SCC File No.

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)

APPLICANT'S MEMORANDUM OF ARGUMENT
(Pursuant to s. 40 of the *Supreme Court Act*, RSC 1985, c. S-26 and
Rule 25 of the Rules of the Supreme Court of Canada)

ATTORNEY GENERAL OF NOVA SCOTIA
Legal Services Division
1690 Hollis Street, 8th Floor
Halifax NS B3J 1V7

Attn: Kevin A. Kindred and Dorianne Mullin
Tel: (902) 220-5774, (902) 220-2788
Fax: (902) 424-1730
Email: Kevin.Kindred@novascotia.ca
Dorianne.Mullin@novascotia.ca

Counsel for the Applicant

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa ON K1P 1C3

Attn: D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Applicant

MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The core question in this case is whether human rights legislation requires governments, when providing voluntary residential supports to persons with disabilities, to provide such supports without delay, and in the form and the community most desired by the applicant. The Nova Scotia Court of Appeal held that a failure to do so amounted to prima facie discrimination under the *Nova Scotia Human Rights Act*, R.S.N.S. 1989, c. 214. The Attorney-General of Nova Scotia seeks leave to appeal that decision to this Court.

2. Discrimination is, at its core, a comparative concept. The Court of Appeal, in its discrimination analysis, adopted a fundamentally flawed comparative analysis, comparing persons with disabilities receiving residential support to persons receiving income assistance cheques, simply because both benefits can be described as "social assistance". This approach to comparison transforms the analysis under human rights legislation from a question of discrimination against persons with disabilities, into a quality-of-service requirement for persons with disabilities. Whatever the merits of a quality-of-service requirement, that approach is inconsistent with both the wording and intent of human rights legislation.

3. In reaching its conclusion, the Court of Appeal misapplied the well-founded and oft-cited principle that

> …the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.[1]

4. Moreover, the Court of Appeal suggests that a meaningful comparative analysis is not in fact fundamental to a discrimination argument, in contrast with the recent discrimination jurisprudence of this Court as well as with similar decisions from other provincial Courts of Appeal.

---

[1] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 ("*Auton*") at para.41

5. This case involves significant questions of public importance. All governments provide services which are designed to address the specific needs of persons with disabilities, such as the supportive housing benefits in this case, with no comparable services provided to persons without disabilities. Under the reasoning of the Court of Appeal in this case, any such benefit is nonetheless discriminatory if it involves a waitlist for services, or if there are limitations on the location or quality of the services available. Enforcing this broad principle will transform human rights adjudicators into the administrators of disability benefits, and transform a legitimate social policy question into a legal question under the auspices of the *Human Rights Act*, which is not designed to serve that purpose.

6. The case below merged two appeals involving both individual discrimination complaints, and a systemic discrimination case brought by the Disability Rights Coalition ("DRC"). The Attorney General seeks leave to appeal only with respect to the finding of systemic discrimination in favour of the DRC, and wishes to leave the findings in favour of the Individual Complainants intact (despite similar discrimination analyses being applied by the Court of Appeal in both instances.) The questions of national importance in the case relate far more to the system discrimination claim than the facts of any individual case.

B. STATEMENT OF FACTS

The Disability Support Program and other relevant government programs

7. Nova Scotia, through its Department of Community Services ("DCS",) provides support to persons with physical disabilities, intellectual disabilities, and/or mental health challenges and their families through the Disability Support Program ("DSP"), which delivers services pursuant to the *Social Assistance Act*[2] and the *Homes for Special Care Act.*[3] In addition to financial support which parallels the benefits available under the *Employment Support and Income Assistance Act*[4], the DSP provides a range of supportive living arrangements from community-based options (such as supports to participants living at home with family, living independently or in "small option homes") to larger residential options such as Adult Residential Centres and Regional Rehabilitation Centres.

---

[2] R.S.N.S, c. 432 ("SAA")
[3] R.S.N.S, c. 203
[4] S.N.S. 2000, c. 27 ("ESIA")

8. A person with a disability may apply for DSP services, but they are not required to apply, and the services are voluntary. An applicant has the choice (or if they lack the legal capacity, their decision-maker has the choice) to accept or reject any of the placement options offered by DSP. This is in contrast to, for example, individuals subject to an Adult Protection order or who are incarcerated, who lack any such choice. However, the evidence is clear that many applicants seeking supportive housing under the DSP have limited, if any, residential options outside what the DSP is able to provide.

