2019 C.A. No. 486952

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

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

Appellants

-and-

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

Respondent

-and-

**Nova Scotia Human Rights Commission**

Respondent

-and-

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

Respondent

-and-

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

Intervenors

# FACTUM OF THE APPELLANTS, Beth MacLean, Olga Cain on behalf of Sheila Livingstone, Tammy Delaney on behalf of Joseph Delaney


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## PART 1 – CONCISE OVERVIEW OF THE APPEAL

1. This is an appeal of a Human Rights Board of Inquiry decision challenging the Board's rulings on *prima facie* discrimination and remedy.

2. The individual appellants' three human rights complaints are emblematic of widespread human rights violations that have occurred in Nova Scotia for decades. The other appellant, the Disability Rights Coalition, advanced the claim that the experiences of the three individual appellants are systemic and widespread.

3. The Province of Nova Scotia has an obligation under the *Human Rights Act* to provide social assistance to low-income Nova Scotians in a manner that takes into account and meets their needs to live in community. The Provincial social assistance system must accommodate persons with disabilities. This case is similar to *Eldridge* and very similar to *Moore*

4. These human rights complaints focussed on the dramatically inferior way in which the Province provides social assistance to persons with disabilities who require residential supports and services compared to how social assistance is provided to persons without disabilities or who may have disabilities but do not require residential supports and services.

5. These profoundly inferior practices and outcomes include the fact that persons with disabilities, all of whom the respondent Province has accepted as eligible for social assistance in the form of community-based residential supports and services, are:

- effectively forced to accept congregate care in segregated **institutional settings** as a form of residential supports and services in the absence of openings for community-based supports,
- languish on years-long **waitlists** before being offered residential supports and services, and
- in practice, treated as though the assistance they require is provided on a arbitrary/**discretionary basis**.

6. This discriminatory treatment in the provision of social assistance has resulted in both physical and psychological harm to the appellants.

## PART 2 – CONCISE STATEMENT OF FACTS

7. In 2014, the three individual appellants each filed a complaint under the *Human Rights Act*. The complaints allege that the Province discriminated against each individual on the basis of disability and source of income when it supported them in institutions rather than the community; that placement in an institution was not medically required. Everyone agreed that they could have been supported to live in community.

8. The parties to the human rights case and the Board of Inquiry agreed to bifurcate the proceedings. Phase One was solely concerned with whether the complainants had established a *prima facie* case of discrimination. Phase Two, if necessary, was to be concerned with whether the Province could justify its actions/inactions under s. 6 of the *Human Rights Act*.

9. In its decision on *prima facie* discrimination, the Board dismissed the claim of systemic discriminant brought by the appellant Disability Rights Coalition. However, the Board upheld the bulk of the individuals' discrimination claims and the matter was expected to proceed to Phase Two. It is noted, however, Ms. MacLean and Ms. Livingstone's sister have each appealed those aspects of their complaints that were dismissed.

10. With respect to Phase Two, the Respondent Province chose not to advance a justification under s. 6 of the *Act*, effectively 'conceding that the long-term institutionalization could not be justified'.[1] Accordingly, the matter proceeded to remedy and after three days of further evidence and argument, the Board of Inquiry made an award that included compensation. That award is under appeal on the basis that it is inadequate and is inconsistent with human rights principles.

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[1] BoI Remedy Decision, para. 30 **[Appellants' Joint Book of Authorities, "BOA.", Tab 2]**

**a. Beth MacLean**

11. Beth MacLean left her parents' care at the age of ten and, as a result, has been institutionalized ever since. She is now forty-eight years old. Between the ages of 10 and 14 she lived in congregate care, segregated settings at the Nova Scotia Youth Training Centre, at Bonny Lea Farms, the Annapolis Youth Training Centre, the IWK, and the Nova Scotia Hospital. Ms. MacLean lived in Kings' Residential Rehabilitation Centre from ages 14 to 29. She spent almost 16 years in the Nova Scotia Hospital.[2] She was "transferred" to the Community Transition Program ("CTP") in Lower Sackville in June 2016. All of these places are institutions which were and are funded in whole or in part by the Province.[3]

12. Ms. MacLean's medical records show that she has an intellectual disability (which has been considered "mild" or "moderate" at times) and, as an adult, developed a mood disorder.[4] The Province has not disputed that she is a person with disabilities who is financially dependent upon the Province for social assistance to have her needs met.

*Kings Regional Rehabilitation Centre (1986-2000)*

13. Beth MacLean was admitted to Kings Regional Rehabilitation Centre ("KRRC" or "Kings"), an institution for adults, as a 14-year old girl in 1986. Because of her age, special Ministerial permission was required for her admission to what was and remains an adult institution that provides services in a congregate care, segregated setting.[5]

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[2] Appeal Book, Bk. 50, Tab 21, pg. 16908 at 16909, DCS/ Community Supports for Adults Form B re Beth dated May 1, 2002.
[3] Appeal Book, Bk. 24, Tab 35, pg. 7631-7634, Testimony of Ms. Bethune, September 6, 2018.
[4] Appeal Book, Bk. 50, Tab 6, pg. 16839 at page 16841, Kings Regional Rehabilitation Centre Discharge Summary re Beth attaching earlier reports, dated November 2000; Appeal Book, Bk. 52, Tab 108, pg. 17350 at 17351, DCS/DSP Individual Assessment and Support Plan re Beth, dated July 18, 2017; Appeal Book, Bk. 51, Tab 85, 17198 at 17199, SPD Individual Assessment and Support Plan re Beth, dated March 14, 2016.
[5] Appeal Book, Bk. 50, Tab 6, pg. 16839 at page 16841, Kings Regional Rehabilitation Centre Discharge Summary re Beth attaching earlier reports, dated November 2000; Appeal Book, Bk. 51, Tab 90, pg. 17229 at pg. 17231, Fax from Mike Margeson (Kings Regional Rehabilitation Centre) to Christine Pynch (Emerald Hall) enclosing social work admission notes re Beth, dated March 9, 2015.

14. On direct examination, the Deputy Minister of Community Services, Ms. Hartwell, testified that children shouldn't be living in institutions. In the context of speaking about the closure of the children's training centres, she stated "the closing of the children's was the right thing to do...Children should be with families they shouldn't be in facilities."[6] The Province's most recent 'care-coordinator' for Ms. MacLean, Ms. Carol Bethune, a worker employed by the Provincial Department of Community Services ("DCS") for many decades, agreed that Kings was not intended to house children.[7]

15. Ms. MacLean testified that she did not like living at Kings. She was fourteen when she arrived there, which was "too young;"[8] she was supposed to be eighteen to be a resident. She received no education during her time there. She was not allowed to help prepare her food. She had two roommates and shared a bathroom with other residents. She spent much of her time at Kings sitting in the lobby.[9]

16. The case file notes from Ms. MacLean's time at Kings make clear that, having lived there since 1986, she was anxious to leave. She made this known to staff on many occasions. Ms. MacLean attended at least one meeting in 1999 of a committee where the subject was her eventual move from Kings into a Small Options home.[10]

17. Even though Ms. MacLean has a significant speech impediment, the records indicate that she only began receiving speech therapy from the Nova Scotia Hearing and Speech Clinic in 1997

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[6] Appeal Book, Bk. 22, Tab 33, pg. 7087, Testimony of Lynn Hartwell, August 9, 2018.
[7] Appeal Book, Bk. 24, Tab 35, pg. 7637, Testimony of Carol Bethune, September 6, 2018
[8] Appeal Book, Bk. 8, Tab 14, pg. 2112, Testimony of Beth MacLean.
[9] Appeal Book, Bk. 8, Tab 14, pgs. 2130-2137, Testimony of Beth MacLean, March 6, 2018.
[10] Appeal Book, Bk. 50, Tab 6, pgs. 16861-2, Kings Regional Rehabilitation Centre Discharge Summary re Beth attaching earlier reports, dated November 2000.

at the age of 26, more than 11 years after she had arrived at Kings.[11]

18. Ms. MacLean's evidence about the quality of her life while at Kings went unchallenged by the Province—she was not asked a single question. Carol Bethune, testified that she had never seen any documentation suggesting that Ms. MacLean had been provided *any* education while at Kings.[12] Documentation from her file states that she had never been "gainfully employed" at Kings.[13] While there, Ms. MacLean went to a birthday party one day for a friend who lived at a Small Option home in the nearby community. She liked the layout of the home as a living space, she thought the place was "nice."[14]

19. Ms. MacLean had no care coordinator assigned to her by the Province during the entirety of her 14 years at Kings (1986-2000). As a result, the Province performed no annual oversight assessments to ensure that Ms. MacLean was appropriately placed, let alone to determine if she wanted to live in a community-based setting instead.[15] Ms. Bethune's predecessor as Care Coordinator, Christine Pynch, flagged this issue, writing to her supervisor that this problem did not just impact Ms. MacLean; no "block-funded clients in homes for special care were assigned care coordinators who performed annual assessments."[16]

20. Over 14 years after she had been 'placed' at the Kings institution, Ms. MacLean was determined to leave. She deliberately engaged in behavior that would facilitate her exit from the institution. A psychiatrist who assessed her at the time stated:

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[11] Appeal Book, Bk. 50, Tab 6, pg. 16849, Kings Regional Rehabilitation Centre Discharge Summary re Beth attaching earlier reports, dated November 2000.
[12] Appeal Book, Bk. 24, Tab 35, pg. 7669-7670, Testimony of Ms. Bethune, September 6, 2018.
[13] Appeal Book, Bk. 50, Tab 6, pg. 16840, Kings Regional Rehabilitation Centre Discharge Summary re Beth attaching earlier reports, dated November 2000.
[14] Appeal Book, Bk. 8, Tab 14, pg. 2139, Testimony of Beth MacLean, March 6, 2018.
[15] BoI *Prima Facie* Discrimination Decision, para. 54, **(BOA, Tab 1)**
[16] Appeal Book, Bk. 50, Tab 9, pg. 16879, Email from Bryan Taylor, dated November 28, 2000; Appeal Book, Bk. 50, Tab 3, pg. 16826, October 2000-January 2018 ICM Case Notes Re Beth, October 13, 2000; Appeal Book, Bk. 24, Tab 35, pg. 7654, Testimony of Carol Bethune, September 6, 2018.

> Her behavior was stable with an average number of difficulties and incidents until early July 2000, when she severely vandalized several cars in a parking lot while at a community work site…. In particular, she has clearly articulated that she wants to leave the Rehabilitation Centre and wants to go to prison, and that the best way to get there would be to increase her aggressive behaviour and attack others. It appears that after fifteen years at the Rehabilitation Centre, and seeing no way to leave through any positive means given her difficulties and those of the Community Service System, Beth determined that aggressive behaviour was her only means to depart and acted in such a manner regardless of the consequences for her relationships to other people and the difficulties she would face.[17] (underlining added)

21. Having carefully reviewed her file, Ms. Bethune, testifying for the Province, agreed that "as Beth moved toward a desire for community based placement, her behaviour became more dysregulated"[18]… "Beth was taking charge of the situation" and wanted out of Kings.[19]

*Nova Scotia Hospital 2000-2016*

22. After the incident at Kings, Ms. MacLean was discharged and transferred to the Nova Scotia Hospital, a provincial psychiatric hospital located in Dartmouth. The Department of Community Services, the Department of Health, and the Nova Scotia Hospital entered into an "agreement/arrangement" to place Ms. MacLean in the Nova Scotia Hospital for "up to one year."[20] Accordingly, in October 2000, she entered the Nova Scotia Hospital for what turned out to be a sixteen-year stay. This is despite the fact that, as the Board found, "Staff told her that she would be at the Hospital for one year."[21]

*Maritime Hall, Nova Scotia Hospital (2000-2007)*

23. When Ms. MacLean lived there, Maritime Hall was a psychiatric rehabilitation unit at the NS Hospital. It did not treat persons with dual diagnoses (intellectual disabilities and mental health

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[17] Appeal Book, Bk. 50, Tab 6, pg. 16846, Kings Regional Rehabilitation Centre Discharge Summary, dated November 2000.
[18] Appeal Book, Bk. 22, Tab 35, pg. 6997, Testimony of Carol Bethune, September 6, 2018.
[19] Appeal Book, Bk. 24, Tab 35, pg. 7667, Testimony of Carol Bethune
[20] Appeal Book, Bk. 50, Tab 3, pg. 16826, October 2000-January 2018 ICM Case Notes Re Beth, Casenote Entry October 23, 2000.
[21] BoI *Prima Facie* Discrimination Decision, para. 158, **(BOA, Tab 1)**

concerns), let alone people like Ms. MacLean who simply had an intellectual disability. Accordingly, it did not provide programming suitable for persons with intellectual disabilities and its staff were not specialists in supporting people with intellectual disabilities.[22]

24. The Board cited the evidence of Jo-Anne Pushie, the Social Worker employed by the Health authority but who also had very broad experience working with people with disabilities during the 'Municipal era', at the Cole Harbour RRC, the East Coast Forensic Hospital and at Emerald Hall as well as the Provincial Department of Community Services. Significantly, the Board explicitly accepted Ms. Pushie's evidence.[23]

25. Ms. Pushie testified that the significance of being placed in Maritime Hall for Ms. MacLean was that most of the people she was surrounded by had no difficulties with their activities of daily living. They had different support needs than Ms. MacLean. She testified that she expected that this was likely intimidating for her.[24]

26. Ms. MacLean spent most of her time in her room on Maritime Hall behind a door that was locked from the outside "24/7" watching TV. She could leave the unit only if sufficient staffing was available and provided. She didn't like the food and had no control over what she ate or when she ate it.[25]

27. An assessment performed on Ms. MacLean in April 2001, while she was in in Maritime Hall stated:

> [Beth] spends most of her time in seclusion. Isolated from others for almost 23 hours a day she takes her meals alone in her room...This secluded and sedentary existence negatively impacts Beth's physical, social, psychological, spiritual and intellectual health in a variety of ways, including contributing to… In my opinion this form of

[22] Appeal Book, Bk. 50, Tab 10, pg. 16881, Email from Christine Pynch to Daphne Caroll, Janet Moore, Phillip Warren, Wayne Hyson re Beth, March 20, 2001.
[23] BoI *Prima Facie* Discrimination Decision, para. 167, **(BOA, Tab 1)**
[24] Appeal Book, Bk. 6, Tab 11, pg. 1471, Testimony of Joanne Pushie, February 14, 2018.
[25] Appeal Book, Bk. 8, Tab 14, pgs. 2143-2150, Testimony of Beth MacLean, March 6, 2018.

