of the assistance regimes, support under the *SAA* is not provided in the same manner as under the *ESIA*. For the latter, anyone who is eligible receives the assistance without delay. According to the Deputy Minister, there is no budgetary cap and support is provided to everyone who is eligible whether they are persons with disabilities or not. With the assistance under the *SAA*, the situation is very different and limits on funding and resources restrict the availability of support.[9]

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[7] Nova Scotia is unique among other Canadian jurisdictions in its reliance on anachronistic models of institutional placements for people with disabilities; *DRC v NS, Supra* Note 5, para 23-26; see AGNS Argument, para 11.

[8] AGNS Argument, para 10.

[9] *DRC v NS*, *Supra* Note 5, para 220.

15. The AGNS's claim that this case somehow upsets a delicate balance between the courts and legislatures is unfounded. It relies on *Chouhan* where this Court was responding to arguments that the federal government's power to repeal the peremptory jury provisions in the Criminal Code was restricted because those provisions were "constitutionalised."[10] This Court's ruling is of no assistance to the AGNS in this application, where there is no issue of legislative competence. Quite the contrary, the NSCA found that the Nova Scotia government is ignoring its own clear statutory obligations under the *Social Assistance Act* in a discriminatory manner.

16. For the reasons cited above, it is premature for this Court to have an adequate evidentiary record on which to base a review. Moreover, there is a profoundly important consideration of the resulting delay experienced imposed on hundreds of persons with disabilities who are waiting for a remedy in order to enjoy their right to equality—a wait that has already been decades long.

Application could lead to divided approach for individual/systemic claims

17. While the AGNS claims its focus is on systemic discrimination, the issues it raises in this application are based on *general human rights principles* applicable to both individual and systemic claims in identifying the service and corresponding comparator.

18. More telling still, despite the fact that the AGNS has not appealed the portion of the ruling dealing with the individual complainants (and the individual complainants would not be respondents in this appeal), the AGNS sole attacks are to portions of the Appeal Court's reasoning addressing the test for discrimination as it applied to the individual complainants.[11]

19. Indeed, the fact that the portion of the NSCA's legal analysis targeted by the AGNS actually arises from its discussion of the individual complaints, which legal determinations the AGNS does not even challenge, serves to raise troubling questions regarding the AGNS "public importance" claim. Should we rely on the NSCA decision with respect to the individuals for our understanding of what constitutes the service and proper comparator, or the AGNS's arguments in this application? While two of the individual complainants have, sadly, died during this litigation, would the remaining complainant be protected by the Province's claims or, if leave was granted and the appeal allowed, would Joseph Delaney's rights to equality be in jeopardy despite having

[10] *R. v. Chouhan*, 2021 SCC 26, para 124-126
[11] AGNS Argument, para 54; *DRC v NS Supra* Note 5, para 166.

won his discrimination case? If leave to appeal is granted at this stage, this case runs the risk of creating greater uncertainty and inconsistency in the law.

20. This Court has found that such distinctions between individual and systemic claims have no place and undermine the equality analysis:

> I think this flows from the fact that it [the Tribunal] approached discrimination in a binary way: individual and systemic. It was, however, neither necessary nor conceptually helpful to divide discrimination into these two discrete categories. A practice is discriminatory whether it has an unjustifiably adverse impact on a single individual or systemically on several: *Griggs v. Duke Power Co.* (1971), 401 U.S. 424 (U.S. N.C. S.C. 1971). The only difference is quantitative, that is, the number of people disadvantaged by the practice.[12]

21. The distinction that the AGNS is implicitly asking this Court to make between the individuals claims and the systemic discrimination claim is contrary to the proper approach to equality rights and discrimination endorsed by this Court.

The identification of the service raises no issues of public importance

22. This human rights case involves people living in poverty ("persons in need") who have disabilities that require supports and services to live. We note that the Province's suggestion that the social assistance programs under review involve "choice" or is somehow "voluntary" is illusory at best and insulting at its worst.[13] At bottom, the identification of 'the service' is a factual issue that, in reality, is unique to the facts of this case and, at most, the Nova Scotia legislation. It certainly is not a question of national importance.

23. The AGNS variously argues that the service, which is the subject of the both the individual and systemic human rights complaints, is "social programs for persons with disabilities" and at other times "voluntary residential supports" for persons with disabilities, or a "housing benefit," all of which were rejected by the NSCA.[14]

Contextual Analysis Leads to Social Assistance as the Service

24. The DRC complaint identified social assistance as the service:

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[12] *Moore v B.C.* [2012] SCC 61 para 58.
[13] AGNS Argument, para 1, 8.
[14] AGNS Argument, para 1, 24, 43.