9. The record before the Court of Appeal indicated that, as of January 2018, there were approximately 5,400 participants in the DSP, and that the cost of the program has exceeded $300,000,000.00 per year in recent years.

10. The undisputed evidence is that the residential supports of the DSP are limited in several ways. DSP is unable to provide a residential placement to all applicants when they want it or need it. Moreover, the limited placements available may not be in the applicant's preferred community, may not be in the setting preferred by the applicant, and may require relocation within the Province.

11. The DSP, historically and currently, relies significantly on placements in large institutional settings. Best practices, and the preferences and needs of applicants, have for some time shifted away from larger congregate institutional settings in favour of community-based placements, often in "small option homes". In this context, the term "small option home" refers to a setting in a residential community with typically 3-4 residents, and staff according to the individual needs of the residents. Expert evidence, accepted by the Province, indicates that community-based residential placements are far superior to congregate institutional settings, provide more positive outcomes for residents, and better respect the inherent dignity of residents.

12. It is also undisputed that, in the face of competing priorities, successive governments have limited investment in small option homes, with the result that such placements were very limited in comparison to placements in congregate institutional settings. The evidence indicates that successive governments have committed to systemic reforms, including significantly reducing the reliance on larger institutional facilities, but the Province acknowledges that reforms have proceeded slowly. The record before the Court of Appeal

indicated that approximately 695 DSP participants resided in small option homes, compared to 555 residing in large congregate institutional settings.[5]

13. The record before the Court of Appeal (in particular with respect to the individual complaints in which the Province does not seek leave to appeal) indicates that some individuals who are eligible for DSP services have instead been resident in hospitals long beyond what was medically necessary, due in part to limited capacity in the DSP as well as particular complicating factors in individual cases.

14. The Court of Appeal contrasted the system of residential placements under the DSP with income assistance under the *Employment Support and Income Assistance Act*, another benefit provided by the Province under the broad umbrella of "social assistance". Income assistance is a program of last resort intended to provide low-income Nova Scotians with funds for shelter and personal expenses, and certain approved special needs. Whereas DSP involves the Province finding (or creating,) staffing, and funding a specific residential placement for an applicant, income assistance simply involves providing funds to the applicant which are intended to cover minimal basic needs.

15. While there is no equivalent to the DSP for persons without disabilities, the evidence in the case would have allowed for comparison to government programs which provide housing to low-income Nova Scotians beyond the financial supports of income assistance. Housing Nova Scotia is a crown corporation with a mandate to provide affordable, safe, and adequate housing to Nova Scotians in need. There are a number of programs within Housing Nova Scotia, some of which focus on allowing low income homeowners to remain in their homes, whereas others provide rental units to low income Nova Scotians. The choices of public housing are limited, and are not guaranteed to be in the neighbourhoods and communities the individual prefers. A non-disabled Nova Scotian seeking

[5] A full numerical breakdown between "institutional settings" and "community-based settings" would be more nuanced, as there are other categories of community-based options beyond small options homes (such as programs to fund living independently or with family members) and also categories of placement which are less easy to categorize (such as group homes and residential care facilities, which tend to have fewer than ten residents.)

governmental support in establishing housing (beyond the financial support available to eligible Nova Scotians as income assistance) would, if qualified based on income, be put on a waitlist for an eventual spot in public housing. The waitlist to access Housing Nova Scotia's programs, at the time of the hearing, stood at approximately 3,400 households. The length of time that applicants must wait is dependent on the area in which the applicant lives, and the program applied for. Specifically, with respect to rental units, the record before the Court of Appeal indicated that the average wait time varies from no wait time for certain buildings, to over ten years for other buildings, with an average wait time of 2.7 years. The Court of Appeal did not refer to this government program in its decision.

