

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM 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

RESPONDENT
(Respondents)

RESPONDENT'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)

NOVA SCOTIA HUMAN RIGHTS COMMISSION and
J. WALTER THOMPSON, Q.C., sitting as a Board of Inquiry
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REPLY FACTUM
OF THE RESPONDENT

NOVA SCOTIA HUMAN RIGHTS COMMISSION

PART I – OVERVIEW AND STATEMENT OF FACTS

OVERVIEW

1. The core of this case is social benefits, disability, and poverty. More precisely, it is about affirming the rights of people with disabilities in Nova Scotia to be treated with dignity and equality.
2. There is no debate that persons with disabilities have not received, historically and presently, the respect they deserve. By way of example, the facts of this case establish that some people with disabilities were, inter alia, housed in locked institutions without justification or legal authority. For example, the complainants in this case were institutionalized as follows: Beth MacLean was institutionalized for sixteen years at the Nova Scotia Hospital, Sheila Livingstone was institutionalized at Emerald Hall for nine years, and Joseph Delaney was institutionalized at Emerald Hall for five years, all without any medical or legal justification. By way of this application for leave, the provincial government of Nova Scotia is trying to seek approval for what is clearly unacceptable by any measure at any time.
3. Through applying a legal lens to the social context above, it becomes clear that the fundamental question involves discrimination. The Disability Rights Coalition (Hereinafter “DRC”) asserted that the delivery of social assistance to persons with disabilities was done in a way that was systemically discriminatory. In contrast to this

position, the provincial government wishes to engage in debate on whether the courts are dealing with social assistance programs or strictly a housing program.

4. The Nova Scotia Human Rights Commission asserts the Nova Scotia Court of Appeal, correctly, considered the evidence and concluded “There is ample evidence in the record and 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, (*Social Assistance Act, for clarity*) creates a disadvantage...”¹
5. The Applicant in this matter contends the Court of Appeal misapplied the test for discrimination because it neglected to employ a ‘meaningful comparative analysis.’ The concept of discrimination is inherently a comparative concept. However, there is nothing in the *Human Rights Act*² that mandates a comparative analysis. The Court of Appeal was alert to the Applicant’s concern that not applying a ‘meaningful comparative analysis’ was fatal and accordingly, canvassed the jurisprudence before deciding a comparative analysis was not required. At paragraph 158 of the decision the Court of Appeal referred to Justice Abella, in *Moore*³, who cautioned:

[30] [...] It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396.

6. A related aspect of the Applicant’s concern about the Court of Appeal’s use of comparative analysis is the identification of the service provided. (Emphasis added). The Applicant has consistently proclaimed the service is supportive housing. The

¹ *Disability Rights Coalition v Nova Scotia (Attorney General)*, 2021 NSCA 70 at para 222 [DRC].

² *Human Rights Act*, RSNS 1989, c 214, s 1.

³ *Moore v British Columbia (Board of Education)*, 2012 SCC 61 at para 30.

Commission and DRC asserted the service is social assistance. The Court of Appeal rejected the Province's argument and found "The "service" at the heart of the complaints is properly framed as social assistance generally".⁴ The courts, as law makers must approach these arguments with humanity, if not then we get entrenched in legal technicalities, while the individuals whose rights we seek to protect are lost. At the time of this Board of Inquiry the decision made affected approximately 1500 members of the disability community. All of these individuals are entitled to the protection of law.

7. This case is of importance because it deals with the rights of a vulnerable group in our collective society. However, it does not illuminate any legal issues that require scrutiny. The case brings to the forefront a societal fail that needs to be corrected in due course.

STATEMENT OF FACTS

8. The facts of this matter are straightforward. In August 2014, Beth MacLean, Joseph Delaney and Shelia Livingstone filed complaints with the Commission. The complaint alleged the Province of Nova Scotia had discriminated against them in the provision of a service contrary to the *Act*.⁵ The individual Complainants believed they were subjected to discrimination because of the enumerated grounds of mental disability and source of income.
9. Unfortunately, Ms. Livingstone and Ms. MacLean have passed away in the long course of this court matter.
10. In the same timeframe, the DRC filed a Complaint alleging that the discrimination suffered by the individual Complainants and others was the result of systemic discrimination.

⁴ DRC, *supra* note 1 at para 149.

⁵ *Human Rights Act*, *supra* note 2.

11. The Applicant, Province of Nova Scotia, denied the allegations of individual discrimination as well as systemic discrimination.
12. After a protracted hearing, Board of Inquiry Chair J. Walter Thompson Q.C. released his decision on 4 March 2019. Chair Thompson found the three individual Complainants established a *prima facie* case of discrimination and dismissed the DRC's complaint of systemic discrimination because, in its view, "all potential members of the group needed to prove they suffered a disadvantage or burden."⁶ but failed to do so.
13. The DRC, Province, and individual Complainants appealed or cross appealed parts of the Board of Inquiry's decision regarding *prima facie* discrimination and remedy to the Nova Scotia Court of Appeal.
14. The Canadian Association for Community Living, Council of Canadians with Disabilities and People First of Canada sought leave to join the appeal, because of the national importance of human rights for persons with disabilities. In addition, the Board of Inquiry's analysis of the systemic discrimination complaint drew their attention. The three organizations were granted leave to intervene by way of Order dated, June 21, 2019.
15. The Province's top court heard arguments on November 18th and 19th, 2020, subsequently releasing its decision on October 6, 2021. The Court of Appeal allowed the DRC's appeal and found there was sufficient evidence to prove, on a balance of probabilities, a claim of systemic discrimination in the treatment of persons with disabilities and the province's social programs supporting them.