> 172. The DRC alleges that all of the Respondent's actions or inactions described above demonstrate that the Respondent has failed to accommodate poor people with disabilities in its provision of social assistance and/or social services. The provision of social assistance to "persons in need" discriminates between the disabled and non-disabled by enabling the latter, but frequently not the former, to live in the community. This failure to accommodate the needs of persons with disabilities is a failure to take account of their differential need, i.e. a failure to account for the fact that many persons with disabilities need supports to be able to live in the community which non-disabled persons do not need.[15]

25. Based on a contextual analysis, the NSCA reviewed the complaints and traced the historical development and legislative basis of social assistance in Nova Scotia, including services for persons with disabilities, before concluding that social assistance was the service at issue in these human rights complaints:

> We are satisfied given the historical development of the legislation, the *SAA* and *ESIA* should not be viewed as separate vehicles for the delivery of social benefits to eligible Nova Scotians, but rather a single comprehensive scheme to address poverty. The testimony of Deputy Minister Hartwell entirely supports such a conclusion. Notably, she described the services offered by virtue of the two statutes as "functionally intertwined", and that those found eligible for assistance under either should expect to seamlessly transition between programs if their needs change.[16]

26. The NSCA decision is grounded in the unique historical and legislative context of social assistance programs in Nova Scotia, programs that stand alone in Canada in their ongoing heavy reliance on institutional settings for people with disabilities in need and that frustrate meaningful and non-discriminatory access to those programs by persons with disabilities, in what was largely a *fact-based determination* unique to this human rights complaint.

NSCA Takes Substantive Equality Approach in Rejecting Province's claim

27. The NSCA offered this conclusion regarding the Province's alternate characterization of the service, one that it seeks to re-argue before this Court:

> The Province would have this Court look at one narrow aspect of the assistance available to disabled persons—the provision of housing—as the "service" in question. In our view, the ameliorative objects of the Act, its liberal interpretation, the statutory context outlined above and the warnings to be vigilant against applying approaches that impede substantive equality, all support a broader view. The "service" at the heart of the

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[15] *DRC v NS*, *Supra* Note 5, para 49; in contrast with AGNS Argument, para 16.
[16] *DRC v NS, Supra* Note 5, para 148.

> complaints is properly framed as social assistance generally. When using this term, we mean benefits available to a person deemed "eligible" under the SAA.[17]

28. The AGNS's submissions obscure the fact that this human rights claim to social assistance is based on legislation that imposes clear obligations on government to provide assistance to both non-disabled and disabled eligible applicants.[18] The complainants simply seek to enforce the Province's existing legislative obligations, in a non-discriminatory manner. This is a case about how the Province has discriminatorily chosen to deliver legislatively required social assistance. It does not seek to add to or expand the services provided under the *Social Assistance Act*. Unlike *Auton,* where the service was found to lie outside the statutory bounds of healthcare services, the complainants' entitlement to social assistance is clearly established by legislation.

Identification of the Service based on Lived Experience of Complainants

29. As a matter of placing the experience of equality-seekers at the forefront of the analysis, particularly in a case by and for persons with disabilities, it was for the Complainants to frame their case as they see it and arising from their lived experiences. It is not for a government respondent to re-frame their case in an effort to 'doom' the equality claim.[19]

30. This Court has repeatedly stated that equality-rights claimants get to identify what benefits and comparisons will be at issue; *their* distinctions and comparisons should be "the natural starting point".[20] The effort here by the AGNS to re-frame the case in order to undermine it was a trend

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[17] *DRC v NS, Supra* Note 5, para 149.

[18] See detailed reasons of the NSCA rejecting this argument: *DRC v NS, Supra* Note 5, para 137-148; see also *Nova Scotia (Community Services) v.*, 2011 NSSC 126, para 60-62 where the Court affirmed the statutory obligation on the Province to provide social assistance to persons with disabilities in need under the *Social Assistance Act*.

[19] *Withler* 2011 SCC 12, paras. 48 and 59; See also, Hogg, Constitutional Law of Canada "Equality" pp 55-49: "The responding government will suggest a different comparator group that either receives worse treatment or the same treatment (*Hodge*) or that does not exist (*Auton*)."

[20] *Law* v. *Canada* (*Minister of Employment and Immigration*), [1999] 1 SCR 497 at para. 58, *per* Iacobucci J: "When identifying the relevant comparator, the natural starting point is to consider the claimant's view. It is the claimant who generally chooses the person, group, or groups with

identified in *Hodge* before being rejected in *Kapp*, *Withler* and repeatedly since. It serves no public or national interest for the Court to allow it to be re-litigated in this Court.