Procedural history

16. In August of 2014, three individual complainants – Beth MacLean, Joey Delaney (by his mother Susan Lattie); and Sheila Livingstone (by her sister, Olga Cain) (collectively, the "Individual Appellants") – filed human rights complaints alleging the Province discriminated against them in not providing them with "appropriate assistance which [they] need in order to live in the community." The Disability Rights Coalition also filed a human rights complaint alleging the Province discriminates against all persons with disabilities in Nova Scotia in failing to "develop, implement and provide appropriate options for community living for persons with disabilities," including the opportunity to choose where to live and with whom, access to in-home residential support services, and other community services and facilities.[6]

17. The Complaints were referred together to a hearing before a Board of Inquiry under the *Human Rights Act*. Prior to the hearing, the parties agreed to bifurcate the hearing corresponding to the two parts of a discrimination analysis: first, the Board would determine whether a case for prima facie discrimination had been made out ("Phase 1"), and if so, the Board would subsequently deal with the question of whether any exceptions under the Act applied ("Phase 2").

---

[6] Complaint of the Disability Rights Coalition, et al. under the Nova Scotia *Human Rights Act*, received by the Nova Scotia Human Rights Commission on August 1, 2014.

18. The "Phase 1" case was heard over forty days of hearing between February and November 2018, with evidence from twenty-eight witnesses in total from all Complainants and seven witnesses from the Province. The Board issued a decision on March 4th, 2019 dismissing the DRC's systemic complaint, but finding that prima facie discrimination was made out with respect to the three individual complaints.

19. With respect to the three individual complaints, the Province waived its right to make an argument at Phase 2. The Board of Inquiry issued a decision on Remedy for the Individual Complainants on December 4th, 2019.

20. The Province, the Individual Complainants, and the DRC all appealed or cross-appealed aspects of the Board of Inquiry's decision on prima facie discrimination and its decision on remedy to the Nova Scotia Court of Appeal, pursuant to s.36(1) of the *Human Rights Act*:

> **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.

21. The DRC's appeal argued that it was an error of law to dismiss its complaint of systemic discrimination. Inclusion Canada, the Council of Canadians With Disabilities, and People First of Canada were granted leave to intervene by Order dated June 21, 2019, in recognition of the national significance of the issues of system discrimination raised in the claim.

22. The Court of Appeal heard argument over two days on November 18 and 19, 2020. It issued its decision on October 6, 2021. The Court of Appeal allowed the DRC's appeal, and found that a prima facie case of discrimination was made out in the systemic complaint. The Court of Appeal ordered that the DRC's claim go back before a differently-constituted Board of Inquiry for a determination of whether any of the exceptions in the Act apply ("Phase 2").

23. The Court of Appeal also upheld the finding of prima facie discrimination with respect to the Individual Complainants, increased the amount of general damages awarded by the Board of Inquiry, and overturned other aspects of the Board of Inquiry's remedial decision. While the Court of Appeal applied largely the same discrimination analysis with respect to the individual and the systemic claims, the Province seeks leave to appeal only with respect

to the finding in favour of the DRC, and asks that the decisions with respect to the Individual Complainants remain undisturbed.

PART II – STATEMENT OF QUESTIONS IN ISSUE

24. The issues are as follows:

ISSUE 1: When a government offers residential supports to persons with disabilities, does human rights legislation require that such supports share the same features as financial supports through income assistance (i.e. no waitlists, no requirement to live in a certain setting, no requirement to relocate communities)?

The Province submits that it does not, and that governments are entitled to provide different forms of "social assistance" in different ways. The Court of Appeal's interpretation is inconsistent with this Court's discrimination jurisprudence, and puts courts and adjudicators in the position of determining social policy rather than simply addressing discrimination. This question has enormous significance to governments, who provide social programs in many forms to persons with disabilities, which programs will always have limitations and shortcomings. Governments require clear guidance from this Court as to when, if ever, the limitations of a social program for persons with disabilities amount to discrimination.

ISSUE 2: Does the discrimination analysis under the *Human Rights Act* require a meaningful comparative analysis?

The Court of Appeal in this case determined that a comparative lens was not a mandatory part of the test for discrimination, directly in contrast with other appellate court decisions in similar cases involving benefits for persons with disabilities. This Court will, in this case, have the opportunity to clarify confusion among lower courts as to the role of comparative analysis in a test for discrimination.

PART III – STATEMENT OF ARGUMENT

Issue 1: When a government offers residential supports to persons with disabilities, does human rights legislation require that such supports share the same features as financial supports through income assistance (i.e., no waitlists, no requirement to live in a certain setting, no requirement to relocate communities)?

