IN THE MATTER OF: The Nova Scotia *Human Rights Act* (the "Act")

- and -

IN THE MATTER OF: Board File No. H14-0418

BETWEEN:

Beth MacLean, Sheila Livingstone, Joseph Delaney and **Disability Rights Coalition**
(Complainants)

- and -

Province of Nova Scotia
(Respondent)

- and -

The Nova Scotia Human Rights Commission
(NSHRC)

Decision of the Board of Inquiry on Relevance of Documents

The Complainants ask me to direct the Province of Nova Scotia (hereinafter "the Province") to produce certain documents. The Province replies that they are irrelevant.

How I determine disclosure relevancy, I think, will define the scope of the hearing itself and lends to this opinion a greater importance. One could narrow disclosure and determine the issues at a hearing, more or less, on the basis of the individual complaints without much reference to socio-political background to government policies for the care of the disabled. The Complainants, on the other hand, from their requests for disclosure, seem to be asking of me is that I appoint myself to conduct a public inquiry into the administration of the provision of housing for disabled Nova Scotians, reviewing history, policy, best practices and rendering a critique of the Province's past administration of care for the disabled with sanctions and implicit directions for future policy. The Disability Rights Coalition (hereinafter "DRC") says, for example, that the Province has for the past 50 years failed to provide adequate, supportive, community housing for people with

disabilities. They say that the failure to provide this housing is the direct result of Provincial Government policy, including a moratorium on small options homes, and the failure to implement successive recommendations to address systemic failures. They seek disclosure of documents relating to the whole system of Provincial community housing services for persons with disabilities in order to support these allegations.

My remit is defined by the *Human Rights Act* and the complaints before me. The *Act,* in its relevant portions, provides as follows:

> 2 The purpose of this Act is to
>
> (a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family; ...
>
> (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; ...
>
> Meaning of discrimination
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> 4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society. 1991, c. 12, s. 1.

This section may be boiled down, for our purposes, to a single simple sentence.

> For the purpose of this Act, a person discriminates where the person makes a distinction based on a characteristic that limits access to advantages available to other individuals.

For the purposes of relevancy, I might say that only those documents which relate to the situation of the individual Complainants must be produced and that, accordingly, at the hearing, I should only hear evidence of their situation with enough collateral information to provide context. Indeed, this is in summary a statement of the Province's position.

The Complaints

The Complainant, Beth MacLean, says that the Province discriminates against her with respect to social services provided her because of her mental disabilities, her mental conditions and because the only available income for her is through social assistance. Ms. MacLean is now 44 years old. She has spent most of her life either in a Regional Residential Centre or at the Nova Scotia Hospital. She currently resides at the Nova Scotia Hospital, but she says she wants "to live in a home, on a street, in a neighbourhood and to live a normal life."

Ms. MacLean is not held at the Hospital. She may leave, but she says because she has no income, she cannot afford to live in the community with the supports that she requires. She says "she could have lived in a small (2-3 person) living situation in a home in the community with support staff as required." She says that if she could personally pay the cost of a community-based living situation, then "such a setting could easily and quickly be arranged through one or other of several organizations in Nova Scotia which provide supportive housing for people with mental disabilities." She also says that her Provincial caseworkers have "acknowledged for many years that I am capable of living in supportive housing in the community." The supports she requires include "Support for all my activities of daily living" and "24-hour supervision". Ms. MacLean contrasts her situation with those who are without disabilities, but who, being in need, receive social assistance immediately and as of right.

I do not need now to detail the complaints of Sheila Livingstone and Joseph Delaney since the gravamen of each is the same; they could be living in the community, but are not because of their disabilities and their lack of funds. Ms. Livingstone actually lives now at Harbourside Lodge, an Adult Residential Centre located in Yarmouth. Mr. Delaney has recently moved from the Nova Scotia Hospital to a facility in Lower Sackville known as Quest.

Each is a discrete complaint, but they do have a common theme and, according to the complaints, these three are not the only ones who want to be living in the community. There are others as well who would prefer to live in a residential neighbourhood in ordinary housing, be it apartments or houses, and live life in as normal a fashion as is possible given their disabilities and lack of resources. I note that the *Act* speaks of "classes of individuals" in its definition of "discrimination". Ms. MacLean, Ms. Livingstone and Mr. Delaney maybe said to be representatives of their class. The Disability Rights Coalition is also a party. The Coalition is a spokesperson for these classes.

For the sake of the argument, I will assume that Ms. MacLean is able, with appropriate supports, to live in the community. I will assume she is able to manage a reasonable degree of self-care, will be content to remain where she is and not abandon herself to the street or engage in other forms of self-harm, and that she presents no danger to others. I will assume that the care and support she needs do not require her to live in a hospital or nursing home or similar setting. I will also assume the officials of the Province have assessed her accordingly. I will also assume that if she were a rich woman, then she could afford to provide herself with 24 hour care in her own home. I will further assume that the reason she continues to live at the Nova Scotia Hospital is that there are no community placements available to her. Ms. MacLean, of course, then argues that not to make an appropriate placement available to her is an act of discrimination contrary to the *Act.*

Powers of a Board of Inquiry under the *Human Rights Act*

The *Human Rights Act* does not provide for rules of procedure for Boards of Inquiry and so there are no "discovery rules" as such. Just the same, in my view, the same goal may be accomplished through the power to enforce the attendance of witnesses and to produce documents under the *Public Inquiries Act.* This may include the witnesses of the Respondent or indeed the Respondents, themselves, although I hasten to add that where counsel is involved, I simply mean to say that this compulsion is simply the available remedy should a direction to produce be ignored.