Social Assistance is Statutorily Mandated

31. The service identified by both the individual the human rights complainants and the Disability Rights Coalition and accepted by the Court of Appeal was "social assistance," a benefit that is already statutorily mandated and prescribed in provincial legislation. The AGNS argument fails to make this clear, leaving the impression that a human rights tribunal has somehow ordered the substantive protections without any legal basis whereas, in fact, the entitlement to those benefits have been part of Nova Scotia's own social assistance legislation for decades. Stated differently, the complainants did not seek to challenge government legislation or to expand or add to services beyond the scope of the legislation.

Discrimination Arises from Province's Implementation of Statutory Entitlement

32. Rather, the complaints challenge the discriminatory implementation of the Province's own legislation, which subjects people with disabilities who are in need of social assistance as defined by the statute and regulations, to administratively imposed barriers and disadvantages that the Province does not impose on people without disabilities in their eligibility for social assistance.

33. The focus of the human rights case is to target the Province's decision (since 1995, when its imposed a Moratorium on the expansion of community-based supported living "Small Option" capacity) to ignore its own statutory obligation in the *Social Assistance Act*.

34. In a real sense, this human rights case is about holding government accountable for its own acts of impunity visited upon persons with disabilities.

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whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge." See also *Lovelace* v. *Ontario,* 2000 SCC 37 at para. 62: "Generally, the claimant chooses the relevant comparator, however, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant".

35. These barriers include failing to provide social assistance upon qualifying, as of right, in the community of choice; distinctions that flow directly from the Province's own legislative obligations.

36. In short, for decades, the Province of Nova Scotia has simply chosen, in the case of persons with disabilities, to ignore its own legislative obligations in the provision of assistance and to apply practices that violate the rights of people with disabilities. The AGNS has failed to claim any error or issue of public importance with respect to the interpretation of that legislation.

Social Assistance Made Conditional upon Institutionalization is Discriminatory

37. This is also a claim of systemic discrimination concerning the appalling institutionalization of hundreds of persons with disabilities in locked wards of psychiatric hospitals and other anachronistic institutions, most located in remote parts of the Province, over many decades, and where Nova Scotia is likely the last province in Canada to rely on segregation of people with disabilities.[21] In proffering the substitute service of "voluntary residential supports" the AGNS tries to obscures and, thereby, erase institutionalization as a condition of receipt of social assistance.

38. Under the AGNS's analysis, the *Human Rights Act* has nothing to say about the segregation and isolation in institutional settings and other inferior treatment of persons with disabilities in the provision of social assistance to them. Applying the principle set out by this Court in *Moore*, if the Province repealed its legislation tomorrow 'cutting all' accommodative social assistance to persons with disabilities, according to the AGNS, it would "be immune from a claim of discrimination." [22]

Identification of the Service not an Issue of Public Importance

39. Seen in these terms, there are no issues of public importance. The NSCA has strongly criticized the Nova Scotia government for its failure, indeed, discriminatory failure to implement its own legislated obligations. Contrary to the contention by the AGNS, the NSCA has not created

[21] *DRC v NS*, *Supra* Note 5, para 25-26.
[22] *Moore v B.C., Supra* Note 14, at para. 30.

quality of service standards and foisted them on the Province—its own legislation already does all that.

40. The Province is asking this Court to turn back the clock with respect to substantive equality. It specifically seeks to overturn the key holding in *Moore* that the identification of the service is an evidentiary exercise into the nature and purpose of the program, informed by the principles of substantive equality.

Accommodation is human rights requirement not a quality of service issue

41. Substantive equality requires accommodation not simply formal or identical treatment. The service identified in this complaint was "social assistance" which is statutorily prescribed and mandated and includes services for persons with disabilities.[23] Access to social assistance for people with disabilities requires meeting their differential needs through 'accommodative' human rights responses to ensure that they, too, have meaningful access to social assistance.

42. It is the implementation of accommodative measures already prescribed by legislation which is at the core of the individual and systemic human rights complaints. The fact that the Province nowhere mentions accommodation, let alone substantive equality is telling of the anachronistic perspective which it seeks to advance if leave to appeal is granted.