25. The Court of Appeal's errors with respect to the discrimination analysis lead to a result which, if not corrected, could fundamentally change the way governments are required to provide services to persons with disabilities. The effect of the decision is that every benefit for disabled persons which could be labelled "social assistance" must share the same fundamental features of income assistance cheques—provided without waitlists, without any requirement as to what setting the applicant lives in, and with no risk of the applicant having to relocate communities in order to receive services. Financial payments to an applicant can of course share those features, but not all benefits can or should work like financial payments. The Court of Appeal's logic has the result of significantly hampering a government's ability to provide benefits like residential supports under DSP, which are more complex than simply issuing a cheque.

26. The Province would argue that the Court of Appeal came to this conclusion through a discrimination analysis which erred in three related ways:

(a) It improperly characterized the "service" at issue in the Complaint as the umbrella term "social assistance," rather than the specific service at issue, residential support.

(b) It failed to make a meaningful comparison between the services provided to persons with disabilities and persons without disabilities.

(c) It failed to give effect to the principle that it is not discriminatory for a government to not provide a benefit or to limit the scope of the benefit provided, so long as it does not discriminate within the provision of the benefit.

27. These errors are closely related, as they all involve principles which are directly extractable from the legal definition of discrimination itself:

> For the purposes of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic…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. (*Human Rights Act*, s.4)

A. The Court of Appeal improperly characterized the "service" at issue in the complaint as the umbrella term "social assistance," rather than the specific service at issue, residential support.

28. This Court has stated in its jurisprudence that a failure to correctly define the service or benefit at issue in a discrimination claim can lead to a fundamentally flawed analysis. The importance of properly characterizing the service at issue was explicitly recognized by the Court of Appeal in this case.[7] The errors by the Court of Appeal in this case will allow this Court, on appeal, to provide clear guidance as to how adjudicators and judges should properly identify the service or benefit at issue in cases where the parties disagree.

29. The need for clear direction on defining the service is illustrated by this Court's decisions in cases like *Moore* v. *British Columbia,* 2012 SCC 61 ("*Moore*"), and *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General),* 2004 SCC 78 ("*Auton*"), which each turned on the question of how the "service" at issue was defined. In each case, the Court rejected one proposed articulation of the service, as it did not set up the proper comparison.

30. *Moore* was a case in which a student with disabilities alleged discrimination when the Province failed to provide appropriate accommodations to allow him to participate in the school system. The government characterized the service as "special education" in order to draw a comparison between the complainant and other disabled students, but this Court accepted that the service was simply "education", which led to a more appropriate comparison between disabled and non-disabled students and how both groups accessed the general education system.

[7] "The identification of the "service" is often determinative of the outcome of a discrimination complaint. This is such a case." (at para.110)

31. The inverse of this dynamic was seen in in *Auton*, which alleged that a failure to publicly fund certain medical treatments for autism through the medicare system was discriminatory. There, the complainants offered a broad interpretation of the "service" at issue ("funding for all medically required treatments,")[8] which would have set up a comparison between some disabled persons who were provided this benefit and others who were not. This Court, however, found that "funding for all medically required treatments" was not actually a benefit provided by law, as medicare is by its nature a limited benefit; as a result, the comparative analysis failed.

32. In this case, the Court of Appeal recognized that the Board of Inquiry erred in identifying the service in question as "services offered generally to disabled people," and had to determine for itself the proper characterization of the service at issue. The DRC articulated the service as "social assistance," a broad term which involves a spectrum of benefits provided under the *Social Assistance Act*, the *Employment Support and Income Assistance Act (* "ESIA"), and other related statutes and regulations. The Court of Appeal accepted this characterization, which set up the discrimination analysis as a comparison between two types of "social assistance": DSP residential supports and ESIA financial supports (or "income assistance").

33. The Province argued at the Court of Appeal, and would argue here, that "social assistance" was not the proper articulation of the service at issue in the Complaint, and that characterizing the service instead as "residential support" allows a comparative analysis which truly answers the discrimination question in comparing persons with disabilities and persons without disabilities.

34. The Court of Appeal appears to have misunderstood the Province as arguing that "social assistance" was not a service to which the *Human Rights Act* applied:

> …neither of those cases support the Province's view that social assistance should not be a "service" under the Act (at para.113)
>
> We do not agree the Province's provision of a social benefit falls outside of the scope of the protections afforded against discrimination in the Act. (at para.119)

---

[8] *Auton*, at para.35

> The Province's argument is also undercut by the existence of case law recognizing government-provided social assistance and benefits as a "service" within the meaning of human rights legislation. (para.125.)