> "lifestyle" will only exacerbate Beth's behavioural problems and retard her potential to improve in virtually all areas of human growth and development.[26]

28. Maritime Hall staff repeatedly informed DCS that Ms. MacLean was being harmed by her stay in Maritime Hall and that it was not in her best interests to be there. The unit was an inappropriate place for someone with an intellectual disability. She wanted to leave and was becoming frustrated and disappointed as her stay lengthened. Hospital staff advocated for DCS to follow-through on its agreement to provide her with 'services' outside the hospital.[27] Ms. Bethune agreed with the characterization of some of these communications as "urgent" and "frustrated."[28]

29. In November 2002, a DCS Field Assessment Officer classified Ms. MacLean at an "RRC" level of care meaning that she was eligible for DCS services in the community and qualified to leave the hospital.[29] Again, there is no evidence that DCS took any other steps to find her a place to live outside the hospital after this classification in November 2002, between November 2002 and February 2003[30], in 2004, or in 2005[31] despite assessments throughout that period that found that Ms. MacLean was ready to live in a community setting[32]

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[26] Appeal Book, Bk. 60, Tab 77, pg. 19895, Exhibit 77, Recreation Assessment per Karen Scribner re Beth, dated April 5, 2001.
[27] Appeal Book, Bk. 50, Tab 10, pg. 16881, Email from Christine Pynch; Appeal Book, Bk. 50, Tab 15, pg. 16893, Email from Avis Faulkner to John Campbell; Appeal Book Vo; 50, Tab 16, pg. 16895, Email from Avid Faulkner dated March 11, 2002; Appeal Book Vo. 50, Tab 17, pg. 16897, Letter from Avis Faulkner dated March 20, 2002; Appeal Book, Bk. 50, Tab 18, pg. 16900, Letter from Janice Hussey (Maritime Hall) dated March 21, 2002; Appeal Book, Bk. 50, Tab 25, pg. 16928, Letter from Sandra Hennigar, dated July 30, 2002.
[28] Appeal Book, Bk. 24, Tab 35, pg. 7738, 7771-7772, Testimony of Carol Bethune, September 6, 2018.
[29] Appeal Book, Bk. 50, Tab 26, pg. 16933, Letter to Avis Faulkner, dated November 7, 2002.
[30] Appeal Book, Bk. 50, Tab 3, pg. 16828, October 2000-January 3, 2018, ICM Case Notes re Beth, Casenotes from 2003; Appeal Book, Bk. 24, Tab 35, pg. 7773, Testimony of Carol Bethune, September 6, 2018.
[31] Appeal Book, Bk. 50, Tab 3, pg. 16829, October 2000-January 3, 2018, ICM Case Notes re Beth, Casenotes from 2005; Appeal Book, Bk. 24, Tab 35, pg. 7780-7781, Testimony of Carol Bethune, September 6, 2018.
[32] Appeal Book, Bk. 51, Tab 27, pg. 16936, DCS/ Community Supports for Adults Form B (renewal of a May 1, 2002 Form B) re Beth, dated February 3, 2003; Appeal Book, Bk. 51, Tab 28, pg. 16949, DCS/ Community Supports for Adults Form B re Beth, dated March 28, 2003 and April 12, 2005; Appeal Book, Bk. 51, Tab 36, pg. 16987, DCS/Community Supports for Adults Medical Assessment Form (Form E) re Beth, dated January 14, 2005.

*Emerald Hall, Nova Scotia Hospital (2007 to 2016)*

30. After almost seven years in Maritime Hall, Ms. MacLean was transferred to Emerald Hall in July 2007. She explained to the staff there that she was only supposed to be in hospital for one year. Recorded in the DCS case notes is the fact that Ms. MacLean told Christine Pynch, her DCS Care Coordinator, that she didn't like Emerald Hall and wanted to live elsewhere.[33]

31. Krista Spence worked as a Developmental Worker in Emerald Hall from March 2011 to June 2013 and knew Ms. MacLean during her time there. She was hired to reform the unit's limited recreation activities. She testified that Ms. MacLean was one of the people on the unit whose limited recreational opportunities caused the clinical team particular concern. This was because she had "very low aggression" levels, needed and wanted social interaction and stimulation, and was considered the "highest functioning" person on the unit. Recreation remained under-resourced on the unit. As a result, Ms. MacLean was only able to leave the unit once every week or two. It would depend on the level of staffing available in the unit and the current health of its other residents. Outings were frequently cancelled.[34]

32. Nicole Robinson, a Board Certified Behaviour Analyst employed at Emerald Hall, worked with Ms. MacLean from December 2015-June 2016. She agreed that Ms. MacLean is considered "higher functioning" than other residents at Emerald Hall.[35]

33. When asked about the long period of time that Ms. MacLean had spent at Emerald Hall, and remembering the one-year 'deal', DCS Care Coordinator Carol Bethune was not surprised that more than four years passed at Emerald Hall without a classification of Ms. MacLean's support needs having been performed by DCS. She explained that DCS takes a passive approach to people who are hospitalized; it does not proactively request hospital staff to perform assessments. Rather,

[33] Appeal Book, Bk. 8, Tab 14, pgs. 2141-2141, 2153-2154, Testimony of Beth MacLean, March 6, 2018.
[34] Appeal Book, Bk. 9, Tab 15, pg. 2560, Testimony of Krista Spence, March 7, 2018.
[35] Appeal Book, Bk. 10, Tab 16, pg. 2750, Testimony of Nicole Robinson, March 8, 2018.

DCS waits for requests to be initiated by [the Respondent's] hospital staff. She agreed that this can result in people in hospitals waiting for years, "indefinitely" for an assessment by DCS. She acknowledged that she "didn't know" the policy basis for DCS' practice of taking a passive role when someone is hospitalized.[36]

34. Ms. MacLean was referred to DASC industries (a 'sheltered workshop', or, more commonly now, a 'social enterprise') by the Emerald Hall staff in October 2009 at the age of 38 in the hope that she could participate in community-based work while awaiting a home outside Emerald Hall. The staff wrote that "Beth would thrive in such an environment."[37] Several months later DASC wrote to Ms. MacLean's DCS Care Coordinator Ms. Pynch, stating they had tried to reach her repeatedly about Ms. MacLean's application.[38] Ms. Bethune agreed that there was no indication in the case notes that Ms. Pynch ever replied to this inquiry letter and the referral failed as a result.[39]

35. A medical assessment performed in June of 2012 stated that Ms. MacLean's health conditions had been stable "for years". [40]

*Community Transition Program ("CTP")* (2016-2019)

36. In June 2016, the Province 'transferred' Ms. MacLean to CTP, which she testified was a "better" place than living in the NS Hospital. She had her own room key, although she couldn't leave the unit by herself. [41] Joanne Pushie testified that CTP is similar to Maritime and Emerald

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[36] Appeal Book, Bk. 24, Tab 36, pg. 7920, Testimony of Carol Bethune, September 18, 2018
[37] Appeal Book, Bk. 51, Tab 51, pg. 17039, Dartmouth Adult Services Centre General Questionnaire completed by Dianne Lummis (Emerald Hall) re Beth, dated October 9, 2009.
[38] Appeal Book, Bk. 51, Tab 59, pg. 17073, Letter from Pam Bateman-Safire (Dartmouth Adult Services Centre) to Christine Pynch (DCS) re Beth application process almost complete, requiring confirmation on funding, dated March 8, 2010.
[39] Appeal Book, Bk. 24, Tab 36, pg. 7930-7934, Testimony of Carol Bethune, September 18, 2018.
[40] Appeal Book, Bk. 51, Tab 74, pg. 17134, 17135, DCS/SPD Physician Report-Medical Assessment re Beth, dated June 25, 2012.
[41] Appeal Book, Bk. 8, Tab 16, pg. 2159-2160, Testimony of Beth MacLean, March 6, 2018.

Hall. It is an institution. It is not locked, but a bell must be pressed to enter and exit the building. It imposes a high degree of surveillance upon residents.[42] She remained there until recently. [**Note**: After the release of the Board's Remedy Decision (December 2019), Ms. MacLean completed her several-month transition to a Small Options Home in Dartmouth where, since the first week of January 2020, she has been residing.]

37. The Respondent called the Deputy Minister of Community Services who agreed with many of the criticisms of DCS' practices over time that were put to her in cross-examination by the Complainants. The Board remarked: "there is little divergence between the evidence and the opinions of the Complainants' witnesses and the evidence of most of the Province's witnesses. The lack of divergence is manifested in the evidence of Ms. Hartwell."[43] She agreed that their inappropriate placements, such as in Emerald Hall, for years on end meant that people's needs were not being met, were being neglected.[44]

*Emerald Hall was No Different than Quest or the Community Transition Program*

38. The Board made findings about the similarity of Ms. MacLean's experience in the Emerald Hall unit of the NS Hospital to other large, congregate care institutions such as Quest, CTP (both located in Lower Sackville) or Kings RRC. In the course of its discrimination analysis, the Board commented that the disadvantageous and harmful experience was not confined to their years at Emerald Hall or the NS Hospital:

> The questionable factor in discrimination analysis is whether the three [complainants] were still placed at a disadvantage. In other words, would they still have "experienced an adverse impact with respect to the service" to be placed at Quest, or CTP, or King's, or another facility for all those same years? In my view, the answer is still yes. The evidence is clear that Ms. MacLean and Mr. Delaney could have been placed in a small options home. The evidence is clear that living in a small options home is better than living in a larger facility.

[42] Appeal Book, Bk. 6, Tab 11, pg. 1609, Testimony of Joanne Pushie, February 14, 2018.
[43] BoI *Prima Facie* Discrimination Decision, para. 300, **(BOA, Tab 1)**
[44] Appeal Book, Bk. 22, Tab 33, pp. 7475-7477, Testimony of Deputy Minister, Lynn Hartwell, August 9, 2018

> They are, in my view, at a disadvantage as long as they are not living in a small options home properly prepared for them.[45]

**The Board's Findings and Conclusions on Beth MacLean**

39. After extensively reviewing the voluminous documentary and testimonial record, the Board set out the following crucial findings regarding Beth MacLean and the Complainants' institutionalization experience more generally:

> **61** I am satisfied from the above that Ms. MacLean's behaviours, whatever may be said about them while she was at King's, had improved after a year to the point where the Province should have placed her in a small options home, or at the very least, some other facility. No witnesses and no documents say that there was any change in Ms. MacLean over the ensuing years. The Province, impervious to all, continued to ignore her.
>
> **62** I refer to other remonstrances to the Province later in this opinion. Suffice it to say for now, however, that I cannot imagine how frustrating and even soul- destroying it must have been for Ms. MacLean to live in hope and to have those hopes dashed day by day. I cannot imagine how frustrating it must have been for the good and faithful servants of the Province, all dedicated to Ms. MacLean's welfare, to have their opinions and advice ignored in 2002 and for the next 13 or 14 years. The Province met their pleas with an indifference that really, after time, becomes contempt. (emphasis added)

**b. Joey Delaney**

40. Joey Delaney was born on September 10, 1972. His records show that he has the following disabilities: a severe intellectual disability, cyclical mood disorder, chronic constipation, epilepsy, and hypothyroidism.[46]The Province has not disputed that Joey is a person with disabilities who was and is financially dependent upon the Province for social assistance in order to have his needs met.

41. Tammy Delaney, Mr. Delaney's sister, is two years older than Joey. Her earliest memories of her brother are of a "crazy, curly headed wild child." His earliest years were spent in the family home in Halifax with his parents, Tammy, and their older brother. He began having seizures at a

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[45] BoI *Prima Facie* Discrimination Decision, at para. 415, **(BOA, Tab 1)**

[46] Appeal Book, Bk. 53, Tab 55, pg. 17733, DCS/SPD Individual Assessment and Support Plan re Joey assessed at Level 5, waiting for Regional Rehabilitation Centre Placement (unsigned), dated May 25, 2017; Appeal Book, Bk. 52, Tab 37, pg. 17577, DCS Physician Report-Medical Assessment per Dr. Mai Riives re Joey dated June 21, 2011.

very young age. He would do unsafe things, like jump off the second story of the home onto the lawn. He would hit his head "open," he hardly slept, and he required 24/7 supervision. The family simply could not provide the care he needed to be safe. Mr. Delaney entered the Dartmouth Children's Training Centre ("CTC") when he was about 4 or 5.

42. The family visited him frequently in the CTC. Tammy described it as "like a hospital." It was located close to the NS Hospital. He came home on weekends and holidays. The family tried to care for him at home again, but they were unable to meet his care needs. He re-entered the CTC.

43. In 1996, the Dartmouth CTC was closed and the Province offered Mr. Delaney a place in a small options home. Tammy Delaney said that the offer made their mother, Susan "afraid, but excited for him."[47] He moved to the home in August 1996—he was almost 24.[48]

44. Mr. Delaney happily lived in small option homes with service provider, RRSS, from 1996 until his admission to Emerald Hall in 2010, at total of 14 years.[49]

45. Tammy Delaney described the home on Skeena street as a "regular home on a street." It had a "cozy living room." It was "always welcoming." The staff were "great." They would offer visitors coffee, they threw birthday parties for the residents and celebrated holidays. She would visit there with her mom, her brother, and one of her kids. Her mother was Mr. Delaney's primary family contact, she visited him the most. Susan took him home with her for visits. Mr. Delaney had a job in Burnside; he worked Monday to Friday. He took a bus to work. She testified that he was comfortable there.[50]

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[47] Appeal Book, Bk. 8, Tab 14, pgs. 2243-2251, Testimony of Tammy Delaney, March 6, 2018.
[48] Appeal Book, Bk. 52, Tab 4, pg. 17404, Notice of transfer from Dartmouth Children's Training Centre to Regional Residential Services Society, dated August 12, 1996.
[49] Appeal Book, Bk. 10, Tab 17, pg. 2959-2960, Testimony of Jim Fagan, March 12, 2018.
[50] Appeal Book, Bk. 8, Tab 14, pgs. 2252-2255, Testimony of Tammy Delaney, March 6, 2018.

46. Suzanne McConnell is now in a senior management position with RRSS, the service provider of the small options home where Mr. Delaney lived. RRSS rented a cottage for a few days in the summer in the Annapolis Valley, and Mr. Delaney enjoyed spending time there.[51]

47. Mr. Delaney's electrolyte levels dropped so dangerously low in late 2009 that he was put in the intensive care unit for treatment. The doctors identified that one of the medications used to treat his epilepsy caused the drop in his electrolytes. He was taken off the medication. To that point, the medication had stabilized Mr. Delaney's moods.[52]

48. Mr. Delaney was admitted to Emerald Hall on January 22, 2010 "due to medication changes."[53] The Emerald Hall social worker wrote that the plan upon his admission was: "med changes—will do well and return to small options home."[54]

49. Tammy Delaney visited Mr. Delaney while he lived on Emerald Hall. However, it is very difficult for her to do so. She cares for her granddaughter who struggles to visit Emerald Hall. There is frequent screaming on the Unit. Emerald Hall is "not welcoming" to visitors. Most family visits happen in a locked room. It was much nicer, easier, and more welcoming to visit Mr. Delaney in his Skeena Street home than on Emerald Hall.[55]

50. Joanne Pushie overlapped with Mr. Delaney's 'residence' on Emerald Hall for several years. She testified that he liked to play with toys, he could be affectionate, and he enjoyed outings. She testified that he had been qualified for and on a DCS waitlist for 'assistance'/services by the time she began on Emerald Hall in January 2011. His mother, Susan Lattie, was very ill but nonetheless a strong advocate for her son. She wanted him to live in the community. She visited

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[51] Appeal Book, Bk. 10, Tab 17, pg. 2914, Testimony of Suzanne McConnell, March 12, 2018.
[52] Appeal Book, Bk. 10, Tab 17, pg. 3020-3021, Testimony of Suzanne McConnell, March 12, 2018.
[53] Appeal Book, Bk. 52, Tab 18, pg. 17513, Emerald Hall Social Work Assessment re Joey, dated February 3, 2010.
[54] *Ibid.*
[55] Appeal Book, Bk. 8, Tab 14, pgs. 2261-2263, Testimony of Tammy Delaney, March 6, 2018.

with her son on Emerald Hall. When she became palliative and unable to visit the hospital she gave Ms. Pushie open-door access to her home so she could stay updated about him.[56]

51. DCS cut the funding for Mr. Delaney's home in the community with RRSS because he was in the hospital for more than 30 days. This is consistent with Ms. McConnell's evidence. She testified that RRSS communicated to DCS in May 2010 that RRSS remained willing to support Mr. Delaney in the community once he was medically stable. In fact, RRSS staff and residents visited Mr. Delaney in the hospital several times after his admission to Emerald Hall in January 2010.[57]

52. The Province had fully accepted Mr. Delaney as eligible for DCS supports and services by June 11, 2010, only two days after Ms. Murray made the decision to cut the funding for his support with RRSS.[58] He was also medically discharged from the hospital on July 21, 2010.[59] In its Decision, the Board cited the evidence of Dr. Sulyman, the head of Emerald Hall whose testimony confirmed that "the issues which had led to his admission had been addressed by July of 2010." "She says that he has been psychiatrically stable throughout her experience with him."[60]

53. RRSS was not contacted by DCS after this point, nor was it asked to resume its support of Mr. Delaney after either his classification or his medical discharge. RRSS remained willing to provide Mr. Delaney with support in a small option home. Ms. McConnell continued to visit Mr. Delaney on Emerald Hall in her personal capacity. She was not compensated for doing so.[61] The Province's witness, Ms. Murray, confirmed that she did not contact RRSS and ask it to consider