The comparative analysis raises no new issues and no issue of public importance

43. With respect to the AGNS's equality-rights arguments, particularly in relation to comparators, it is clear that the Province is seeking to take this Court's jurisprudence back two decades to the *Auton* era and ignores recent settled jurisprudence on this question. There is no issue of public importance raised under this ground given this Court's jurisprudence over the past decade, which is directly on point, and which the AGNS fails to meaningfully address.[24]

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[23] *Social Assistance Act,* RSNS 1989 c. 432 at ss 4(d), 9; *DRC v NS*, *Supra* Note 5, para 136-149.
[24] *Withler v. Canada (Attorney General),* [2011] 1 S.C.R. 396; as cited in *DRC v NS*, *Supra* Note 5, para 161 and following; *Ontario (Attorney General) v. G,* 2020 SCC 38 at paras. 44-47, as cited in *DRC v NS*, *Supra* Note 5 para 164; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 as cited in *DRC v NS*, *Supra* Note 5 para 163 (citing *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61).

Comparative Analysis fails to Meet Public Importance Test

44. At the outset, contrary to the AGNS's arguments that the NSCA failed to conduct a meaningful comparison, it is apparent that this issue was thoroughly addressed, including the AGNS's various characterizations of the service and suggested comparators.[25] If this Court was to conclude there was no issue of public importance in relation to "the service" in this discrimination case, it falls to reason that the AGNS's argument regarding comparators also fails.

45. Before the NSCA the AGNS argued for the necessity of a formal comparator group analysis. After a thorough review of the recent jurisprudence of this Court, the NSCA found that the role of comparators was diminished and followed this Court's jurisprudence in finding that a formal comparator group analysis was not required. Contrary to the assertions of the AGNS, the NSCA conducted its review in a manner consistent with and informed by *Withler*.

Consistent approach to individual and systemic claims should be maintained

46. Paradoxically, while not appealing the Court's judgment in relation to the individual complainants, the AGNS grounds its argument, for a formalistic comparator group analysis, on the NSCA's reasons in the case of the *individual* complainants in relation to institutionalization. As noted previously, this paradoxical approach creates a real risk of creating uncertainty and confusion in the jurisprudence if this application is allowed and the appeal granted, by creating the wrong impression that there are different tests for systemic and individual discrimination claims, contrary to the jurisprudence of this Court.

Comparative approach to institutionalisation

47. In the case of the unnecessary institutionalization of the individual complainants in locked psychiatric wards for many years, the NSCA expanded its reasoning concerning the substantive nature of the discrimination against people with disabilities in relation to institutionalisation:

> Simply put, at the heart of the claim of the discrimination is this: to place someone in an institutional setting where they do not need to be in order to access their basic needs, which the Province is statutorily obligated to provide, is discriminatory.[26]

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[25] *DRC v NS*, *Supra* Note 5, para 149-168.
[26] *DRC v NS*, *Supra* Note 5, para 175.

48. Putting aside any theoretical debate, it is apparent that the NSCA did conduct a clear and thorough comparative analysis, in comparing non-disabled people who qualify for social assistance to those with disabilities in relation to the systemic discrimination claim:

> There is ample evidence in the record and the findings of the Board to support the conclusion that **the manner in which the Province provides social assistance to persons with disabilities under the SAA creates a disadvantage that is unique to them and not applicable to assistance given to non-disabled persons under the ESIA.** The impact varies depending upon the circumstances of the individual, but in extreme cases it includes unnecessary extended institutionalization such as experienced by the individual complainants. The results of this differential treatment may also include years-long waits to receive services that persons with disabilities are statutorily entitled to receive, or having to relocate in order to receive these services.[27]

49. The NSCA's approach to the issue of the institutionalisation of people with disabilities relies upon settled principles of substantive equality and accommodation, including *Moore,* a human rights claim, which in turn relied upon *Withler*, where this Court found that substantive discrimination should not be limited by rigid adherence to a formalistic comparator group analysis, such as the one argued by the AGNS in this application.[28] The AGNS's efforts to reinstate a pre-*Withler* formal comparator group approach to this issue is inconsistent with these settled principles and certainly fails to meet the test of public importance to justify intervention by this Court.

50. Since *Withler*, *Quebec v. A*. and, most recently, *Fraser*, this Court has centred concepts of accommodation and substantive equality at the epicentre of its jurisprudence—especially when considering the situation of persons with disabilities.[29] Despite this, the AGNS omits the relevant principles of accommodation and substantive equality in its argument with respect to comparators, a clear indication that this application fails to meet the test of public importance.

51. This Court has repeatedly emphasized that equality jurisprudence informs its interpretation of human rights legislation and *vice versa* in rejecting a formalistic, mirror group analysis such as

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[27] *DRC v NS*, *Supra* Note 5, para 222.
[28] *DRC v NS*, *Supra* Note 5, para 133, 158-167, where it adopts this principle.
[29] *Fraser v Canada*, *Supra* Note 1, para 94; See also *Canada (AG) v CHRC, First Nations Family and Child Caring Society* 2013 FCA 75, para 18-19, Stratas J applies these principles in a claim of systemic discrimination under the *Canadian Human Rights Act.*

the one put forward by the AGNS. There is no new or compelling reason to suggest that this Court's intervention is needed given the settled equality rights jurisprudence on this point.