35. The Province did not, and does not, contest that the *Human Rights Act* applies to the provision of social assistance, as it does to the provision of any other government benefit. Rather, the argument in this case was whether "social assistance" as characterized by the DRC was *the* "service" truly at issue in the complaint. The Province asked the Court of Appeal to do what this Court did in *Moore*, *Auton*, and many other cases - characterize the service in a way that spoke to the issues truly at the core of the argument. It was not enough for the Court of Appeal to find that "social assistance" *could be* a service within the meaning of the Act; it had to analyse whether "social assistance" truly was the service at the core of the allegation of discrimination. By misunderstanding that question, the Court of Appeal failed to set up an appropriate discrimination analysis.

36. The Province submits that "social assistance" is not the appropriate characterization of the benefit at issue in the Complaint, for several reasons. First, "social assistance" is a broad term that encompasses many government benefits which work in different ways. The DRC prefers the term "social assistance" because it allows for a comparison between the financial supports of income assistance and the residential supports of the DSP, but the term itself, as defined in the relevant regulations, covers many kinds of benefits beyond those two:

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

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

(vi) rehabilitation services;[9]

37. Thus, there is no useful comparison to be had between how the Province provides "social assistance" to persons with disabilities and persons without; the umbrella term encompasses many kind of benefits, not all of which are provided in the way income assistance is.

38. Secondly, "social assistance" is not actually the substance of the DRC's Complaint, despite it articulating it in that manner for the purposes of making a comparison. In the Complaint itself, the DRC describes the alleged discrimination as the "fail[ure] to provide adequate, supportive, community-based housing for people with disabilities."[10] The DRC later describes the "service" as: "access to social assistance or other public assistance or service required in order to enable persons with disabilities who are in need to live in an appropriate care setting"[11]. It is clear that the substance of the argument is not about "social assistance" as some broad umbrella term, but rather about specific benefits which provide residential support.

39. Finally, treating "social assistance" as the benefit does not adequately capture a distinction between persons with disabilities and persons without disabilities. Every person eligible for DSP would also be eligible for simple financial support through income assistance through ESIA, should they prefer that over the residential supports available through the DSP. The distinction between the two benefits is not based on disability per se; it is based on the fact that they are inherently very different benefits which cannot be provided in the same way.

40. The Province will argue that this mischaracterization of the "service" in question is a crucial error in law by the Court of Appeal, which, if taken to its conclusion, would create an obligation on governments to provide all forms of social assistance to persons with

---

[9] *Municipal Assistance Regulations*, O.I.C. 81-665 (effective May 12, 1981), N.S. Reg. 76/198, as amended to O.I.C. 1999-464 (effective October 1, 1999), N.S. Reg. 93/1999, s.1(e).

[10] Complaint of the Disability Rights Coalition, et al. under the Nova Scotia *Human Rights Act*, received by the Nova Scotia Human Rights Commission on August 1, 2014 (Tab 4), at para.34.

[11] *Ibid*., at paragraph 161.

disabilities in the same way it provides income assistance cheques to persons with and without disabilities.

B. The Court of Appeal failed to make a meaningful comparison between the services provided to persons with disabilities and persons without disabilities.

41. Mischaracterizing the service in question set the wrong parameters for the comparative analysis required in order to assess an allegation of discrimination. This case will allow the Court an opportunity to clarify how to give effect to the comparative nature of the discrimination analysis, in cases involving benefits which are only available for persons with disabilities, like the DSP.

42. If the service in question had been properly understood as residential support, the Court of Appeal would have been able to make a comparison which truly addressed the issues in the Complaint, and would have determined that the social problem identified by the DRC was not a problem of discrimination under the *Human Rights Act*.

43. When the service is understood as residential support, it becomes clear that there is no generally-available benefit offered for persons without disabilities which can be compared to the DSP in order to show discrimination. Unlike with (eg.) education[12] or hospital services,[13] there is no universal housing benefit provided by provincial governments to all citizens. The fact that government undertakes to provide a benefit for persons with disabilities which it does not provide for others cannot lead to the conclusion that any shortcomings of that benefit are discriminatory on the basis of disability, as argued by the DRC.