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[56] Appeal Book, Bk. 6, Tab 12, pgs. 1651-1654, Testimony of Joanne Pushie, February 20, 2018.
[57] Appeal Book, Bk. 10, Tab 17, pg. 2946, 2947, Testimony of Suzanne McConnell, March 12, 2018.
[58] Appeal Book, Bk. 52, Tab 21, pg. 17522, Case Notes re Joey, dated June 11, 2010.
[59] Appeal Book, Bk. 52, Tab 27, 17537, Emerald Hall Alternate Level of Care Patient Information re Joey, dated July 21, 2010.
[60] BoI *Prima Facie* Discrimination Decision, para. 194, **(BOA, Tab 1)**
[61] Appeal Book, Bk. 10, Tab 17, pgs. 2945-2947, Testimony of Suzanne McConnell, March 12, 2018.

resuming supporting him in a small option home.[62]

54. Ms. Murray did not meet with, phone, or write a letter to Ms. Lattie (Mr. Delaney's mother and the SDM) about DCS' decision to cut his RRSS funding.[63] Ms. Murray agreed that the effect of her failure to notify her meant that Ms. Lattie was deprived of her statutory right to appeal her son's classification decision which resulted in a loss of funding.[64]

55. Throughout his time on Emerald Hall, the medical team consistently indicated that Mr. Delaney could be supported to live outside the hospital.[65] In April 2013, Dr. Sulyman wrote a letter on behalf of the Emerald Hall team in which she stated that Mr. Delaney was ready for discharge to the community as of June 2011. She stated that:

> Mr. Delaney will require a small option home with 24-hour supervision and support with the activities of daily living…in closing it is the position of the Emerald clinical team overseeing Mr. Delaney's admission that his care needs can be very well managed in the community. [66]

56. Mr. Delaney was transferred to Quest RRC in February 2015. This was the first placement offer that had been made to him during his nearly five years on Emerald Hall. Mr. Delaney was at Quest from February 2015 until January 2017.[67] Tammy Delaney testified that she visited Mr. Delaney while he was there. She found it was very similar to Emerald Hall. It is locked. It is loud.[68]

57. The Province called Trish Murray, Joey Delaney's DCS Care Coordinator from January 23, 2009 until April 15, 2015. She acknowledged that in her entire six-year tenure as Mr. Delaney's

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[62] Appeal Book, Bk. 19, Tab 30, pg. 6169-6171, Testimony of Trish Murray, June 20, 2018.
[63] Appeal Book, Bk. 19, Tab 30, pgs. 6185-6190, Testimony of Trish Murray, June 20, 2018.
[64] Appeal Book, Bk. 19, Tab 30, pgs. 6185-6190, Testimony of Trish Murray, June 20, 2018; Appeal Book, Bk. 32, Tab 4, pg. 10527, Community Supports for Adults Policy Manual, prepared by DCS, Department of Health, dated April 1, 1998.
[65] Appeal Book, Bk. 52, Tab 43, pg. 17616, DCS Physician Report, dated May 24, 2012; Appeal Book, Bk. 53, Tab 45, pg. 17627, Jo-Anne Pushie (Social Worker) to Tricia Murray (SPD), dated November 28, 2012; Appeal Book, Bk. 53, Tab 47, pg. 17638, Letter from Dr. M Sulyman to Claire McNeil, dated April 22, 2013; Appeal Book, Bk. 53, Tab 48, pg. 17643, Clinical Care Planning Meeting, dated July-August 2014.
[66] Appeal Book, Bk. 53, Tab 47, pg. 17638, Letter from Dr. M Sulyman to Claire McNeil, dated April 22, 2013.
[67] Appeal Book, Bk. 52, Tab 8, pgs. 17419-17423, September 2004 - January 3, 2018 Case notes re Joey.
[68] Appeal Book, Bk. 8, Tab 14, pg. 2265, Testimony of Tammy Delaney, March 6, 2018.

care coordinator she never once met his mother and Substitute Decision Maker, Susan Lattie. She only spoke to her on the phone once, to get consent for his transfer from Emerald Hall to Quest.[69]

58. Mr. Delaney's mother died on May 22, 2015. Tammy Delaney, his sister, became his SDM for the purpose of placement offers. [70] On October 25, 2015, Tammy Delaney phoned her brother's new DCS care coordinator and requested that he move to a small option home or developmental residence.[71]

59. Mr. Delaney was discharged from Quest in January 2017 because he was experiencing "increased vocalizations and agitation which was disturbing other clients."[72] He was discharged to the Dartmouth General Hospital. Emerald Hall was asked to re-admit him since he had nowhere to go after his discharge from Quest.[73] Within days of his admission to Emerald Hall the staff identified that Mr. Delaney had a kinked intestine.[74] This was treated and shortly afterwards the case notes record that he had "returned to baseline."[75]

**Board of Inquiry Evidentiary Findings/Observations relating to Joey Delaney**

60. The Board found that people, including Joey Delany, do well in small options homes.[76] The Board also cited the opinion of the Emerald Hall team that Mr. Delaney "could and should" have been returned to supported community living.[77]

61. Mr. Delaney was transferred out of Emerald Hall and to the Quest institution in March 2015. He was transferred back to Emerald Hall because, as the Board found, his bowel problems

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[69] Appeal Book, Bk. 19, Tab 30, pg. 6181, 6083, Testimony of Trish Murray, June 20, 2018.
[70] Appeal Book, Bk. 52, Tab 8, pgs. 17422, September 2004 - January 3, 2018 Case notes re Joey.
[71] Appeal Book, Bk. 52, Tab 8, pgs. 17421, 17422, September 2004 - January 3, 2018 Case notes re Joey.
[72]Appeal Book, Bk. 53, Tab 53, pg. 17691, Quest Interdisciplinary Discharge Summary, dated February 7, 2017
[73] Appeal Book, Bk. 12, Tab 19, pg. 3538, Testimony of Dr. Sulyman, March 14, 2018.
[74] Appeal Book, Bk. 52, Tab 8, pg. 17419, September 2004 - January 3, 2018 Case notes re Joey, January 31, 2017
[75] Appeal Book, Bk. 52, Tab 8, pg. 17418, September 2004 - January 3, 2018 Case note re Joey, February 21, 2017
[76] BoI *Prima Facie* Discrimination Decision, para. 143, **(BOA, Tab 1)**
[77] BoI *Prima Facie* Discrimination Decision, paras. 195-196, **(BOA, Tab 1)**

had caused him distress that Quest could not address. Within days of being returned to Emerald Hall, his bowel problems had been resolved and he settled.[78] [**Note**: Mr. Delaney remains there to this day though it is expected that he will move to a small option home in Dartmouth in March 2020.]

62. The Board accepted the undisputed evidence from Jim Fagan and RRSS Executive Director Carol Ann Brennan that Mr. Delaney could have been supported in a small option home from the time of his 'medical discharge' from Emerald Hall in July 2010.[79] The Board found that "Mr. Delaney could have spent most of the years he has passed at Emerald Hall in a small options home. His disabilities and physical medical difficulties were, by all the evidence, manageable."[80]

63. With respect to identifying the Province's failures which resulted in discrimination, the Board stated, vis-à-vis Joey Delaney, that:

> …the Province has limited or denied Joey Delaney access to a residence suitable to his needs and the disturbance caused by his disability. Emerald Hall told the Province Mr. Delaney was ready to leave in July, 2010. The fact is, however, that the Province made no placement until he moved to Quest in February, 2015. Then his screaming was too much so they returned him to Emerald Hall in January, 2017 rather than create a small options placement for him. Mr. Delaney required a specialized residence of the kind Mr. Fagan said in evidence RRSS could have created if provided the resources. **Putting him back into Emerald Hall as a solution to his screaming is, to me, a manifest failure to accommodate his disability** and a denial of "meaningful access".[81] (emphasis added)

**c. Sheila Livingstone**

64. Sheila Livingstone was born in 1947. She died in October 2016 while living at Harbourside Lodge Adult Residential Centre ("ARC"), a congregate care institution attached to the Yarmouth Hospital.[82] Her sister, and statutory decision-maker, Olga Cain, both initiated the complaint and

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[78] BoI *Prima Facie* Discrimination Decision, paras 195-6, **(BOA, Tab 1)**
[79] BoI *Prima Facie* Discrimination Decision, paras. 217, 226, 246-249, 336 and 349, **(BOA, Tab 1)**
[80] BoI *Prima Facie* Discrimination Decision, para. 358, **(BOA, Tab 1)**
[81] BoI *Prima Facie* Discrimination Decision, para. 409, **(BOA, Tab 1)**
[82] BoI *Prima Facie* Discrimination Decision, para. 74, **(BOA, Tab 1)**

continued after Ms. Livingstone's death.[83]

65. Ms. Livingstone's medical records show that she was, over time, diagnosed with the following disabilities: schizoaffective disorder, vascular dementia, a seizure disorder, a moderate intellectual disability, chronic renal insufficiency, and chronic heart failure.[84] The respondent Province did not dispute that Ms. Livingstone was a person with disabilities who was financially dependent upon the Province for social assistance in order to have her needs met.

66. Ms. Livingstone lived in Emerald Hall from July 9, 2004 until January 29, 2014.[85] From Emerald Hall, Ms. Livingstone was moved to Harbourside Lodge in Yarmouth on January 29, 2014, living there until her death in October 2016.[86]

**Ms. Livingstone's Early Life in Institutional Settings**

67. There were fifteen children in Sheila Livingstone's family of origin. Lacking supports and expertise to care for her, and in need of assistance, the family sent Ms. Livingstone to the Children's Training Centre when she was 12. While she learned some useful skills while at the Centre, her sister testified that she didn't like it there. She had no privacy. Ms. Livingstone became very protective of herself while living there; for example, she no longer liked being touched by family members after she had begun living at the CTC.[87]

68. After the Children's Training Centre, Ms. Livingstone lived in the Nova Scotia Hospital from January-March 1964, the Halifax Mental Hospital from March 1964-October 1966, the Abbie Lane Hospital (October 1967-December 1976, March 1977-January 1982), Vernon Street Group

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[83] Appeal Book, Bk. 8, Tab 14, pgs. 2362, 2363, Testimony of Olga Cain, March 6, 2018.
[84] Appeal Book, Bk. 53, Tab 13, pgs. 17875, 17877, 17879, 17888, 2003-2016 Combined DCS Medical Assessments
[85] Appeal Book, Bk. 55, Tab 84, pg. 18334, Discharge Summary (per Dr. Mutiat Sulyman), dated January 29, 2014.
[86] Appeal Book, Bk. 55, Tab 102, pg. 18412, DCS Notice of Resident Movement (notice of death) re Sheila, dated October 17, 2016; Appeal Book, Bk. 53, Tab 4, pg. 17790, Casenote Entry February 6, 2014.
[87] Appeal Book, Bk. 8, Tab 14, pg. 2329, Testimony of Olga Cain, March 6, 2018.

Home (December 1976-March 1977), and Cole Harbour RRC (January 1982-May 1986). She lived in a developmental home with RRSS on Robert Allen Drive from May 1986 until 1989.

69. Regarding the Abbie Lane Hospital, Ms. Cain testified that it was a "hell hole" for her sister."[88] One of the psychiatrists would punish residents by putting them in a cement room, naked. She described Cole Harbour RRC as a "cave," "understaffed", "it wasn't a good place."[89] The Province's witness concerning Ms. Livingstone, her former Care Coordinator, Ms. Renee Lockhart-Singer, agreed that Ms. Livingstone was institutionalized for much of her adult life.[90]

*Life in a Small Options Home*

70. From 1989 until 2004, Ms. Livingstone lived in an RRSS-managed small option home on Topsail Boulevard in Dartmouth.[91] Ms. Lockhart-Singer, the former Care Coordinator, confirmed that Ms. Livingstone lived in the community with RRSS for 18 years even though she had diagnoses of:

> …mental health issues, obsessive compulsive behaviour and occasional difficulties with aggression, an intellectual disability and schizoaffective disorder, as well as heart troubles, chronic renal failure, diabetes, cancer, and fluid on her lungs. [92]

71. Put differently, Ms. Livingstone's significant disabilities and accompanying needs did not present a barrier to her successfully living in the community.[93]

72. Ms. Livingstone's sister, Olga Cain, and Ms. Cain's daughter, Jackie McCabe-Sieliakus, testified about Sheila Livingstone's life when she lived in the community. Together, they had visited Ms. Livingstone at her home on Topsail Boulevard "dozens of times." Ms. Cain described

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[88] BoI *Prima Facie* Discrimination Decision, para. 67, **(BOA, Tab 1)**; Appeal Book, Bk. 8, Tab 14, pg. 2329, Testimony of Olga Cain, March 6, 2018.
[89] Appeal Book, Bk. 8, Tab 14, pg. 2336, 2337, Testimony of Olga Cain, March 6, 2018.
[90] Appeal Book, Bk. 21, Tab 31, pg. 6661, Testimony of Ms. Lockhart-Singer, August 7, 2018.
[91] Appeal Book, Bk. 53, Tab 8, pg. 17854, Memo to Pam Townsend from Cathy Wood, dated August 23, 2001; Appeal Book, Bk. 11, Tab 17, pgs. 3166-3170, Testimony of Jim Fagan, March 12, 2018.
[92] Appeal Book, Bk. 53, Tab 8, pg. 17854, Memo to Pam Townsend from Cathy Wood re Request for Exceptional Funding re Sheila, dated August 23, 2001.
[93] Appeal Book, Bk. 21, Tab 31, pg. 6661-6662, Testimony of Ms. Lockhart-Singer, August 7, 2018.

it as the "happiest place" for her sister. She had her own room, it was "just like being home." The staff were good to her; they held parties and celebrated holidays. They ate meals together. Ms. Livingstone helped with the chores. The staff and residents sang and danced.

73. Ms. Cain recalled that one of the workers brought her baby to visit with the residents. Sheila Livingstone was taken out often for shopping and for meals, which she loved. She had a TV. She had a job working with envelopes. She took a bus to go to work every day.[94] Jackie McCabe-Sieliakus was Sheila Livingstone's niece. She testified to similar effect regarding the cozy atmosphere where Ms. Livingstone lived and how happy she was to be there.[95]

74. Prior to her full-time admission to Emerald Hall in 2004, Ms. Livingstone had many shorter term admissions to Emerald Hall as a form of emergency care in late 2003 and early 2004.[96] The admission in July 2004 resulted in the loss of Ms. Livingstone's home

**Emerald Hall**

75. Upon her admission in July 2004, the Emerald Hall clinical team identified the "discharge plan" as a "plan to return to Topsail [small option home]."[97] Olga Cain testified about her sister's experience at Emerald Hall. She spoke of Ms. Livingstone rushing visitors to her room and locking the door. She was scared and uncomfortable there. She had few recreational opportunities and rarely left the unit. She suffered frequent assaults.[98] Ms. McCabe-Sieliakus testified that her aunt seemed "extremely fearful" on Emerald Hall. Her speech worsened on Emerald Hall. The staff at Topsail knew her speech patterns well and helped her communicate. The high volume of staff on

[94] Appeal Book, Bk. 8, Tab 14, pgs. 2332-2337, Testimony of Olga Cain, March 6, 2018.
[95] Appeal Book, Bk. 9, Tab 9, Tab 15, pgs. 2451, 2454-2460, Testimony of Jackie McCabe-Sieliakus, March 7, 2018.
[96] Appeal Book, Bk. 53, Tab 4, pg. 17795, July 1997 to August 2015-DCS Case Detail Report notes re Sheila, Case note entry May 13, 2003.
[97] Appeal Book, Bk. 53, Tab 16, pg. 17907, 2004 - 2011 Emerald Hall Monthly Summaries re Sheila, July 2004.
[98] Appeal Book, Bk. 8, Tab 14, pgs. 2355-2360, Testimony of Olga Cain, March 6, 2018.