⁶ DRC, *supra* note 1 at para 210.

16. The evidence and record before the Court of Appeal clearly demonstrated that persons with disabilities in receipt of social assistance were disadvantaged or endured a burden that others did not. The evidence showed unnecessary institutionalization; being placed outside their community of origin without family support; a long-standing moratorium on the funding of small option homes; and significant time spent on waitlists. This resulted in many individuals being kept under lock in institutional settings for years after they had been cleared to leave such places. In one case we heard these living conditions were a detriment to the person's recovery. If they had been placed in an assisted living community environment or small options home the likelihood of becoming self sufficient was much greater.
17. The Nova Scotia Court of Appeal directed the matter be sent to a newly constituted Board of Inquiry. This was ordered to allow the Applicant a chance to make s.6 arguments pursuant to the *Act*. Section 6 of the *Act*, is a justification section for any program that may be seen as discriminatory.⁷
18. Following the direction of the Court of Appeal a new Board of Inquiry, Donald C. Murray Q.C., was appointed on December 7, 2021. Thus, Mr. Murray, is now tasked with hearing arguments regarding the exceptions found in s.6 of the *Act* and, potentially, remedies.
19. The Commission's position on this application to the Supreme Court of Canada, is that it is premature. There has not yet been a full decision on the merits.

PART II – STATEMENT OF ISSUES

⁷ *Human Rights Act*, *supra* note 2 at s 6.

20. There are two issues for examination. They are as follows:

ISSUE 1: Did the Nova Scotia Court of Appeal incorrectly identify the “service” at issue in this case?

21. The Nova Scotia Human Rights Commission asserts the Court of Appeal did not mischaracterize the service. The Commission agrees with DRC’s description of the “service”. Furthermore, the Commission also concurs with the analysis taken by the Court of Appeal in pinpointing the “service” as ‘social assistance and not just the provision of supportive housing. The individuals who are the main focus in this series of proceedings, are not just provided a place to live or “housing”. The assistance provided are the necessities to live as full members of society. According to the province’s position, this is somehow different than any other social assistance program for those people without a disability. We submit that the assistance provided by the government is not different. What is different, is the way people with disabilities have been treated in this province.

22. It is uncontested that human rights legislation occupies a special status within a free and democratic country like Canada. It is also unchallenged that rights-based legislation is to be interpreted in a broad and liberal manner. In *McCormick v. Fasken Martineau DuMoulin LLP*, 2014⁸ this Court noted that “*quasi-constitutional legislation ... attracts a generous interpretation to permit the achievement of its broad public purpose.*” Section

⁸ *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at para 17.

2 of the *Act* notes, inter alia, the purpose (of the Act) is to “(a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family;”

23. The Nova Scotia Court of Appeal has followed the direction of this Court and has cited on several occasions that *Heerspink*⁹ remains the leading authority with respect to the quasi-constitutional nature of human rights legislation and the necessity of a broad and purposive interpretation.
24. Therefore, triers of fact must favour interpretations that align with the purposes of human rights legislation, rather than adopt narrow and technical constructions that would frustrate those purposes. Again, this notion goes back to the humanity in protecting societies human rights. How can one justify locking a person up for 7 years, or 10 years without justification or a court order? The human rights legislation was meant to protect people from precisely these circumstances.
25. 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. It follows, given the general rule regarding interpretation of the *Act*, “service” must also be understood in a liberal and purposive manner.
26. Despite clear guidance from this Court, Chair Thompson at the Board of Inquiry embraced a restricted view of the term “service”. Similarly, the Applicant also adopted a narrow meaning of “service”.
27. The Nova Scotia Court of Appeal noted that “service” is not defined in the *Act*, but guidance could be found in the jurisprudence.

⁹ *Insurance Corporation of British Columbia v Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 SCR 145.

28. The Court of Appeal examined the pertinent pieces of legislation. “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.”¹⁰

29. The Court of Appeal considered and distinguished relevant cases like *Moore* and *Auton* before finding the “service” to be social assistance generally.

“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 complaints is properly framed as social assistance generally.”¹¹

30. Chair Thompson as well as the Applicant, with respect, welcomed a narrow approach that is contrary to case authorities. “The Court must look at the reality of the situation and assess whether there has been discriminatory treatment having regard to the purpose of s.15(1)...”.¹²

ISSUE II – Does the discrimination analysis under the Human Rights Act demand a meaningful comparative analysis?