44. To the extent the Province does offer a benefit similar to DSP for persons without disabilities, the closest parallel that could be drawn is to public housing under Housing Nova Scotia. The evidence before the Court of Appeal was that public housing for persons without disabilities works under limitations comparable to the limitations of the DSP: it may involve waitlists for applicants, and the only options available may not be in the setting or the community the applicant prefers. This comparison illustrates that the limitations of

---

[12] As was at issue in *Moore*.

[13] As was at issue in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

the DSP, while presenting an important social problem for governments to address, do not amount to discrimination under the *Human Rights Act*.

45. An even more general comparative lens might simply ask: what options would a DSP applicant have if they did *not* have a disability, and therefore were not eligible for services under the DSP, limited as they may be. The answer is that an applicant without a disability would have access to the limited financial support of income assistance, and possibly a public housing option through Housing Nova Scotia. The evidence in the record indicates that those options are in fact open to, and sometimes preferred by, persons who might be eligible for the DSP. While the DSP applicant might face the prospect of limited options, they are not at a comparative disadvantage to persons without disabilities, who would have even fewer options.

46. The Court of Appeal's approach in this case is in stark contrast to the only similar appellate-level decision argued by the parties, the New Brunswick Court of Appeal's decision in *New Brunswick Human Rights Commission* v. *Province of New Brunswick (Department of Social Development)*, 2010 NBCA 40 ("*Province of New Brunswick*").[14] There, a human rights complaint was brought by a family on behalf of their son who had severe autism, alleging discrimination because the son was institutionalized at a large facility instead of being given community-based residential supports, and also because he was subsequently transferred to a facility in Maine rather than remaining in his home community. New Brunswick successfully challenged the Commission's preliminary finding that a prima facie case of discrimination had been made out. The New Brunswick Court of Appeal stated:

> We are not dealing with a person with a disability who is seeking access to existing government benefits or services as was true in *Eldridge*, *Auton* and *Moore*. Specifically, we are not dealing with a case in which one party is arguing that the relief being sought amounts to the funding of a benefit or service not otherwise available to the public and the other party is arguing that the relief being sought is necessary in order for the person with a disability to gain access to an existing service. This is why the Commission's belief there is no need to isolate an appropriate comparator group is without legal foundation.[15]

[14] Leave to appeal to this Court was dismissed (2011 CanLII 2096).

[15] *Province of New Brunswick*, at para.80.

47. Dealing with the same limitations in that individual claim as the DRC raises in its systemic discrimination claim, the New Brunswick Court of Appeal properly concluded that a comparative analysis led to a finding of no discrimination, the exact opposite conclusion reached by the Court of Appeal in the present case.

C. The Court of Appeal failed to give effect to the principle that it is not discriminatory for a government to not provide a benefit or to limit the scope of the benefit provided, so long as it does not discriminate within the provision of the benefit.

48. As noted above, the Province also relied on the oft-cited principle from *Auton*:

> …the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.[16]

49. This principle flows from the comparative nature of the discrimination test. Where a government does not provide a benefit at all, a comparative analysis cannot conclude that persons with disabilities are disadvantaged, even if they might particularly benefit from a service being provided. On the other hand, if government makes a benefit available to all, but persons with disabilities have a comparative difficulty accessing the service, it may be discriminatory. This principle is fundamental to the way discrimination claims against governments are determined, and this case provides the Court the opportunity to clarify its application and confirm that it continues to be good law.

50. The Court of Appeal dealt with this principle as follows:

> In our view, *Auton* does not stand for the proposition that governments should not be questioned as to whether their provision of social benefits is discriminatory within the meaning of human rights legislation. It does stand for the proposition governments should not be forced, as part of a claim of discrimination, to create benefits that do not exist. Importantly, it expressly recognizes that should a government offer a benefit, it cannot do so in a discriminatory fashion. In our view, the complaints here involve an allegation that the Province is providing an existing benefit in a discriminatory manner. We do not view this matter as being one in which the complainants are seeking a non-existent benefit and, as such, *Auton* is of little relevance. (para. 123.)

[16] *Auton*, at para.41.