Emerald Hall made this kind of familiarity with Ms. Livingstone impossible. Her communication worsened, which she found very frustrating. The family was unable to take Ms. Livingstone off the unit as often as they liked because they needed staff accompaniment. Their visits on Emerald Hall occurred in locked rooms and were short. [99]

76. During the hearing of this matter, the Province repeatedly suggested and, later, argued that Ms. Livingstone was too aggressive/violent to safely move out of Emerald Hall. This claim was contradicted by the evidence of the actual staff members[100] who described Ms. Livingstone as elderly and ill. Thus, the Board of Inquiry summarized the evidence of the lead psychiatrist, Dr. Sulyman, as follows:

> Ms. Livingstone suffered from dementia. She would have been better off in a calm, quiet environment. A nursing home would have been a better place given her age and diagnosis. She was never dangerous. She would scratch or pinch when staff supported her in the activities of daily living, but she does not recall anyone being afraid of her. Sometimes she would become acutely confused, on top of her chronic confusion, which could lead to her being angry, but you would expect that in a nursing home or anywhere else. It is a normal aspect of the dementing process.

77. More importantly, this characterization was fully accepted by the Board of Inquiry which found that: "Ms. Livingstone was disabled and ill. She was no danger to anybody."[101]

78. It is noteworthy that DCS' own Care Coordinator, Ms. Lockhart Singer, acknowledged that in the approximately five years that she was the Departmental person supervising Ms. Livingstone's care, she never once met Ms. Livingstone's sister, Olga Cain nor spoke to her on the phone.[102] This is noteworthy inasmuch as it is indicative of the systemic posture toward people who, even though they had been qualified by DCS for supports, were living in psychiatric

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[99] Appeal Book, Bk. 9, Tab 15, pgs. 2463-2467, Testimony of Jackie McCabe-Sieliakus, March 7, 2018.
[100] Appeal Book, Bk. 12, Tab 19, pg. 3513, Testimony of Dr. Sulyman, March 14, 2018; Appeal Book, Bk. 9, Tab 15, pgs. 2568, Testimony of Krista Spence, March 7, 2018.
[101] BoI *Prima Facie* Discrimination Decision, para. 78 and 193, **(BOA, Tab 1)**
[102] Appeal Book, Bk. 21, Tab 32, pg. 6863, Testimony of Renee Lockhart-Singer, August 8, 2018.

hospitals. The 'system' was, clearly, content to let them languish. As with staff actually working at Emerald Hall, it became apparent to all that prospects for rehabilitation were negligible since, as the Board of Inquiry found, "there is no point to rehabilitation since come what may, the likes of MacLean, Delaney and Livingstone are not going anywhere."[103]

79. Emerald Hall staff began the process of trying to refer Sheila Livingstone for placement with DCS in January 2005. By the Spring of 2005, Ms. Livingstone had stabilized and DCS was, itself, indicating that her needs could safely be met outside the hospital.[104] By April 2005, the DCS Care Coordinator, Cathy Wood, assessed Ms. Livingstone and placed her on a DCS waitlist for social assistance in the form of supports and services.[105]

80. The Board stated that "the evidence is clear that the professional staff of Emerald Hall recognized she was suitable for placement somewhere else and should not remain there."[106]

81. In its decision, the Board addressed some evidence concerning Ms. Livingstone's periodic health problems with the following observation:

> Of course, she suffered from several chronic illnesses which would require access to medical services and hospitalization from time to time, as it did while she was a resident of Topsail, but that would not detract from the fact that Emerald Hall was a bad placement for her and she should have been resident elsewhere thereafter.[107]

82. By 2013, Ms. Livingstone's sister, Olga Cain, was reporting frequent assaults on her sister by other Emerald Hall patients. Because of her age, ill-health and mobility problems, Ms. Livingstone, as Ms. Cain described in her human rights complaint, had become a sitting duck; for patients who wanted to bother or assault her. These assaults and resulting bruising were reported

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[103] BoI *Prima Facie* Discrimination Decision, para. 357, **(BOA, Tab 1)**
[104] Appeal Book, Bk. 54, Tab 28, pg. 18131, 18135, DCS/ Community Supports for Adults Form B re Sheila, dated March 21, 2005.
[105] Appeal Book, Bk. 54, Tab 36, pg. 18161, SPD Waitlist Submission Form re Sheila, dated April 14, 2005.
[106] BoI *Prima Facie* Discrimination Decision, para 77, **(BOA, Tab 1)**
[107] BoI *Prima Facie* Discrimination Decision, para 81, **(BOA, Tab 1)**

to staff. They are documented in the hospital charts[108] and confirmed in the testimony of staff.[109] The Board itself referred to Dr. Sulyman's testimony to the effect that Ms. Livingstone "was a target of other patients because she was older and was usually just sitting in a common area."[110]

83. These same records also document Olga Cain's expressions of serious concern about her sister's safety on Emerald Hall. [111] Ms. Lockhart Singer, denied any awareness of Ms. Livingstone being repeatedly assaulted on Emerald Hall, despite being her DCS care coordinator for much of the relevant period and having open access to her medical file.[112]

84. Ms. Livingstone was offered a placement in Yarmouth at an institution called Harbourside Lodge Adult Residential Centre in January 2014.[113] Olga Cain testified that she did not want Ms. Livingstone to be in an institution, and especially one located so far away from home. However, as the Board of Inquiry put it, "The Province eventually offered a placement in Yarmouth, but it gave Ms. Cain no option but to agree to Sheila Livingstone's placement there."[114] Out of grave concerns for her sister's safety and well-being, the offer to live in an institution in Yarmouth was accepted.[115] Ms. Livingstone was transferred to Harbourside on January 29, 2014.[116] The expense of travelling from Truro and the long-distance made it very difficult for her sister to visit her.[117]

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[108] Appeal Book, Bk. 54, Tab 17, pgs. 18055-18108, 2004 - 2014 Extracts of Emerald Hall Progress Notes re assaults on Sheila.
[109] Appeal Book, Bk. 12, Tab 19, pg. 3509, Testimony of Dr. Sulyman, March 14, 2018; Appeal Book, Bk. 9, Tab 15, pgs. 2570-2571, Testimony of Krista Spence, March 7, 2018.
[110] BoI *Prima Facie* Discrimination Decision, para. 192, **(BOA, Tab 1)**
[111] Appeal Book, Bk. 54, Tab 17, pgs. 18055-18108, 2004 - 2014 Extracts of Emerald Hall Progress Notes re assaults on Sheila.
[112] Appeal Book, Bk. 21, Tab 32, pg. 6910-6911, Testimony of Renee Lockhart-Singer, August 8, 2018.
[113] Appeal Book, Bk. 53, Tab 4, pg. 17790, July 1997 to August 2015-DCS Case Detail Report notes re Sheila, Case note entry January 14, 2014.
[114] BoI *Prima Facie* Discrimination Decision, para. 430, **(BOA, Tab 1)**
[115] Appeal Book, Bk. 8, Tab 14, pg. 2357-2359, Testimony of Olga Cain, March 6, 2018
[116] Appeal Book, Bk. 55, Tab 84, pg. 18334, Emerald Hall Discharge Summary (per Dr. Mutiat Sulyman) re Sheila, dated January 29, 2014.
[117] Appeal Book, Bk. 8, Tab 14, pg. 2358-2360, Testimony of Olga Cain, March 6, 2018; Appeal Book, Bk. 9, Tab 15, pg. 2408, Testimony of Olga Cain, March 7, 2018; Appeal Book, Bk. 9, Tab 15, pgs. 2473-2478, Testimony of Jackie McCabe-Sieliakus, March 7, 2018.

85. The Board noted that after placement in Yarmouth, her sister, Ms. Cain, and her legal counsel all requested that Ms. Livingstone be offered a small options home placement closer to her.[118] Ms. Livingstone's sister, niece and her legal counsel all pursued a transfer for her from Harbourside Lodge to a small option home in Metro, or Sunset ARC, closer to her sister's home.[119] DCS responded to these applications for community based services by placing Ms. Livingstone on a waitlist.[120] She was offered a spot in the Sunset ARC a month before her death. Olga Cain declined it due to her sister's failing health. [121]

86. Ms. Livingstone passed away in Yarmouth on October 16, 2016. Her sister was at home in Truro. Ms. Cain opted to continue her sister's human rights case.

*The Board's Summary Findings*

87. Regarding the comparative benefit/advantage of living in a small options home, the Board accepted the evidence "that people do well in small options homes."[122]

88. The Board also accepted that service provider RRSS was both willing to and capable of supporting Ms. Livingstone in a small option home once medically discharged from Emerald Hall.[123] Unfortunately, despite RRSS having offered to welcome Ms. Livingstone 'back home', the Province failed to take up the offer. As the Board put it, in referring to the Province's actions/inactions despite the medical and social work evidence supporting a return to the community:

> The uppermost echelons of government were, by all the evidence, utterly impervious to it all. The Province would not find or create a solution. They could have done something.

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[118] BoI *Prima Facie* Discrimination Decision, para. 83, **(BOA, Tab 1)**; Appeal Book, Bk. 55, Tab 92, pg. 18359, Letter from Karen Gaudet-Dauphinee and Danielle Boudreau (DCS) to Olga Cain re Sheila, dated March 11, 2015
[119] Appeal Book, Bk. 53, Tab 4, pg. 17791, 17792, DCS Case notes re Sheila, Casenote entries February 25, 2015
[120] Appeal Book, Bk. 55, Tab 91, 18354-18356, DCS/SPD Wait List Submission for Adults form re Sheila, dated March 2, 2015.
[121] Appeal Book, Bk. 55, Tab 99, pg. 18392, DCS Internal Emails re Sheila transfer issues, dated September 13, 2016.
[122] BoI *Prima Facie* Discrimination Decision, para. 143, **(BOA, Tab 1)**
[123] BoI *Prima Facie* Discrimination Decision, paras. 217, 242, 351 and 411, **(BOA, Tab 1)**

> They chose not to. **The moratorium prevailed**.[124] (emphasis added)
>
> -and-
>
> One wonders about the dynamic of indifference. Departmental staff and, I am persuaded, the Department as an entity itself through its repeated commissioning of reports and studies, begged for the resources to place Ms. MacLean, Ms. Livingstone, Mr. Delaney, and I presume others, out of Emerald Hall. Successive governments of all political stripes simply ignored everyone over decades and condemned our most vulnerable citizens to a punishing confinement. I cannot think in systems here. The "system" through its people knew well what had to be done and strenuously recommended it. People with the final authority were blind, deaf and especially dumb to the effects of what they were doing.[125]

89. On the question of where Ms. Livingstone could have moved to once out of the Emerald Hall debacle, the Board acknowledges that: i) she could have been supported in the Metro area in a small options home, and ii) that this would have been her sister's first preference ("Ms. Cain would, in a heartbeat, have chosen a place like Topsail small options home),"[126] and "that a return to a small options home would have been ideal".[127]

## PART 3 – LIST OF ISSUES

90. The individual appellants filed both a Notice of Contention (April 2019) and an amended Notice of Appeal (December 31, 2019). On review, it is submitted that the live Issues can be consolidated and synthesized into the following five issues:

**ISSUE 1:** **The Board erred in its interpretation and application of "discrimination" under the *Human Rights Act* which led to mischaracterization of 'the service' in question, comparisons made and to an incorrect ruling.**

**ISSUE 2:** **The Board erred in dismissing Ms. MacLean's complaint regarding her placement in Kings RRC during the years 1986 to 2000.**

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[124] BoI *Prima Facie* Discrimination Decision, para. 412, **(BOA, Tab 1)**
[125] BoI *Prima Facie* Discrimination Decision, para. 413, **(BOA, Tab 1)**
[126] BoI *Prima Facie* Discrimination Decision, para. 74, **(BOA, Tab 1)**
[127] BoI *Prima Facie* Discrimination Decision, para. 451, **(BOA, Tab 1)**

**ISSUE 3:** **The Board erred in dismissing Ms. Livingstone's complaint regarding placement in an institution upon being discharged from Emerald Hall in January 2014.**

**ISSUE 4:** **The Board erred in law in its interpretation and application of the principles underlying human rights compensation awards.**

**ISSUE 5:** **The Board of Inquiry erred in law and jurisdiction in ordering costs.**

## PART 4 – STANDARD OF REVIEW FOR EACH ISSUE

91. Appeals from a Human Rights Board of Inquiry are authorized pursuant to s. 36(1) of the *Human Rights Act*:

> 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."

92. Pursuant to the Supreme Court of Canada's recent decision in *Vavilov*, on statutory appeals, questions of law are decided on a standard of correctness. It is an appellate standard of review. On questions of mixed fact and law, involving an extricable legal issue, the standard is correctness.[128]

## PART 5 – ARGUMENT

**ISSUE 1: The Board erred in its interpretation and application of "discrimination" under the *Human Rights Act* which led to mischaracterization of 'the service' in question, comparisons made and to an incorrect ruling.**

93. The Board erred by identifying the wrong "service" as being the subject of the human rights complaint. This had the effect of 'tainting the entire discrimination analysis'. All of this happened because of the Board's failure to correctly apply a substantive equality approach in its discrimination analysis.

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[128] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, paras. 36-52, **(BOA, Tab 6)**

94. It is submitted that the Board's error in identifying the wrong service—with the fatal taint for the remainder of the discrimination analysis—can only properly be understood by reviewing briefly the purpose of equality rights, what the courts have said regarding the social situation of persons with disabilities and their equality rights.

*Purpose of Equality Rights*

95. Equality rights, whether located in s. 15 of the *Charter* or the Nova Scotia *Human Rights Act*, enshrine substantive equality in the law. It is the controlling concept that must animate any adjudication of human rights complaints. Human rights acts are directed at "redressing socially undesirable conditions quite apart from the reason for their existence....the central purpose of a human rights Act is remedial—to eradicate anti-social conditions without regard to the motives or intention of those who cause them."[129] Of particular relevance for these appellants is the reminder from the Supreme Court that human rights legislation, which has quasi-constitutional status, is often the: "final refuge of the disadvantaged and the disenfranchised" and the "last protection of the most vulnerable members of society.[130]

96. More recently, this Court has considered the purpose and scope of the concept of 'substantive equality'. In *Adekayode*, Justice Fichaud relied on the Supreme Court's judgment in *Quebec* v. *A* for the principle that, far from requiring evidence of stereotyping, the norm of substantive equality is concerned with the effects, not the intentions, of government action/inaction. As to the content of the norms underpinning substantive equality, this Court emphasized that it involves:

> …oppression or unfair dominance of one group by another, or involve a denial to one group of goods that seem basic or necessary for full participation in Canadian society.[131] (emphasis added)

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[129] *Robichaud* v. *The Queen* [1987], 2 SCR 84 at 90-1, **(BOA, Tab 30)**
[130] *Tranchemontagne* v. *Ontario (Director, Disability Support Program)*, 2006 SCC 14 at para. 49, **(BOA, Tab 34)**
[131] *International Association of Fire Fighters, Local 268* v. *Adekayode*, 2016 NSCA 6, paras. 64, 79 **(BOA, Tab 14)**

(It is noteworthy that the underlined passage appears at two points in the Court's reasons.)