¹⁰ *DRC*, *supra* note 1 at para 148.

¹¹ *DRC*, *supra* note 1 at para 149.

¹² *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 at para 25.

31. There is no disagreement that the *Act*, via section 4, sets out what is required to prove a claim of discrimination. That section provides the following:

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.

32. The Nova Scotia Court of Appeal recognized the *Act* is the starting point when assessing a claim of discrimination.¹³ In a nutshell, to prove *prima facie* discrimination a Complainant must show they have a protected characteristic; they experienced a burden or disadvantage; and that the protected characteristic was a factor.
33. After identifying the necessary elements of the *Act* to demonstrate discrimination, the Court of Appeal addressed, in detail, the Applicant's declaration that a "meaningful comparative analysis" is critical when undertaking discrimination analysis.
34. The Commission agrees with the Court of Appeal that a "meaningful comparative analysis" is not vital to any discrimination assessment. The Court explained:

[156] The *Act* does not say a comparative analysis to another identifiable group is mandatory. That being said, we acknowledge doing so may, in some cases, assist a claimant in establishing *prima facie* discrimination. We return to the wording of the *Act*:

4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a

¹³ DRC, *supra* note 1 at para 104.

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 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.

[157] The definition of discrimination contemplates a distinction being drawn between a claimant and “others” in relation to the imposition of “burdens, obligations or disadvantages”. Although “others” could in some complaints be an identifiable group, it does not have to be. Recall that in considering a similar statutory provision in *Moore*, Justice Abella articulated three factors to demonstrate *prima facie* discrimination:

- The complainant has a characteristic protected under the legislation;
- The complainant experienced an adverse impact with respect to the service;
and
- The protected characteristic was a factor in the adverse treatment.

[158] Notably, in setting out these requirements, Justice Abella did not mandate a “meaningful comparative analysis”. Indeed, referencing principles from *Charter* equality jurisprudence, she cautioned:

[30] [...] It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada (Attorney General)*, 2011 SCC 12 (CanLII), [2011] 1 S.C.R. 396.

[159] The Province, in arguing the Board ought to have compared the barriers being experienced by the individual appellants to the similar hurdles experienced by those accessing public housing services, despite its arguments to the contrary, is endorsing the same problematic approach Justice Abella cautioned against.

35. The Commission submits that the Court of Appeal accurately identified what is required to substantiate a claim of discrimination and, equally important, correctly applied it in the present case. The Court did not depart from what is legislatively required nor from cases flowing from this Court.

PART III - CONCLUSION

36. The Nova Scotia Human Rights Commission respectfully submits that the Court of Appeal recognized the guidance from this Court that “human rights legislation is quasi-constitutional in nature and must be given a large, purposive and liberal interpretation with Charter values incorporated into the interpretive process.”¹⁴ As a result, the Court of Appeal took a broad and liberal approach when examining the “service” and found it to be “social assistance generally”. The Human Rights Commission agrees.
37. The Commission further submits that the Court of Appeal did not err when considering the requirements of the *Act* to prove individual and systemic discrimination.
38. As such the Commission is asking this court to forego granting leave to appeal by the Applicant in this matter. We further submit this matter should be dealt with in any event by the newly constituted Board of Inquiry to finish the examination of whether or not the Applicant has a justification for the finding of discrimination made by the Court of Appeal.

PART IV- SUBMISSION OF COSTS

39. The respondent the Nova Scotia Human Rights Commission will not be arguing for costs.


PART V – ORDER SOUGHT

40. The respondent the, Nova Scotia Human Rights Commission respectfully request that the application for leave to appeal by the Applicant, the Attorney General of Nova Scotia of the decision dated October 6, 2021, be dismissed.

¹⁴ DRC, *supra* note 1 at para 160.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

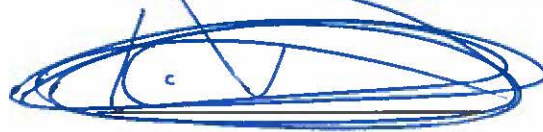
DATED at Halifax, in the Halifax Regional Municipality, Province of Nova Scotia this
21st, day of January, 2022.



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PART VI – TABLE OF AUTHORITIES & STATUTES

Case Law:	Paragraph References
<i>Auton (Guardian ad litem of) v. British Columbia (Attorney General)</i>, 2004 SCC 78	25
<i>Disability Rights Coalition v Nova Scotia (Attorney General)</i>, 2021 NSCA 70	222, 149, 210, 148, 149, 104, 160
<i>Insurance Corporation of British Columbia v Heerspink</i>, 1982 CanLII 27 (SCC), [1982] 2 SCR 145	
<i>McCormick v Fasken Martineau DuMoulin LLP</i>, 2014 SCC 39	17
<i>Moore v. British Columbia (Education)</i>, 2012 SCC 61	30

Statutes:	Section References
<i>Human Rights Act</i>, RSNS 1989, c. 24 <i>Loi sur les droits de la personne</i>, RSNS 1989, c 214	1, 6.