51. In part, this conclusion flows from the Court of Appeal's error in mischaracterizing the service as "social assistance," which is an existing benefit, rather than "residential support," which is not a benefit generally available to all. However, even in this context, the Court of Appeal misapplies the principle. In *Auton* itself, the claim dealt with the limitations of publicly-funded health care, which was in fact an existing benefit. The principle in *Auton* does not come down to whether the benefit argued for is "non-existent"; it comes down to allowing governments to place limits on benefits, such as the limits inherent in publicly-funded health care, so long as the limits do not create discriminatory distinctions in how the benefit applies.

52. The Province submits that, as in *Auton*, this case involved a benefit which is by its very nature limited, as a result of government "target[ing] the social programs it wishes to fund as a matter of public policy." The fact that the DSP operates under limitations and does not meet all the wants and needs of all applicants is similar to how, in *Auton*, the medicare system operated under limits and failed to fund all beneficial health services. The limits on social programs for persons with disabilities are legitimate social issues for governments to seek to redress, but they do not ground a legal finding of discrimination.

53. The principle in *Auton,* in addition to being an important part of how discrimination is defined at law, also serves as an important boundary defining the separate roles of adjudicators and courts, on the one hand, and elected governments on the other. This Court has recognized the role of the legislative and executive branches of government in developing social policy, which ought not to be lightly interfered with by courts.[17] Governments have legislated a prohibition on discrimination, and thus are legally restrained (by human rights legislation or the *Charter*) from discriminating in implementing social policy. However, social programs may have limitations which, while raising important policy questions for government, do not amount to discrimination. In such cases, courts respect the role of elected governments, and do not interfere. The analysis of the Court of Appeal in this case, by misapplying the concept of discrimination and neglecting the principle in *Auton*, inappropriately blurs the line between those separate spheres.

---

[17] *R.* v. *Chouhan*, 2021 SCC 26, at para.84 (reasons for decision of Moldaver and Brown JJ) and paras.126-137 (concurring reasons of Rowe J.)

Issue 2: Does the discrimination analysis under the Human Rights Act require a meaningful comparative analysis?

54. While the Court of Appeal framed its decision in comparative terms, contrasting the financial benefits of income assistance to the residential benefits of the DSP, it also reframes the discrimination analysis itself so as to minimize or eliminate the need for a meaningful comparative analysis at all. This fundamentally reshapes the legal concept of discrimination, unmooring it from the comparative lens which the statutory language, and this Court's jurisprudence, continue to emphasize.

55. The Court of Appeal was correct to observe that this Court's approach to performing the comparative analysis has evolved, most notably by the rejection of a "mirror comparator group" framework in *Withler* v. *Canada (Attorney General),* 2011 SCC 12. However, the Court of Appeal takes this evolution even further by suggesting that the discrimination analysis can operate without any structured comparison at all:

> In our view, boards and courts should exercise caution in viewing a structured comparative analysis as being a mandatory aspect of a discrimination analysis… (para.155)
>
> …we note the court[18] did not consider the applicability of the principles outlined above in the Charter equality jurisprudence and, accordingly, do not regard its view that an appropriate comparator group is required as being persuasive. (para.166)

56. Despite evolution in the approach to comparison, this Court has emphasized that equality is inherently "a comparative concept" and that "comparison plays a role throughout the analysis."[19] Comparison is also inherent in the words used in the Act to define discrimination:

> For the purposes of this Act, a person discriminates where the person *makes a distinction*, whether intentional or not, *based on a characteristic*, or perceived characteristic…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

---

[18] Referring to the Prince Edward Island Court of Appeal in *King* v *Govt. of P.E.I. et al.*, 2018 PECA 3 ("*King*").

[19] *Withler* at paras.41, 61.

> advantages *available to other individuals or classes of individuals in society*. (*Human Rights Act*, s.4, emphasis added.)