97. Indeed, a consistent theme running through years of equality jurisprudence at the Supreme Court is the "right of each person to participate fully in society and to be treated as an equal member…protecting equal membership and full participation in Canadian society runs like a leitmotif through our s. 15 jurisprudence."[132]

98. Moreover, the Nova Scotia *Human Rights Act* enshrines similar principles in its purpose clause:

> The purpose of this Act is to:
> …
> (e) recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons; (underlining added)

*Equality and Disability Rights*

99. More specifically, the Courts have had an opportunity on several occasions to set out the overarching goals of equality rights, in the disability context where social structures and designs have too often failed to take persons with disabilities into account and accommodate them. Thus, in *Eaton*, the Supreme Court stated that:

> …it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them … the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons….Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access.[133] (underlining added)

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[132] *Gosselin* v. *Quebec (Attorney General)*, 2002 SCC 84 at para. 23, **(BOA, Tab 12)**
[133] *Eaton* v. *Brant County Board of Education*, **[**1997] 1 SCR 241, at paras. 66-67, **(BOA, Tab 9)**

*Context: the importance of assessing discrimination in a full social context*

100. Given the purpose of equality rights and the right to be free from discrimination, human rights claims are particularly sensitive to social context, the lived experience and historical disadvantage of the claimant group is important. In *Withler*, the Court repeatedly emphasized the importance of a contextual discrimination analysis:

> What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.[134]

*Judicial notice regarding the history of exclusion experienced by persons with disabilities*

101. The Supreme Court of Canada has repeatedly taken judicial notice regarding the social and historical situation of people with disabilities. Most famously, in *Eldridge*, the Court stated:

> 56. It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions…. This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms… One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled.[135] (underlining added)

102. Following *Eldridge*, in *Martin* (2003), the Supreme Court of Canada made similar statements that have particular resonance here: "This Court has consistently recognized that persons with mental disabilities have suffered considerable historical disadvantage and stereotypes: *Granovsky*, *supra*, at para. 68; *R.* v. *Swain*, [1991] 1 S.C.R. 933, at p. 994; *Winko*, *supra*, at paras. 35 et seq."[136]

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[134] *Withler* v. *Canada (Attorney General)*, 2011 SCC 12 at para. 40, **(BOA, Tab 37)**
[135] *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 56, **(BOA, Tab 10)**
[136] *Nova Scotia (Workers' Compensation Board)* v. *Martin*, 2003 SCC 54 at para. 90, **(BOA, Tab 25)**

103. At the hearing, Dr. Bach's report and oral evidence substantiated the harmful way in which people with mental disabilities (including intellectual disabilities) have been treated historically in Nova Scotia.[137] It is significant, too, that the respondent Province indicated on the record that it would file expert rebuttal evidence to that of Dr. Bach. In the end—and after hearing weeks of evidence—the Province changed its mind, stating in its post-hearing submissions that their own intended expert would not be called:

> The Respondent does not disagree that living in community is the preferred model of delivering residential support, or that "institutionalization" has the effects that the Complainants outline. Indeed, the Respondent chose not to call an expert witness because, in the end, any dispute in the expert evidence on this issue would be so narrow as to be of marginal relevance to the Board.[138]

**Discrimination under the Nova Scotia *Human Rights Act***

104. For convenience, the relevant statutory provisions are set out:

> **Prohibition of discrimination**
> 5(1) No person shall in respect of
>
> (a) the provision of or access to services or facilities;
>
> discriminate against an individual or class of individual on account of
>
> …
>
> (o) physical disability or mental disability;
>
> …
>
> (t) source of income;

105. The leading human rights case on discrimination in the provision of government 'services' is, and unquestionably remains, the Supreme Court of Canada's judgment in *Moore*.[139] In *Moore*, the Court set out the following test for what was at issue in Phase One of this proceeding:

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show [1] that they have a characteristic protected from discrimination under the Code; [2] that they experienced an adverse impact with respect to the service; and [3] that the protected characteristic was a factor in the adverse impact.[140] (numbers in parentheses added)

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[137] Report of Dr. Bach, Exhibit 12, Appeal Book, Bk. 56, page 18,418 at pp. 18,424, 18,431, 18,443-6 and 18,451-2
[138] Respondent's Post-Hearing Submissions: Appeal Book, Bk. 64, Tab 8, 20,969 at page 20,990
[139] *Moore* v. *British Columbia*, 2012 SCC 61, **(BOA, Tab 21)**
[140] *Moore* (*supra*) at para. 33, **(BOA, Tab 21)**

***Step One: Protected characteristic***

106. Given the appellants' circumstances, there was never any dispute that each of them had disabilities and have had them for their entire lives.[141]

***Step Two: 'They experienced an adverse impact <u>with respect to the service</u>'***

*Preliminary issue: Identifying 'the service' at issue*

107. The appellants filed complaints about their treatment within the social assistance system.

108. For its part, the Province, presumably for litigation purposes, sought to effectively change the appellants' complaints by claiming that 'the service' was *not* what was complained of but, rather, the service was the 'provision of housing'. In characterizing 'the service' this way, the Province tried to focus on what are the appellants' requirements for supports and services and has, thus, mischaracterized the accommodative social assistance, for the service as a whole (the comprehensive social services/assistance system), thereby substituting the means for the end. This appears to have been done in order to set-up comparator groups that would lead to a discrimination dead-end. This tactic adopts the same approach as the now discredited reliance on 'comparator groups'.

109. For its part, the Board's decision properly set out the test in *Moore*. However, it then went on to identify 'the service' as what one expert described as the "broken"[142] accommodative services program provided to persons with disabilities by DCS.

***The Service: What the Complaints Were About***

110. Because of the dispute mentioned above regarding proper characterization of 'the service', and the centrality of the characterization of the service to the whole appeal, the appellants will

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[141] The respondent Province conceded this element of the case (Respondent's Pre-Hearing Submissions: Appeal Book, Bk. 63, page 20,719 at page 20,725, para. 9) and the Board of Inquiry found likewise (Board of Inquiry *Prima Facie* Discrimination Decision, para. 347 and *passim*, **(BOA, Tab 1)**

[142] This is Dr. Bach's conclusion regarding the disability supports system as captured in the BoI Decision, para. 258

make submissions relating to: i) the actual service as set out in their complaints, and ii) situate the complaints within the purpose and practice of social assistance services in Nova Scotia during the period covered by the complaint.

111. The complaints were drafted by legal counsel. They were filed with the Human Rights Commission on August 1, 2014 and ultimately referred by the Commission to a Board of Inquiry in May 2015. Based on this chronology, it will be appreciated that counsel drafted the complaints in the wake of the Supreme Court's judgment in *Moore* (November 2012) regarding government's provision of a service and at a point when all were alive to the issue of proper identification of the service.

112. Accordingly, each of the appellants' three complaints, as well as that of the Disability Rights Coalition, made clear their reliance on the Province for social assistance to be able to live. The four complaints each identifies "social services" as the service at issue in the preamble of their complaints.[143] In addition, each of the appellants:

- Contrasted, the '"assistance"[144] provided to 'persons in need' who had no disabilities permitting them to live in their communities with the fact that the Province has failed to provide the appropriate "assistance" to persons with disabilities, which they need in order to live in the community.[145]
- Pointed to "disability" as being the basis of the discrimination: "because the Province gives people without disabilities, who are in need, social assistance to live in the community. This assistance is given immediately and as of right."[146]
- In their remedial request, each asked "the Province to treat [them] in a non-discriminatory way

[143] Appellants human rights complaints: Appeal Book, Bk. 1 at page 3 (re Beth MacLean), at page 10 (re Sheila Livingstone), pages 16-17 (re Joey Delaney) and page 22 (re the Disability Rights Coalition)
[144] As will be elaborated below, "assistance" has an extremely broad technical definition within Nova Scotia's social assistance legislation.
[145] Appeal Book, Bk. 1, Tab 1, page 2 at page 8
[146] Appeal Book, Bk. 1, Tab 1, page 2 at page 8

by providing [them] with the means to immediately access the help and supports that [they] need to live in the community as it does for other people who have no disabilities but who need social assistance." [147]

- Finally, and even though a human rights complaint is not intended to be a legal submission, each of the appellants also contained a paragraph headed "Human Rights Act Violation" in which they explicitly set out the 'service' that they were impugning. The following is typical:

> I feel that I am entitled to and should have been given the help and supports that I need to live in the community. The Province does provide assistance for people without disabilities who have no money; they are given the help they need by the Province to live in the community. The Province's failure, since 1986, to take into account and accommodate my different needs in offering supports for me to live in the community is discriminatory and a violation of s. 5(1)(a), (o) and/or (t) of the *Human Rights Act*.

113. The DRC complaint—drafted and filed together with the individual complaints—also has repeated references to "social assistance" being the service at issue.[148]

114. For its part, the Board appeared to acknowledge that social assistance was 'the service' which the complainants had identified. Its summary of the complainants' legal claim (and the resulting comparisons) in Ms. MacLean's complaint is typical:

> **21** Ms. MacLean submits that she is entitled to these supports. She says that since the Province does provide income assistance to people without disabilities and this assistance enables them to live in the community, her disabilities ought to be accommodated so that she can too. She says the Province's failure to accommodate her disabilities "is discriminatory and a violation of s. 5(l)(a) access to services because of disability and/or source of income."[149]

***Legislative Context: Purpose and Practice Regarding Social Assistance in Nova Scotia***

115. The above references to "assistance" and social assistance in all four human rights complaints are better understood when situated in the legislative context to which they relate.

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[147] Appeal Book, Bk. 1, Tab 1, page 2 at page 10
[148] See, for example, DRC complaint, paras.: 137, 138, **161** (AB page 31), 163, 164 and 172.
[149] BoI *Prima Facie* Discrimination Decision, para. 21, **(BOA, Tab 1).** The characterization of Ms. Livingstone's complaint is in the Board's decision at para. 26 and, that regarding Mr. Delaney is at para. 30.

116. The purpose of all social assistance legislation is 'the provision of assistance to persons in need'. Courts in Nova Scotia have confirmed this.[150]

117. For decades, the Province has assisted *all* "persons in need" via its social assistance legislation. The phenomenon of the 'poor house' in Nova Scotia—institutions where the poor resided and were supported—came to an end by the early 1960s. The modern way for people to be assisted is for eligible "persons in need" to be provided a monthly amount of assistance from which they would meet their needs. Nova Scotia's *Social Assistance Act* (1966) authorized the provision of "assistance" to *all* persons in need. Thus, the same 1960s legislation which authorized the provision of supports and services to able-bodied, unemployed persons in need *also* authorized the supports and services for persons with disabilities in order to live in community.[151]

118. The *Social Assistance Act* ("*SAA"*) authorized a full range of what came to be called 'basic needs' and 'special needs'. 'Food, clothing and shelter' would be treated as *basics* while 'special needs' would often be seen as health or medical needs that a person might require. However, it is important to note that, as witness Professor Frazee reminded the hearing that, for persons with disabilities, what some people regard as 'special needs' are, for disabled persons, actually basic needs in terms of their ability to continue functioning and living in society. That is, whether needs are 'basic' or 'special' has to do with whether one has disabilities or not.[152]

119. This legislative regime continued until August 2001 when the Province chose to split its

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[150] *Woodard* v. *Social Assistance Appeal Board* (1983), 64 NSR (2d) 429 NSSC *per* Hallett J. , **(BOA, Tab 38)**; and *Halifax* v. *Carvery*, 1993 CanLII 3239 (NS CA) , **(BOA, Tab 13)**. The purpose of the ESIA is set out in s. 2: "The purpose of this Act is to provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency."

[151] It is noted that, in 1977, 'provincial assistance' under "Part I" of the SAA, and which was provided to persons with disabilities and single parents was hived off from the *SAA* and was authorized under new legislation: the *Family Benefits Act*.

[152] Expert Report of Prof. Catherine Frazee (December 7, 2017), Appeal Book, Bk. 57, Tab 37, page 18,937 at 18,940 and testimony in Appeal Book, Bk. 14, page 4136-4139

provision of social assistance into two legislative regimes. General social assistance (including both basic and so-called 'special-needs' assistance) was/is now provided pursuant to the *Employment Support and Income Assistance Act* ("*ESIA*") while the *Social Assistance Act* was maintained intact but now narrowed in its scope;[153] reserved for persons with disabilities whose need are such that they require residential supports and services. It is important to realize that, apart from the definition of person in need, neither the *Social Assistance Act* nor the accompanying *Municipal Assistance Regulations* have been amended since the 1990s, the purpose of the *SAA* has never changed—the provision of assistance to 'persons in need'.

*SAA and ESIA: A Continuum of Assistance*

120. During the Board of Inquiry hearing, considerable evidence was heard from DCS employees (including the Deputy Minister) who spoke to the ways in which the social assistance regimes under the *SAA* and *ESIA* closely mirror each other. Thus, for example, the allowance schedules are pretty much identical. Indeed, the Deputy Minister testified that this synchronicity was intentional.

121. Thus, both statutes and the administrative programs pursuant thereto base eligibility on the applicant being found to be a 'person in need'. This, in turn, requires that they be found to have a "budget deficit" under which their allowable expenses exceed their chargeable income. Both legislative regimes have accommodative allowances which take into account and meet the needs of persons with disabilities and, finally, both regimes share the same appeal system—located in the *ESIA* legislation.[154]

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[153] The narrowing of scope was accomplished via statutory amendment to the definition of "person in need". From August 2001, it was defined as a person "who requires financial assistance to provide for the person in a home for special care or a community based option." See also the Ministerial Statement on the Bill bringing about the changes: Appeal Book, Bk. 58, Tab 59, page 19,255

[154] See, for example, *SAA*, s. 19, **(BOA, Tab 42)**

122. Not surprisingly, the Board found that 'persons in need' can and do flow back and forth the between the two programs as their needs change.[155] As the Deputy Minister put it:

> …from a…Provincial policy perspective, you want to make sure that those programs are working together and creating as much of a support system that makes sense and so it shouldn't actually matter which program you're in....Which program you're in so that you know you're – have access to the same types of supports.[156]

123. The Board stated its acceptance of this characterization of the two legislative regimes, with both statutes forming "a continuum" of support for all persons in need, including people with disabilities "and that, as the Complainants have submitted, one cannot meaningfully distinguish the two."[157]

*Provision of Assistance Legally Mandatory*

124. Both historically and currently, the *SAA* and the *ESIA* statutes create not only an authority for governments but a mandatory legal obligation to provide assistance to all persons found to be "in need". Thus, both s. 9(1) of the *SAA* and s. 7(1) of the *ESIA* stipulate that for those determined by the Department to be 'persons in need', social assistance "shall" be provided.

125. Having said that, it is the actual Departmental ***practice*** which is at the root of the problem in this case—it is NOT a legislative problem or barrier. Indeed, as we know from the existence of DCS' community based options, there is certainly no lack of statutory authority for the Province to have met the appellants needs. What we have here is government's failure of accommodation.

126. The Departmental practice is quite striking in the different ways that it handles the provision of social assistance. On the one hand, the DCS Deputy Minister (and other DCS witnesses) confirmed that the actual provision of social assistance for "persons in need" under the

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[155] BoI *Prima Facie* Discrimination Decision, para. 458, **(BOA, Tab 1)** and Deputy Minister Hartwell testimony, Appeal Book, Bk. 23, page 7291-7294
[156] Deputy Minister Hartwell testimony, Appeal Book, Bk. 23, page 7289
[157] BoI *Prima Facie* Discrimination Decision, para. 405, **(BOA, Tab 1)**

*ESIA* (and, historically, under the *SAA*) is in fact always carried out; it is provided wherever in the Province, the 'person in need' chooses to live and immediately upon being found eligible.[158]

127. However, in stark contrast, and with the exception of two programs that are intended to assist person with disabilities who are able and willing to live with family at home or supported by family while living independently, everyone else found to be a "person in need" under the *Social Assistance Act* program (including the appellants herein), was/is institutionalized and/or put on a waitlist for community supports—waiting for supports and services that they have already been found suitable and eligible for under the legislation.[159] The length of the wait depends on the need they have but, for a small options home, the wait is at least several years long. The individual appellants are good examples of people waiting longer—far longer.

128. "Assistance" is broadly defined in both the *SAA* and the *ESIA* legislation. [See s. 3(a) of the *ESIA* and the definition in the *SAA* regulations which has not been amended since it was promulgated in 1981 (*Municipal Assistance Regulations,* N.S. Reg. 76-81)].

129. Accordingly, for persons in need, who i) simply require basic needs 'assistance' or ii) for persons with disabilities requiring supports and services ('assistance') to live in community, the legislative intention of the *SAA* was to provide one-stop shopping. Both groups (i.e., persons in need–either with or without disabilities) fell within the scope of the *Act* and were assisted under it.