Distinguishable Appellate Cases

52. The Province's arguments that there is uncertainty in the appellate case law regarding the role of comparators in equality rights relies on the PEI Court of Appeal in *King*.[30] In its discussion of *King*, the NSCA correctly noted that the PEI Court of Appeal failed to cite any of the relevant jurisprudence from this Court regarding substantive equality and the diminished role of formalistic comparator groups to discrimination that followed *Withler*. The AGNS's position that a formalistic comparison is required does not raise an issue of public importance and its attempt to portray this issue as an apparent "inconsistency" in the appellate jurisprudence should be rejected.[31]

53. The case cited by the AGNS from the New Brunswick Court of Appeal predates *Withler* and subsequent jurisprudence from this Court regarding comparators that are directly on point and dispositive of the issue.[32] The NBCA also relies on the BCCA decision in *Moore* that was subsequently overturned by this Court, on the issue of the service and comparators. There is no tenable basis to argue based on this outdated authority that there is an issue of public importance that requires resolution by this Court.

Accommodation

54. The AGNS's argument that there is no equivalent to the disability supports programs and that therefore they should not be compared to other forms of social assistance ignores settled principles of accommodation in human rights law. The issue of comparators is importantly a

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[30] *King v Govt. of P.E.I. et al.,* 2018 PECA 3; In *King,* where a claim, addressing an allegedly underinclusive disability support program by people with mental disabilities, was based on intra-disability discrimination. In identifying a requirement for a comparator group, the PEICA failed to mention, let alone consider, *Withler* and more recent relevant jurisprudence of this Court.

[31] *DRC v NS*, *Supra* Note 5, para 166.

[32] *New Brunswick Human Rights Commission v. Province of New Brunswick (Department of Social Development),* 2010 NBCA 40; AGNS Memorandum of Law, para 46; See also *DRC v NS*, *Supra* Note 5, para 128, Footnote 25.

contextual and fact-based inquiry. For people with disabilities who are in need of social assistance, their differential needs require accommodation in a human rights sense. The testimony of the AGNS's own witness before the Board of Inquiry, relied upon by the NSCA, confirmed this understanding of the need for accommodative services and the intertwined system of social assistance for people with and without disabilities in Nova Scotia:

> The Province provides assistance and support for persons who are eligible to receive it in order to live at a minimum level of dignity and self-worth. As explained earlier, these resources are provided under the auspices of the SAA and ESIA. **As the Deputy Minister indicated in her testimony, these legislative schemes are interrelated and inseparable.** The Board reviewed the Deputy Minister's evidence on this subject and concluded (at p. 85):
>
> > These two Acts of the legislature provide a continuum of services to the disabled in need from the basic income support, through assistance with special needs to full-time expensive residential care and support. I am satisfied, too, from her evidence that this is the way Deputy Minister Hartwell herself views the legislation she administers. **I can see, for the purposes of their application to the disabled, no substantial difference between the two Acts, except in terms of the scale of the services they offer.** The scale of the opportunities, benefits and advantages, or the fact that as one escalates one may encounter waitlists, does not, in my view, make any significant difference for the disabled.[33]

55. The approach to comparators advanced by the AGNS, in arguing that social assistance for non-disabled and disabled persons cannot be compared because they are different, overlooks the very basic principle of accommodation in the human rights jurisprudence of this Court, as cited by the NSCA.[34] This superficial approach to discrimination ignores the jurisprudence and fails to raise an issue of public importance.

The public importance test is not met

56. The NSCA relied upon well settled jurisprudence from this Court regarding the service and comparators and applied principles of substantive discrimination within the unique historical and legislative context of social assistance in Nova Scotia. Their legal analysis does not alter in any way the post *Withler* and post *Moore* approach adopted by this Court. The AGNS has failed to raise any issue of public importance.

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[33] *DRC v NS*, *Supra* Note 5, para 216, Emphasis added.
[34] *DRC v NS*, *Supra* Note 5 and 24.

PART IV SUBMISSION ON COSTS

57. The Respondent requests costs.

PART V ORDER REQUESTED

58. The Respondent requests that Leave to Appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of January 2022.

Claire McNeil
Counsel for the Respondent,
Disability Rights Coalition

PART VI – TABLE OF AUTHORITIES

RESPONDENT'S AUTHORITIES	CITED AT PARAGRAPH NO.
CASES	
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