57. In minimizing or eliminating the role of the comparative analysis, the Court of Appeal reached an opposite conclusion from provincial Courts of Appeal in two similar cases. In *King*, referenced above, the claim also involved a provincial Disability Support Program, and specifically challenged that the program excluded disabilities based on mental illness while covering physical and intellectual disabilities. The PEI Court of Appeal did, in that case, find discrimination based on the ground of disability, but emphasized the "mandatory" nature of the comparative analysis in reaching that conclusion. The Court of Appeal in the present case explicitly disagreed with the Court of Appeal in *King* on this point:

> Further, we acknowledge *King* is supportive of the Province's position that some formal comparative analysis is necessary. There, the Court of Appeal opined "[l]ocating the appropriate comparator is necessary in identifying differential treatment and the grounds of the distinction". With respect, we disagree. In doing so, we note the court did not consider the applicability of the principles outlined above in the *Charter* equality jurisprudence and, accordingly, do not regard its view that an appropriate comparator group is required as being persuasive. (at para.166)

58. The case of *Province of New Brunswick,* also referred to above, is even more factually similar to the case at bar, involving a claim that the Province discriminated by only making residential supports for a disabled claimant available in a large institution or out of province. In that case, the Human Rights Commission had been prepared to find a prima facie case of discrimination without undergoing a comparative analysis. The New Brunswick Court of Appeal overturned the decision, explicitly stating that:

> …the Commission's belief there is no need to isolate an appropriate comparator group is without legal foundation.[20]

59. The Province submits that the Court of Appeal in the present case, in showing a willingness to minimize or abandon the role of the comparative analysis in a discrimination case, pushes the discrimination jurisprudence in a direction that is inconsistent with the wording of the *Human Rights Act*, inconsistent with the jurisprudence of this Court, and explicitly in conflict with the approach of at least two provincial Courts of Appeal considering similar

---

[20] at para.80.

discrimination claims. Beyond the implications in the present case, which are substantial, this evolution of the jurisprudence has the potential to be of national significance, and requires correction by this Court.

Conclusion

60. The Province submits that the Court of Appeal, in the present case, misapplied the concept of discrimination in a manner which, rather than addressing comparative differential treatment, becomes a non-comparative guarantor of the quality of services provided to persons with disabilities. Governments can and should strive to improve the quality of services available to persons with disabilities, including services under the DSP; however, the accountability for governments with respect to that quality of service does not fall to adjudicators and courts applying the *Human Rights Act*. In making the errors outlined above, the Court of Appeal disregarded the wording of the legislation, the jurisprudence of this Court, and the specific rulings of other provincial Courts of Appeal in similar cases. This raises issues of national significance in the evolution of the discrimination case law, issues which, the Attorney General respectfully submits, it is incumbent on this Honourable Court to address.

PART IV – SUBMISSION ON COSTS

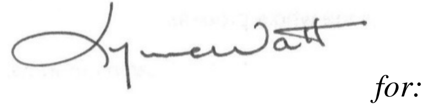
61. The Applicant does not seek costs on this application.

PART V – ORDER SOUGHT

62. The Applicant respectfully requests leave to appeal from the decision of the Nova Scotia Court of Appeal, dated October 6, 2021, with respect to the systemic discrimination claim brought by the Disability Rights Coalition.

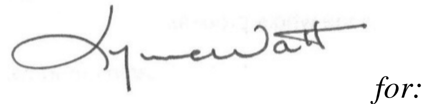
ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Halifax, in the Halifax Regional Municipality, Province of Nova Scotia this 6th day of December, 2021.



for:

Kevin A. Kindred
Counsel for the Applicant,
Attorney General of Nova Scotia



for:

Dorianne M. Mullin
Counsel for the Applicant,
Attorney General of Nova Scotia

PART VI – TABLE OF AUTHORITIES & STATUTES

Case Law:	Paragraph References
Auton (Guardian ad litem of) v. British Columbia (Attorney General), 2004 SCC 78	3, 31, 48
King v *Govt. of P.E.I. et al.*, 2018 PECA 3	55
Moore v. British Columbia (Education), 2012 SCC 61	43
New Brunswick Human Rights Commission v. *Province of New Brunswick (Department of Social Development)*, 2010 NBCA 40	46
R. v. *Chouhan*, 2021 SCC 26	53
Withler v. Canada (Attorney General), 2011 SCC 12	55

Statutes:	Paragraph References
Employment Support and Income Assistance Act, SNS 2000, c. 27	7, 32
Homes for Special Care Act, RSNS 1989, c. 203	7
Human Rights Act, RSNS 1989, c. 24 *Loi sur les droits de la personne*, RSNS 1989, c 214	20, 27, 56
Municipal Assistance Regulations, NS Reg 76/81	36
Social Assistance Act, RSNS 1989, c. 432	7