130. As mentioned above, the Courts have held for decades that the purpose of the legislation was to provide 'assistance' provision of assistance to persons found to be 'persons in need' and, in fact, doing so was a mandatory legal obligation. There is no residual discretion vested in staff to decide whether or when to provide assistance to those having been determined to be eligible

[158] Deputy Minister Hartwell testimony, Appeal Book, Bk. 23, page 7299-7301
[159] Deputy Minister Hartwell testimony, Appeal Book, Bk. 23, page 7308-7309

'persons in need'.[160]

**Conclusion re 'the Service'**

131. This review makes it abundantly clear that 'the service' which the complainants identified in their discrimination complaint is the provision of 'social assistance'.

132. Moreover, of all cases that go before the courts, it is submitted that in this case, the perspective and claims of the poor who are living with disabilities must be respected, rather than twisted or disregarded in order to have their claim dismissed.

133. Finally, to be clear, the appellants at no point alleged discrimination *within* the DCS programming for persons with disabilities; i.e., *between* various persons with disabilities. From a legal—and human rights perspective—social assistance was 'the service'.

***The Board erred in applying the test for Discrimination and identifying 'the service' as those provided to disabled persons***

134. At over 20 places in its reasons for decision, the Board makes clear that in applying the test for discrimination it restricted its analysis to 'services provided by the province for persons with disabilities'.[161] Thus, at the outset of the Board's consideration of the meaning of 'discrimination', the Board stated: "In our context then, Ms. MacLean, Ms. Livingstone and Mr. Delaney may be said to have been discriminated against within the class of the disabled generally."[162]

135. It will be readily apparent that the Board's error in restricting the service to "services to people with disabilities" resulted in the Board making comparisons *between* persons with

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[160] See: *DeWolf, DeWolf and Johnston* v. *City of Halifax and Welfare Committee of City of Halifax*, [1979] NSJ No. 711 *per* Morrison J, **(BOA, Tab 8)**; *McInnis* v. *Halifax (City) Social Planning Department, Director* (1990), 70 DLR (4th) 296 (NSCA) *per* Jones J.A. , **(BOA, Tab 20)**; *Woodard* v. *Social Assistance Appeal Board* (1983), 64 NSR (2d) 429 NSSC *per* Hallett J. , **(BOA, Tab 38)** (followed by the Nova Scotia Court of Appeal in *Halifax* v. *Carvery*, 1993 CanLII 3239 (NS CA) , **(BOA, Tab 13)** and, most recently, *Nova Scotia (Community Services) v. Boudreau*, 2011 NSSC 126, at paras. 61-71 **(BOA, Tab 24)**

[161] See BoI *Prima Facie* Discrimination Decision, paras. 341, 342, 343, 346, 355, 362, 363, 364, 365, 369, 370, 371, 376, 380, 383, 402, 404, 408, 410, 422 and 426, **(BOA, Tab 1)**

[162] BoI *Prima Facie* Discrimination Decision, para. 341, **(BOA, Tab 1)**

disabilities who were 'similarly situated' i.e., disabled people requiring accommodative social assistance/services to enable them to live in the community. This resulted in an exploration of whom, among equality seekers with disabilities, was treated worse/better. This contemplates an unseemly 'race to the bottom' (in terms of social exclusion and marginalization) which is the complete opposite of substantive equality.

136. This is precisely what the Supreme Court in *Moore* warned against; comparing the experience of members of historically disadvantaged groups against each other is flawed for several reasons:

a. Doing so effectively relieves any requirement on government to ensure that social services are accommodative of all persons with disabilities; [163]

b. Doing so also risks descending into a 'separate but equal' analysis "majestically discarded"[164] decades ago by courts in the US and Canada. That is, the Province could cut all accommodative services for persons with disabilities but, under the Board's approach, would be immune from a claim of discrimination. It effectively provides a perverse incentive to treat people with disabilities terribly, thereby immunizing itself from claims of discrimination against persons with disabilities. It could encourage a race to the bottom vis-à-vis the provision of accommodative services.[165]

c. Adopting this approach "risks perpetuating the very disadvantage and exclusion from mainstream society the Code is intended to remedy".[166]

d. Focusing on how badly the appellants were treated vis-a-vis other persons with disabilities awaiting services, precludes exploration of whether/how well they were accommodated vis-à-vis the Province's provision of social assistance generally.

137. Consistent with the warning contained in the case law from the Supreme Court on this point, the Board's misidentification of *the service* served to 'taint the whole analysis'.[167] More fundamentally, it made clear that the Board had erred in law by misinterpreting the principal of

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[163] Justice Abella, for the SCC, at para. 29 of *Moore*, **(BOA, Tab 21)**
[164] Justice Abella, for the SCC, at para. 31 of *Moore*, **(BOA, Tab 21)**
[165] Justice Abella, for the SCC at para. 30 of *Moore*, **(BOA, Tab 21)** citing Justice Rowles in the BC Court of Appeal.
[166] Justice Abella, for the SCC at para. 31 of *Moore*, **(BOA, Tab 21)** citing Justice Rowles in the BC Court of Appeal.
[167] Justice Abella, for the SCC, at para. 28 of *Moore*, **(BOA, Tab 21)** citing with approval Justice Rowles in the *BCCA*.

'discrimination' as defined in s. 4 of the *Human Rights Act*.

**Conclusion: Board erred by applied a 'similarly situated'/formal equality analysis**

138. The Court, in *Moore*, characterized the flawed approach taken by the Courts below and, it is submitted, the Board of Inquiry here, as one informed by formal equality ("formalism"[168]) which had been squarely rejected in *Andrews*[169] and re-rejected in *Withler*:

> It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed — the elimination from the law of measures that impose or perpetuate substantial inequality.[170]

*Application of the Principles of Step #2 of a Substantive Equality Analysis to the service at issue—Social Assistance*

139. Returning to the second step of a *prima facie* discrimination analysis, and bearing in mind that this Court is conducting an appellate review,[171] it is submitted that this Court has more than enough evidence to determine this stage of the analysis. Both the Province[172] and the Board of Inquiry[173] observed that the evidence was largely undisputed.

140. At a fundamental level, the Province has violated the 'essence' of equality rights—accommodation:

> In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.[174]

141. Having said that, given that the individual appellants were, with two exceptions to be discussed below, successful before the Board of Inquiry, it is not intended to discuss at any length

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[168] Justice Abella, for the SCC, at para. 30 of *Moore*, **(BOA, Tab 21)** and *Withler (supra)* at paras. 2, 39 and 40, **(BOA, Tab 37)**
[169] *Andrews* v. *Law Society of BC*, 1989 1 SCR 143 at p. 164 SCR, paras. 26-30, **(BOA, Tab 3)**
[170] *Withler* (*supra*) at para. 40, **(BOA, Tab 37)**
[171] *Per Vavilov*, [B.A. Tab ] and s. 36(4) of the NS HRA, **(BOA, Tab 6)**
[172] See the respondent Province's Post-Hearing Submissions, Appeal Book, Bk. 64, Tab 8, page 20,969 at pp. 20983-4, paras. 28-29
[173] BoI *Prima Facie* Discrimination Decision, at paras. 46-47 and 300, **(BOA, Tab 1)**
[174] *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 SCR 519 at para. 47, **(BOA, Tab 31)**

the disadvantages they experienced with respect to their receipt of accommodative social assistance. Rather, only a brief summary of those disadvantages and burdens as found by the Board of Inquiry will be set out here:

Re Beth MacLean

- The Board of Inquiry found that Ms. Maclean could have been supported in a small option home from the time of her admission to the NS Hospital in October 2000. As a result, she languished, much to her disadvantage, until finally supported in a small options home in January 2020. She also missed out on the benefits and advantages of participating in community life which receipt of accommodative social assistance would have enabled.

Re Joey Delaney

- The Board of Inquiry found that Mr. Delaney could have been supported in a small option home from the time of his 'medical discharge' from the NS Hospital in October July 2010. As a result, he languished, much to his disadvantage, until the present (**Note**: It is currently expected that Mr. Delaney will move from Emerald Hall to a small option home in March 2020.) He also missed out on the benefits and advantages of participating in community life which receipt of accommodative social assistance would have enabled.

Re Sheila Livingstone

- The Board of Inquiry found that Ms. Livingstone could have been supported in a small option home from the time of her 'medical discharge' from the NS Hospital in April 2005. As a result, she languished, much to her disadvantage, until finally 'transferred' to Yarmouth in January 2014. During and after the period, she also missed out on the benefits and advantages of participating in community life which receipt of accommodative social assistance would have enabled.

**Step #3: '…that the protected characteristic was a factor in the adverse impact'**

142. Again, the evidence is undisputed in establishing a link between the appellants being persons with disabilities and the disadvantages they experienced with respect to receipt of accommodative social assistance. Stated most broadly, and as the Province ultimately admitted[175] and the Board of Inquiry itself found, the Province chose to impose a moratorium on the expansion of existing supports and services in community-based small option homes for persons with disabilities—including the appellants. That is, "the moratorium prevailed" over the interests of

[175] Province's Post-Hearing Submissions, Appeal Book, Bk. 64, Tab 8, page 20,995, para. 52

persons with disabilities.[176]

**ISSUE 2: The Board erred in dismissing Ms. MacLean's complaint regarding her placement in Kings RRC during the years 1986 to 2000.**

**Re Beth MacLean and her 14 years of residence in the Kings RRC**

143. This portion of her claim is referred to in paras. 9 through 17 of Ms. MacLean's complaint.

144. The Board of Inquiry dismissed that part of Ms. MacLean's human rights complaint relating to the 14-year period during which, as a young teenaged girl, she was 'placed' at the adult institution called the Kings Residential Rehabilitation Centre, located on 'County Home Road' in Waterville, Nova Scotia. She was 14 at the time.

***Step Two: 'She experienced an adverse impact*** with respect to the service**'**

*The Board of Inquiry dismissed the discrimination claim re KRRC as no 'disadvantage' shown*

145. In its *prima facie* discrimination ruling, the Board stated that it was "not satisfied, on the basis of the evidence before me, that placing Ms. MacLean in King's in 1986 was inflicting a disadvantage on her." This surprising decision (i.e., given the Board's other comments regarding living in a small option homes being demonstrably better than in an institution such as Quest, CTP or Kings[177]) is elaborated in the following paragraph:

> **426** It is anachronistic to impose current conceptions of the proper care for the disabled and try 30 years later to judge what ought to have been done for Beth MacLean at King's. Again, "meaningful access" has to be determined in context. The context here, in large part, is historical. There is not the evidence in the context of the time to say that the placement at King's, given the difficulties which arose at the Truro Children's Training Centre and the options for care that were then conceived of, was a discriminatory decision. There is no evidence to say, for example, that placement at King's was disadvantageous to her relative to the placement at the Children's Training Centre. Children's Training Centres were "institutions" too.[178]

[176] BoI *Prima Facie* Discrimination Decision, para. 412, **(BOA, Tab 1)**
[177] BoI *Prima Facie* Discrimination Decision, para. 415, **(BOA, Tab 1)**
[178] BoI *Prima Facie* Discrimination Decision, para. 426, **(BOA, Tab 1)**

146. In essence, the Board approached the question of whether Ms. MacLean had shown a 'disadvantage' from the perspective of asking itself what were "conceptions of the proper care for the disabled". With respect, the Board adopted a paternalistic view toward the claimant, not a human rights view, in asking itself about prevailing practices at the time.

147. The Board's approach reveals two fundamental errors.

148. First, it is recalled that in its Prima Facie Decision generally, the Board's foundational focus—and overarching error—was in comparing the complainants' treatment to that offered to other persons with disabilities in the Province. Thus, the query regarding proper conceptions of the care for the disabled at the time, would be relevant if the goal of the human rights inquiry was to recover prevailing historical practices of care toward persons with disabilities and to then gauge how well Ms. MacLean was treated compared to those others.

149. Stated in these terms, the flawed 'similarly situated' approach discussed above is once more on display. Under the Board's template, if persons with disabilities were, as a group, 'relegated and banished'[179] to institutions during the 1980s and 1990s, then Ms. MacLean's treatment could not be seen as discriminatory.

150. Rather, Ms. MacLean's complaint was seeking to be 'socially assisted' in the same way that other people living in poverty were assisted by their government; with the right to live in community and to receive assistance that accommodated their needs, where they chose to live.

151. Indeed, once it is appreciated that the Board's conclusion that there was no evidence of 'disadvantage' had come from its application of the 'similarly situated' template to discrimination, one can appreciate the Board's statement that: "There is no evidence to say, for example, that

[179] To borrow from the description employed by the Supreme Court in *Eaton* (supra) at para. 67

placement at King's was disadvantageous to her relative to the placement at the Children's Training Centre."[180]

152. However, when a substantive equality lens is applied to the evidence, it becomes clear that the Board had before it un-contradicted evidence—all from government documentation—to the effect that persons with disabilities had been seeking 'mainstreamed', 'normalized' lives in community and, by the 1980s, government practices had already moved in that direction:

a. "Report of the Task Group on Homes for Special Care", 1984 (NS Dep't. of Social Services)

> For the past decade, in Nova Scotia and across North America, the development of residential and support services has been guided by the principle of normalization. Normalization has the following emphasis: the integration of the mentally handicapped into a variety of community living settings; the provision of a broad array of community—based support services; a gradual policy of deinstitutionalization of mentally handicapped persons from large, often remote, institutional facilities; and a rehabilitative rather than custodial orientation within institutions to ensure that persons are moved as quickly as possible to community alternatives.

Indeed, this trend from the 1970s and early 1980s included supports for children with mental disabilities:

> With the increase in community support services to mentally handicapped children and particularly the development of educational services in various communities throughout the province, the need for institutional beds for children has decreased over time. This trend is particularly visible in those facilities operated for the care or training and education of mentally handicapped children.[181]

b. The movement towards 'normalization' emerged and had become widespread in the 1960s and 1970s. In an important Cabinet memorandum from the Minister of Community Services (November 1990) to the provincial cabinet, the Minister stated:

> The 1960's and 1970's produced social change within the field of mentally handicapped as it did they did with most of society. The concept of normalization was born and developed in this period evolving a philosophical stance which stated that the mentally handicapped should be treated in the same fashion as the normal or average citizens in our

[180] BoI *Prima Facie* Discrimination Decision, para. 426, **(BOA, Tab 1)**
[181] *Report of the Task Group on Homes for Special Care*, (NS Dep't. of Social Services), Appeal Book, Bk. 49, Tab 111, page 16,209 at p. 16,273-276.

> society. They should go to school, live in the community, work, and recreate in the community. They should not be placed outside of the community, i.e., in institutions.[182]

c. The Appeal Book contains, literally, hundreds of pages of government reports and documents that attest to the deinstitutionalization of adults ***and*** children through this period. These include the internal memoranda and commissioned Reports to the Province surrounding the closure of the Children's Training Centres in the early-1990s in Nova Scotia.[183]

d. The expert testimony of Dr. Bach and Jim Fagan both addressed the question of community based supports for children and adults during the 1980s and 1990s. Jim Fagan, an RRSS Director with decades of experience provided an expert report to the Board of Inquiry which was favourably reviewed by the Board. In his Report and *viva voce* evidence, [184] Mr. Fagan states clearly that Ms. MacLean could easily have been supported from her 18th birthday since that was the focus of the service work that RRSS provided at the time.

153. Again, the key question is far less about what Nova Scotia government practices were or were not at the relevant time and crucially about whether 'persons in need' were being assisted and supported to live in community during this period. The evidence is clear, the 'poor houses' had closed by this period and people in poverty were assisted in community. Quite apart from widespread evidence of best practices, the equality of persons with disabilities demanded it.

154. As a "person in need", Ms. MacLean was seeking nothing other than the right to live in community and receive social assistance/services which accommodated her needs. She was *not* claiming that she was worse off than others who were 'similarly situated'.

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[182] "Memorandum from the Minister of Community Services, Guy LeBlanc, to Cabinet" (November 1990), Appeal Book, Bk. 31, Tab 8, pages 9984-9985.

[183] See, for example, the internal briefing notes to the Minister regarding the planned de-institutionalization of children which refer to the North American practice of supporting children in community: 'Briefing Memo to the Minister' (April 4, 1991), Appeal Book, Bk. 30, Tab 3, p. 9908-9909; 'Minister's Advisory Committee on Services to Children with a Mental Handicap' (December 1993), Appeal Book, Bk. 30, Tab 1, p. 9787 at p. 3 *et seq*.

[184] Jim Fagan Report re Beth MacLean, Exhibit 27, Appeal Book, Bk. 56, Tab 27, page 18, 622 at page 18,625 and Fagan testimony, Appeal Book, Bk. 11, page 3136 and 3229

155. It is submitted that when the correct law is applied, animated by substantive equality, there can be no real question that Ms. MacLean suffered disadvantages by having been institutionalized as a 14-year-old girl in adult institution and was made to remain there until 2000. Her record of repeatedly making it clear that she did not like it in Kings RRC and wanting to live in community establishes the *prima facie* discrimination requirement of "disadvantage".

156. The Board erred by incorrectly applying the law of discrimination generally to these complaints, including Ms. MacLean's period of institutionalization in Kings RRC. She was clearly "disadvantaged" within the meaning of Step #2 of the test in *Moore*.

**Step #3: '…that the protected characteristic was a factor in the adverse impact'**

157. There can be no question that Ms. Maclean's 'placement' in a segregated adult institution, one intended for adults with mental disabilities, i.e., intellectual disabilities was not just a factor in but was explicitly because she had a mental disability.

**Conclusion on Prima Facie Discrimination re Beth MacLean at King RRC 1986 to 2000**

158. Therefore, it is submitted that when the law of discrimination is properly applied, the respondent Province had discriminated against her.

**ISSUE 3: The Board erred in dismissing Ms. Livingstone's complaint regarding placement in an institution upon being discharged from Emerald Hall in January 2014.**

159. The Board referred to Ms. Livingstone's 'transfer' to an institution in Yarmouth from Emerald Hall as having come about after her sister was presented with a choice which, as the Board made clear, was no choice at all: "The Province eventually offered a placement in Yarmouth, but it gave Ms. Cain no option but to agree to Sheila Livingstone's placement there. Ms. Cain wanted her sister out of Emerald Hall."[185]

[185] BoI *Prima Facie* Discrimination Decision, para. 430, **(BOA, Tab 1)**

160. In the end, while the Board concluded that the remoteness of the institution was a violation of Ms. Livingstone's equality rights, the fact that it was an institution was acceptable:

> She, in my opinion, due to her age and myriad infirmities might properly have been placed in a small options home, a nursing home or some other "institutional facility". Harbourside Lodge is an "institution", not a small options home, but apart from its distance from Halifax about which I will comment later, I am satisfied Harbourside was an appropriate placement for her. She received proper care and was content. I restrict my finding of discrimination against her to the fact that she was placed and held at Emerald Hall for well over nine years.[186] (underlining added)

161. Indeed, earlier in its decision, the Board had made clear: "Ms. Cain would, in a heartbeat, have chosen a place like Topsail small options home."[187] The evidence was, not only, that Ms. Livingstone had lived successfully in a small options home for many years but the Board accepted, as did the Province that Ms. Livingstone could have been supported in community. The Board stated: "The evidence from Ms. Livingstone's family was that, while a return to a small options home would have been ideal, Harbourside was a good placement and she was content there."[188]

162. Accordingly, it is submitted that the Board made the same error as it did in the decision with respect to MacLean's residence at Kings RRC. It applied a paternalistic approach of comparing Ms. Livingstone's institutionalization in Yarmouth to the treatment that the Board saw other persons with disabilities receiving and concluded that it was adequate.

163. For the Board to hold that Harbourside was an 'appropriate placement", reveals that it was not asking itself whether the Province should have accommodated Ms. Livingstone's entitlement to return to live in community, but rather whether what it came up with was 'acceptable'. The Board erred, once again, in applying the wrong test to the evidence.

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[186] BoI *Prima Facie* Discrimination Decision, para. 411, **(BOA, Tab 1)**
[187] BoI *Prima Facie* Discrimination Decision, para. 74, **(BOA, Tab 1)**
[188] BoI *Prima Facie* Discrimination Decision, para. 451, **(BOA, Tab 1)**

**Step Two: 'She experienced an adverse impact with respect to the service'**

164. Again, the evidence before the Board and, indeed, the Board's own findings make clear that both while residing in Emerald Hall and, later, while in Harbourside Lodge in Yarmouth, Ms. Livingstone wanted to live in community *and* could have been supported to live there. For its part, the Department of Community Services had found her eligible for services in a small option home but then stated that she would be put on a waitlist. The continued and unnecessary institutionalization and being found eligible for social assistance and then being put on a waitlist are clear, undisputed disadvantages.

**Step #3: '…that the protected characteristic was a factor in the adverse impact'**

165. Ms. Livingstone's 'placement' in a segregated, congregate care institution, one intended for adults with mental disabilities, rather than the community-based setting she had been approved for, was not just a factor in but was explicitly because she had a mental disability.

**Conclusion on Prima Facie Discrimination re Sheila Livingstone at Harbourside Lodge ARC 2014 to until her death in 2016**

166. It is submitted that on the voluminous and undisputed record before the Court, it can be concluded that a *prima facie* case of discrimination had been established.

**ISSUE 4: The Board erred in law in its interpretation and application of the principles underlying human rights compensation awards.**

167. This ground of appeal is a consolidation of Grounds # 12(a)-(e) and 13-15 in the Amended Notice of Appeal (filed December 31, 2019). The appellant's appeal the Board of Inquiry's compensation award. There are, in fact, many problems with the principles animating the Board's reasoning.

168. However, one overarching flaw underlying many of the problems briefly reviewed below is a carryover from the reasoning that tainted the discrimination analysis. That is, in its

determination of an appropriate award, the Board stated that it was cognizant of the fact that the scope of those potentially eligible to make their own human rights complaint regarding the provision of services was great. Not only would it include 'the complainants [who] fall into the general category of disabled people waiting placement'[189]…which, in the Board's view, …"is very common, ordinary."[190] The Board then implicitly expanded this group (in paras. 83 and 84) to anyone who has been diagnosed as requiring any form of medical services and has to await treatment.[191]

169. The appellants will make submissions on each of the Board's errors in its reasoning and then follow with submissions regarding a proper, human rights compliant award.

*1. **Arbitrary compensation awards***

170. The Board of Inquiry awarded Mr. Delaney general damages compensation of $100,000 for his approximately 10 years of discriminatory institutionalization. (in Emerald Hall ***and*** in Quest) from the date of his medical discharge in July 2010 to present. The Board awarded precisely the same amount to Ms. MacLean even though her discriminatory institutionalization, on the Board's reasoning, began in or around 2000 or 2001. In short, Ms. MacLean was wrongfully institutionalized (in Emerald Hall and, since 2016, in CTP) for **twice** the length of time as Mr. Delaney (~20 years) and, yet, was awarded exactly the same amount.

171. The Board makes no effort to provide reasoning for its failure to grant awards that were commensurate with either the duration of discriminatory institutionalization or harm suffered.

172. Similarly, Ms. Livingstone's sister, Olga Cain, pursued the human rights complaint after

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[189] BoI Remedy Decision, para. 62, **(BOA, Tab 2)**
[190] BoI Remedy Decision, para. 63, **(BOA, Tab 2)**
[191] That is, in its Remedy Decision (paras. 83 and 84), the Board makes reference to its earlier *Prima Facie* Discrimination decision where, at paras. 382 and 383 it misinterpreted the scope of disability discrimination in this case to include not just 'persons in need' who are eligible for disability supports and services under the *SAA* but also people awaiting knee surgery and "The definition [of disability] is broad and deep enough to include almost every affliction that one could imagine."

her sister's death in October 2016. She sought a compensation remedy that would reflect the egregious violation of her sister's human rights from the date of her sister's medical discharge from Emerald Hall in April 2005 until her death in October 2016. The Board made no award for the violation of Ms. Livingstone's rights while compensating Ms. Cain and her daughter, Ms. McCabe-Sieliakus—something that was not even sought at the hearing. It is submitted that the Board's failure to grant a compensation award for the violation of Ms. Livingstone's rights was a clear violation of the provisions of the *Human Rights Act* (including its remedial provisions) and, more fundamentally, the sacred principle that 'there is no right without a remedy'. The respondent Province should not stand to benefit from the fact that the matter took so long to get to a hearing that Ms. Livingstone died in the meantime.

173. Finally, while the Board provided many reasons for why the award should be reduced, it ultimately failed to explain in any rational way, the basis or methodology for the figure it arrived at. There is simply no reasoning, either via precedent or application of guidelines to understand the Board's logical thought process. The Board, itself, described the quantum of the award as "arbitrary".[192]

*2.* ***Remedy was reduced in light of the appellant's disabilities***

174. In its discussion of an appropriate award, the Board stated that the appellants' disabilities, which it highlighted, meant that these disabilities are a "relevant" factor, serving to reduce the award:

> Joey Delaney is so disabled that payment to him of a very large sum will not have a greater impact on his life than a moderate sum. Beth MacLean does have capacity, but the potential benefit to her of a very large damage award is limited. I do not suggest that a payment ought to be limited because of disability, but I do say that a lack of capacity to benefit from the fruits of an award of the size that is advocated is a relevant factor in discouraging me from ordering that they be paid millions.[193] (underlining added)

[192] BoI Remedy Decision, para. 61, **(BOA, Tab 2)**
[193] BoI Remedy Decision, paras. 43, **(BOA, Tab 2)**

175. With respect, the Board's reasoning—to award a disabled person less than an able-bodied person would be awarded for a violation of their rights—appears, itself, to be discriminatory, indeed, disturbingly so.[194] That is, discrimination against people with mental disabilities, egregious harms caused to them on account of discrimination (here, "soul destroying"[195] and "wrenching diversion of their lives"[196]), would be compensated on a lower scale (here, **$5-6,000 per year** in the case of Ms. MacLean) because, effectively, their lives are less valuable. By the same token, there is less incentive for respondents to avoid discrimination if the message sent is that violations of human rights to disabled victims will be taken less seriously by the legal system. Conversely, people who are fit and resourceful, ought, on this view, be awarded greater compensation, because they would have capacity to benefit from it.

176. With respect, a position which effectively values the equality rights violations to people differently, depending upon whether they have disabilities is not just completely inconsistent with the purpose of and guarantees in the *Human Rights Act* but is contrary to public policy.[197] This approach is no different than if awards were greater or lesser depending upon a person's race or gender.

*3.* ***'Deterrence awards are not effective' and should not seek to effect systemic change***

177. The Board stated that "I doubt the deterrent effect of larger awards against government. It seems to me that governments are likely to be relatively impervious."[198] The Board's statement was made in a complete absence of evidence regarding the amount of financial deterrence required to influence government behaviour. It is submitted that the very fact that the Supreme

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[194] It should be noted that the Board of Inquiry actually voiced this position at greater length during the remedial hearing. Appeal Book, Bk. 29, page 9,435 *et seq*.
[195] BoI *Prima Facie* Discrimination Decision, para. 62, **(BOA, Tab 1)**
[196] BoI Remedy Decision, para. 43, **(BOA, Tab 2)**
[197] See the case comment in the *Canadian Human Rights Digest*, "Compensation Decision is Shocking, If Not Outright Discriminatory" (December 2019) 14-16 by Shelagh Day, **(BOA, Tab 46)**
[198] BoI Remedy Decision, para. 68, **(BOA, Tab 2)**

Court has cited the crucial role that deterrence plays in arriving at damage awards against governments to compensate for rights violations is sufficient direction that deterrence is both a real, necessary and significant factor:

> Deterrence, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution…. Similarly, deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future."[199]

178. Similarly, in the context of a *Human Rights Act* award, this Court, in *Kaiser* v. *Duval* stated: "The Act has a mixed purpose; a public interest to deter and eliminate discrimination on the bases enumerated in s. 5 of the *Act* and a private interest to remedy specific violations of the *Act*."[200]

179. It is submitted that the Board erred in effectively dismissing the ability, requirement and importance of awarding damages sufficient to deter the impunity with which the Province has operated for decades regarding the fundamental rights of persons with disabilities.

180. Insofar as the Board of Inquiry relied on the concern that large general deterrence awards will reduce the amount of resources available for other (social) programs, it is submitted, i) that an overriding fundamental requirement is that government's existing programs—especially those for the poor— be non-discriminatory, and ii) were the Board's concern to be overriding, presumably legislatures and Courts would not permit, let alone encourage damage awards for human rights cases.

181. Finally, the Board also stated that a significant deterrent damages award would be "a remedy that seeks to force systemic change" (para. 69). With respect, this is precisely the point of deterrent damage awards (*Ward*, SCC at para. 29). It is submitted that the Board fundamentally

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[199] *Vancouver* v. *Ward*, 2010 SCC 27 at para. 29, **(BOA, Tab 35)**
[200] *Kaiser v Dural*, 2003 NSCA 122 at para. 21, **(BOA, Tab 19)**

misunderstood the purpose and goals of deterrent damages. In the present case, the need for significant deterrence to end a human rights violation which the undisputed evidence indicates has been going on for decades is urgent.

*4.* ***'The amount of the award should recognize that the Province has always provided care for them'***

182. It is submitted that this basis, too, for reducing an award is fraught. That is, in a context where it has been found that a person was improperly confined in an institution for, literally, decades and their lives have been torn asunder, it is unconscionable for the Board to then mitigate its assessment of damages by effectively saying: '...but the respondent didn't starve them or keep them in the cold.' If we were to transfer such a consideration into a wrongful imprisonment damages claim, it becomes clear how irrelevant it would be that the Respondent didn't let the appellant starve to death.

183. For the Board to reduce an award on the basis that "the people of Nova Scotia, through their government and their servants, have kept the Complainants safe, clean, warm, fed, clothed and healthy…. the care they have received should not be taken for granted and should not be ignored",[201] is to mitigate the significance of the human rights violation—especially in the context of a claim advance by impoverished persons with disabilities regarding their living circumstances.

*5.* ***Analogy to wrongful imprisonment/institutionalization: unlike those cases, these are "very common, ordinary"***

184. With respect, the Board's error is that by relying on its formal equality analysis of what is 'the service' at issue here (i.e., the Board stated that it was 'services offered to persons with disabilities'), it ends up, once again, with the conclusions that there are actually "many many people who have been denied reasonable access".[202] It will be recalled from the discussion above

[201] BoI Remedy Decision, para. 65, **(BOA, Tab 2)**
[202] BoI Remedy Decision, para. 64, **(BOA, Tab 2)**

that just about any and all people waiting for any kind of medical service could be considered 'disabled' and thus, have a potential discrimination claim, on the Board's view of it.

185. With respect, when a substantive equality approach to the issues in this case is applied, it becomes clear that the universe of people who might be able to make a human rights claim are those persons with disabilities who have been found to be 'persons in need' and who have been forced to wait, in institutions etc. Clarifying this point leaves the Board's fear that significant general damages would be available to anyone on any government waitlist as unfounded.

*6.* ***'No harm intended, even though they decided to spend no money on community care'***

186. Under this view, the Board reasons that: "the mistreatment was not born of any particular….ill will"[203]and, therefore, damages should be reduced. It is ironic, however, that in the following sentence, the Board adds: "Successive governments of all colours decided to spend little or no more money providing facilities to the disabled." [204] However, high-level decisions, such as the Moratorium, were deliberately made, and re-made, year in and year out,[205] knowing that they would disadvantage persons with disabilities.

187. Indeed, a discriminatory policy/legislative decision is arguably worse from a human rights perspective and calls to mind Justice McIntyre's statement made in the *Charter* discrimination challenge to legislation in *Andrews*: "The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee."[206] Here, as has been made clear, there is NO legislation being challenged but what is at the root of the appellants' oppression are decisions and practices of the respondent Province taken at the 'uppermost echelons

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[203] BoI Remedy Decision, para. 66, **(BOA, Tab 2)**
[204] BoI Remedy Decision, para. 66, **(BOA, Tab 2)**
[205] Deputy Minister Hartwell testimony, Appeal Book, Bk. 22, page 7248
[206] *Andrews* v. *Law Society of BC*, 1989 1 SCR 143 at p. 172 SCR, para. 35, **(BOA, Tab 3)**

of government', by 'people with the final authority'.[207]

*7. **The Amount Sought Would be to Punish NOT to Remedy***

188. In its reasons, the Board rejected the range of compensation sought by the appellants, stating that awarding such amounts would be 'wrong in principle';[208] that the scale of the amounts sought "would be to punish" and, thus be contrary to the remedial purposes of human rights.[209]

189. With respect, the amounts sought were entirely based on the egregiousness of the harm visited upon the appellants because of the Province's actions/inactions. Of course, the amounts sought were significant but, it is submitted they were entirely in proportion to the harm caused to the appellants over the years and decades. When one reviews the scale and scope of harm caused (including the impact on the appellant's *liberty* rights), it is clearly staggering.

**Quantum of Damages**

190. Given the available space/page limit, the appellants will make only brief submissions on appropriate damage scale.[210] The remedy hearing conducted in September 2019, included expert evidence from psychiatrists Drs. Scott Theriault and Mutiat Sulyman concerning the harmful impacts of the discrimination on Ms. MacLean and Mr. Delaney.[211] Reference to their evidence nowhere appears in the Board's remedy decision.

191. The Board awarded Ms. MacLean $100,000 and the same amount for Mr. Delaney. Ms. Livingstone's estate was awarded nothing but her sister and her niece were each awarded $10,000—even though they sought nothing for themselves.

192. Put differently, in the case of Ms. MacLean she was awarded approximately **$5-6,000 per**

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[207] BoI *Prima Facie* Discrimination Decision, paras. 412 & 413, **(BOA, Tab 1)** See also the testimony of Deputy Minister Lynn Hartwell, Appeal Book, Bk. 22, page 7245
[208] BoI Remedy Decision, paras. 39-40, **(BOA, Tab 2)**
[209] BoI Remedy Decision, paras. 40-41, **(BOA, Tab 2)**
[210] At the BoI Remedy hearing, the complaints filed full written submissions regarding their damages claim: Appeal Book, Bk. 64, Tab 10, page 21148 at pages 21,168-21,200
[211] Appeal Book, Bk. 27, Tab 43, Dr. Theriault: pages 8855-8935 and Dr. Sulyman: pages 8936-9008

**year** for each year of her life that was discriminatorily taken from her, or as the Board put it, the respondent's "soul destroying" failure to respect her equality rights, which, at some point rose to the level of "contempt" for her rights.[212]

193. The purpose of compensatory damages is two-fold: a deterrent component to prevent future violations against the public and to restore the individual.

194. In terms of damages, this case is without precedent in terms of Canadian human rights jurisprudence. However, in *Ward*, a claim for *Charter* damages, the Supreme Court of Canada thematically discussed the principles that would inform determinations of quantum and stated explicitly that conventional tort law considerations would apply.[213]

195. In the assessment of damages, the appellants rely on two civil cases in which plaintiffs have sought damages for wrongful institutionalization. In *Muir* (Alta. QB, 1996),[214] the Court granted damages to the plaintiff who had been wrongfully institutionalized for almost 10 years and filed a civil claim; for wrongful sterilization and, *separately*, wrongful institutionalization. For the latter, the Court awarded Ms. Muir $250,000 for the pain and suffering stemming from her wrongful confinement, with interest of $115,500 which ran from the date she was discharged from the institution (para 6).

196. Importantly, and crucial to the question of the quantum of damages, the Court explicitly adopted the framework for damages established by wrongful imprisonment cases (paras, 221-224). In particular, the Court relied on the compensation paid in the Donald Marshall case.

197. Following *Muir*, in *H. (J.) v. British Columbia*,[215] (1998) the plaintiff was awarded

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[212] BoI *Prima Facie* Discrimination Decision, para. 62, **(BOA, Tab 1)**
[213] *Ward* (*supra*) at paras. 48-50, **(BOA, Tab 35)**
[214] *Muir* v. *Alberta*, 1996 CanLII 7287 (AB QB); 132 DLR. (4th) 695 **(BOA, Tab 23)**
[215] *H. (J.) v. British Columbia*, 1998 CarswellBC 2786, **(BOA, Tab 15)**

$100,000 for being wrongfully confined in an institution for people with intellectual disabilities for three and a half years. The plaintiff had been admitted into the institution after a physician assessed him as having a mild intellectual disability. Previous tests administered had found he did not have an intellectual disability. Soon after his admission, testing made clear that the plaintiff did not in fact have an intellectual disability. A doctor who assessed him after his admission found that he was inappropriately placed (paras 80, 81).

198. Critically, both *Muir* and *H. (J.),* the two Canadian cases for which damages were awarded for wrongful institutionalization both drew their guidelines for damage assessments from wrongful incarceration precedents. Unfortunately, they were both based on a misunderstanding of the total amount of compensation awarded to Mr. Donald Marshall, and were decided without the benefit of more recent wrongful imprisonment precedents which establish a range of $250,000 to over $1, 000, 000 **per year** of wrongful institutionalization. It is also crucial to note that *Muir* and *H. (J.)* are now 20-25 years old. The 1998 figure of $25, 000, when adjusted for inflation to today's dollars, amounts to damages of $38,483.15 **per year** of wrongful institutionalization.[216]

199. Lastly, the recent (2016) decision in *Henry v. British Columbia*,[217] at para 418 provides not only a more recent indication of the scale of damages award for wrongful imprisonment but also, helpfully, provides a full survey of the awards made for wrongful imprisonment.

**Conclusion re Compensatory Damages**

200. It is submitted that this Court has the complete evidentiary record for the 3-day remedial hearing and is in a position to grant the award that the Board should have granted. It is submitted that an award in the nature of $275,000-$500,000 **per year** for each year in which the appellants' rights were violated is appropriate and commensurate with analogous precedent.

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[216] Bank of Canada, *Inflation Calculator*, https://www.bankofcanada.ca/rates/related/inflation-calculator/
[217] *Henry v. British Columbia*, 2016 BCSC 1038, at para 418 **(BOA, Tab 16)**

**ISSUE 5: The Board of Inquiry erred in law and jurisdiction in ordering costs.**

201. The Board was informed by all counsel that the applicable legislation and case law[218] did not permit the ordering of costs.[219] In effectively ordering costs for legal counsel, the Board erred.

## PART 6 – ORDER AND RELIEF SOUGHT

202. The appellants humbly request that this Honourable court:

a. Allow the appeal of Ms. MacLean with respect to the Board of Inquiry's ruling that she had not established *prima facie* discrimination with respect to the period of her residence at the Kings RRC and that the matter be remitted to a differently constituted Board of Inquiry for the Phase Two hearing in her case.

b. Allow the appeal of Ms. Livingstone with respect to the Board of Inquiry's ruling that she had not established *prima facie* discrimination with respect to her period of residence at the Harbourside Lodge in Yarmouth and that the matter be remitted to a differently constituted Board of Inquiry for the Phase Two hearing in her case.

c. Allow the appellants' appeal with respect to the damages awarded and for this Court to substitute its determination for that of the Board regarding damages for the violations found.

d. With respect to the request that the matter be remitted as necessary to a differently constituted tribunal, it is submitted that this is appropriate for the following reasons:

i. The Board's remarks during the hearings and in its decision make clear that the Board is opposed, on a personal, political level, to the concept of disability-based systemic discrimination, including: "If I am speaking from a position of privilege and am "un-

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[218] *Johnson* v. *Halifax (Regional Municipality) Police Service*, 2005 NSCA 70 at para. 20, **(BOA, Tab 18)**

[219] Appeal Book, Bk. 29, Tab 45, page 9376

woke", then so be it."[220] This goes considerably beyond a statement regarding the Board's understanding of the law to one of personal antipathy to it.

ii. Based on the fact that the written record in this matter is complete, a differently constituted tribunal can effectively assume jurisdiction.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 6th day of March, 2020

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**Vincent Calderhead**
Counsel for the Appellants,
Beth MacLean, Olga Cain on behalf of Sheila Livingstone, Tammy Delaney on behalf of Joseph Delaney

PL 347713

[220] BoI *Prima Facie* Discrimination Decision, para. 282, **(BOA, Tab 1)**

## APPENDIX A - LIST OF CITATIONS REFERRED TO IN PART 5

| TAB | AUTHORITY |
|---|---|
| **Cases** | |
| **1** | *MacLean* v *Nova Scotia* (*Attorney General*), [2019] N.S.H.R.B.I.D. No. 2 |
| **2** | *MacLean* v *Nova Scotia* (*Attorney General*), [2019] N.S.H.R.B.I.D. No. 5 |
| **3** | *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 |
| **4** | *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3 |
| **5** | *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219 |
| **6** | *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 |
| **7** | *Canadian Elevator Industry Welfare Trust Fund v Skinner*, 2018 NSCA 31 |
| **8** | *DeWolf v City of Halifax and Welfare Committee of City of Halifax*, [1979], NSJ No. 711 |
| **9** | *Eaton v Brant (County) Board of Education*, [1997] 1 SCR 241 |
| **10** | *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 |
| **11** | *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada* (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 |
| **12** | *Gosselin v Quebec (AG)*, 2002 SCC 84 |
| **13** | *Halifax (City) v Carvery*, 1993 CanLII 3239 (NS CA) |
| **14** | *IAFF, Local 268 v Adekayode*, 2016 NSCA 6 |
| **15** | *H. (J.) v. British Columbia*, 1998 CarswellBC 2786 |
| **16** | *Henry v. British Columbia*, 2016 BCSC 1038 |
| **17** | *Janzen v Platy Enterprises Ltd*, [1989] SCJ No 41 |
| **18** | *Johnson* v *Halifax* (*Regional Municipality*) *Police Service*, 2005 NSCA 70 |

| TAB | AUTHORITY |
|---|---|
| **19** | *Kaiser v Dural*, 2003 NSCA 122 |
| **20** | *McInnis v Halifax (City) Social Planning Department*,(1990), 70 DLR (4th) 296 (NSCA) |
| **21** | *Moore v British Columbia (Board of Education)*, 2012 SCC 61 |
| **22** | *Moore v British Columbia (Board of Education)*, 2010 BCCA 478 |
| **23** | *Muir v Alberta*, 1996 CanLII 7287 (AB QB) |
| **24** | *Nova Scotia (Community Services) v Boudreau*, 2011 NSSC 126 |
| **25** | *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 |
| **26** | *Olmstead v LC ex rel Zimring*, 527 US 581 (1999), 119 S Ct 2176 |
| **27** | *Quebec (AG) v A*, 2013 SCC 5 |
| **28** | *Québec (Procureure générale) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 |
| **29** | *R v Appulonappa*, 2015 SCC 59 |
| **30** | *Robichaud v The Queen*, [1987] 2 SCR 84, DLR (4th) 57 (SCC) |
| **31** | *Rodriguez* v *British Columbia* (*Attorney General*), [1993] 3 SCR 519 |
| **32** | *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 |
| **33** | *Sparks v Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82 |
| **34** | *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14 |
| **35** | *Vancouver* v *Ward*, 2010 SCC 27 |
| **36** | *Via Rail Canada v Canadian Transportation Agency*, 2007 SCC 15 |
| **37** | *Withler v Canada*, 2011 SCC 12 |
| **38** | *Woodard v Social Assistance Appeal Board* (1983), 64 NSR (2d) 429 NSSC |

| TAB | AUTHORITY |
|---|---|
| **Legislation** | |
| **39** | *Americans with Disabilities Act of 1990*, 42 USC Title II, 12132 |
| **40** | *Employment Support and Income Assistance Act*, SNS 2000, c 27 |
| **41** | *Human Rights Act*, RSNS 1989, c 214 |
| **42** | *Social Assistance Act*, RSNS 1989, c 432 |
| **43** | *Municipal Assistance Regulations*, O.I.C. 81-665 (May 19, 1981), N.S. Reg. 76/81 as amended up to and including O.I.C. 1999-464 (Sept. 28, 1999), N.S. Reg. 93/99 |
| **United Nations Sources** | |
| **44** | *International Covenant on Civil and Political Rights*,19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) |
| **45** | *Concluding observations of the Human Rights Committee* UNHRC (Canada), 85th CCPR/C/CAN/CO/5 (2006) |
| **Legal Literature** | |
| **46** | *Canadian Human Rights Digest*, "Compensation Decision is Shocking, If Not Outright Discriminatory" (December 2019) 14-16 by Shelagh Day |

## APPENDIX B – STATUTES AND REGULATIONS

***Social Assistance Act***
CHAPTER 432 OF THE
REVISED STATUTES, 1989

**Social Assistance**

**Short title**

**1** This Act may be cited as the *Social Assistance Act*. R.S., c. 432, s. 1.

PART I

MUNICIPAL ASSISTANCE

INTERPRETATION

**Interpretation of Parts I and II**

**4** In this Part and in Part II,

(d) "person in need" means a person who requires financial assistance to provide for the person in a home for special care or a community based option;

GRANT OF ASSISTANCE

**Duty of committee to assist person in need**

**9 (1)** Subject to this Act and the regulations the social services committee shall furnish assistance to all persons in need, as defined by the social services committee, who reside in the municipal unit.

**Appeal**

**19** Any person who applies for or receives assistance pursuant to this Act on or after August 1, 2001, may appeal any decision related to the person's application or assistance received to an appeal board established pursuant to the *Employment Support and Income Assistance Act* and the provisions of that Act and any regulations made pursuant to that Act respecting appeals apply *mutatis mutandis* to appeals made pursuant to this Section. 2000, c. 27, s. 22.

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***Municipal Assistance Regulations***
made under Section 18 of the
Social Assistance Act
R.S.N.S. 1989, c. 432
O.I.C. 81-665 (May 19, 1981), N.S. Reg. 76/81
as amended up to and including O.I.C. 1999-464 (Sept. 28, 1999), N.S. Reg. 93/99

**1** In these regulations

*** *** ***

(e) "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 wellbeing of the recipient,

(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;

*** *** *** *** ***

***Employment Support and Income Assistance Act***
An Act to Encourage the Attainment
of Independence and Self-sufficiency
through Employment Support
and Income Assistance

WHEREAS independence and self-sufficiency, including economic security through opportunities for employment, are fundamental to an acceptable quality of life in Nova Scotia;

AND WHEREAS individuals, government and the private sector share responsibility for economic security;

AND WHEREAS some Nova Scotians require help to develop skills and abilities that will enable them to participate as fully in the economy and in their communities so far as it is reasonable for them to do;

AND WHEREAS the Government of Nova Scotia recognizes that the provision of assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance are the concern of all Nova Scotians;

AND WHEREAS it is necessary that income assistance be combined with other forms of assistance to provide effectively for Nova Scotians in need;

AND WHEREAS employment support and income assistance must be effective, efficient, integrated, coordinated and financially and administratively accountable:

**Short title**

1 This Act may be cited as the Employment Support and Income Assistance Act. *2000, c. 27, s. 1* .

**Purpose of Act**

2 The purpose of this Act is to provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency. *2000, c. 27, s. 2* .

**Interpretation**

3 In this Act,

(a) "assistance" means the provision of money, goods or services to a person in need for

(i) basic needs, including food, clothing, shelter, fuel, utilities and personal requirements,

(ii) special needs,

(iii) employment services;

**Assistance to persons in need**

7 (1) Subject to this Act and the regulations, the Minister shall furnish assistance to all persons in need.

(2) Persons assisting the Minister in the administration of this Act shall

(a) receive applications for assistance; and

(b) in accordance with this Act and the regulations,

(i) determine whether the applicant is eligible to receive assistance,

(ii) determine the amount of financial assistance the applicant is eligible to receive,

(iii) determine the other forms of assistance available that would benefit the applicant,

(iv) advise the applicant of the amount of financial assistance that will be provided, the other forms of assistance that will be available for the applicant and the conditions to be met to ensure the continuation of the assistance provided,

(v) advise the applicant that the applicant has the right to appeal determinations made pursuant to this Act, and

(vi) from time to time review the assistance provided to a recipient, and in particular whether any conditions imposed have been met, and promptly advise the recipient of any changes in eligibility and of the right to appeal the change.

2000, c. 27, s. 7.