I should also add that in my view, in the absence of a rule of procedure providing for an affidavit of documents, the parties will have to rely on undertakings of counsel or the parties, themselves, that documents do not exist. In this case, the Complainants are seeking certain documents which the Province's counsel advises do not exist. It seems to me that the Province, either through counsel or through an appropriate senior official, should confirm for the record which requested documents do not exist to the best of their knowledge, information or belief, or are not within their power and control. The Complainants may be as specific in their requests as they like for the purposes of clarity, but in the end it seems to me the Complainants will have to be content with the written confirmation. If the documents later appear, then their existence should be made known, of course, and it will always be open for one party to impeach another for non-disclosure of known relevant documents as it would be in any civil proceeding.

Documents may be irrelevant in the view of a Respondent, or indeed any reasonable person, and yet if they are easily found and delivered, I would hope the Respondent would simply provide them and not get into an argument. That is not

to say that a Respondent is not entitled to draw a line, but rather to express the hope that no line would be drawn without some reason. Thus, I encourage the Province to produce whatever it reasonably can that the Complainants say is of interest to them regardless of what I might say in this opinion.

The actual power to order the production of documents is found in the *Human Rights Act* and, by incorporation, the *Public Inquiries Act.* The *Human Rights Act* provides in s. 34(1) that Boards have the powers of a commissioner appointed under the *Public Inquiries Act.*

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

The *Public Inquiries Act* provides:

> The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court. (emphasis added)

The powers of a Supreme Court judge in civil cases are as set out in the *Nova Scotia Civil Procedure Rules.* I should apply them, and in doing so, in my view, should adopt the principles determining the powers of a Supreme Court judge under the *Supreme Court Rules* as set out by Moir, J. in *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4. Justice Moir concluded his extensive review of the meaning of relevancy under the "new" *Rules* by writing:

> [46] This examination of the legislative history, the recent jurisprudence, and the text of Rule 14.01 leads to the following conclusions:
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> · The semblance of relevancy test for disclosure and discovery has been abolished.
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> · The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that. Chambers judges are required to assess relevancy from the vantage of a trial, as best as it can be constructed.

> · The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally. The Rule does not permit a watered-down version.
>
> · Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made. In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and the recognition that an overly broad requirement worked injustices in the past.
>
> [47] In my opinion, these conclusions do not suggest a retreat from the broad or liberal approach to disclosure and discovery of relevant information that has prevailed in this province since 1972.

Justice Moir's opinion is, I acknowledge, a plea for judicial restraint while preserving "the broad or liberal approach to disclosure". I also acknowledge that the documents already delivered and now solicited are voluminous. Mr. Calderhead, in mid-November, 2015 correspondence, says the Complainants had delivered almost 14,000 pages. Ms. McNeil, in mid-December, 2015 correspondence, acknowledges that "the disclosure provided by the Province in this case so far numbers in the thousands of pages..." I note as well the Province advises that two employees have been at work researching and producing documents. The requests of the Complainants seem to require much more work. As Justice Moir says, the costs of retrieval and reproduction are not irrelevant and may burden the fair and just resolution of disputes. I also acknowledge the Province's position that the placement of disabled individuals in facilities is more nuanced than the Complainants would have it. The Province points out that the clients are individuals and the Province is faced with the challenge of tailoring people's needs to the housing to be provided. It is not enough, the Province says, to simply say that people should be living in the community as opposed to "institutions", however the word might be defined, and so to determine discrimination, it is the individual complaints which must be examined rather than the system as a whole.

On the other hand, while I am not bound by it, I must take note of the Canadian Human Rights Tribunal's (CHRT) decision in *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 and decision of the Federal Court in the matter (2012 FC 445). The CHRT took a broad view and engaged in a thorough review of the provision of child welfare services on reserves. Their opinion runs to 163 pages. The hearings stretched over 72 days and involved massive numbers of documents. The CHRT examined the whole system of child welfare on reserves.

The CHRT opinion is, arguably, distinguishable in that it does involve a class of people with special constitutional protections and for whom the Government of Canada had issued a specific Directive providing that services be provided equal to Provincial standards , but both claims seek a human rights tribunal direction that government provide a service to a specific group of people alleged to have been discriminated against and to have been disadvantaged. The arguments in both cases are much directed to the "system" of the provision of child welfare on reserves in *Caring Society* and of providing housing for the disabled in this case. The plight of specific individual Complainants is only indirectly engaged in *Caring Society* and only part of the Complainants' case in this one.

My initial reaction was to take a narrow view focussing on the actual Complainants in the context of their individual circumstances and determine relevancy accordingly. I would not have been inclined under that view to order the requested disclosure regarding Braemore Home, a moratorium on the creation of new community facilities, Minister's Advisory Committee for Children with a Mental Handicap, the Quest facility. The Complainants in *Family Caring Society* put forward evidence broadly incorporating many facets of the Government of Canada's approach to the provision of child welfare to those on reserves and many reports and reviews of that approach. That evidence and argument upon it was accepted by the tribunal. The Complainants in this case seek to present similar evidence and a similar argument. In their oral submissions, Ms. McNeil, on behalf of the Disability Rights Coalition, put it this way:

> I went through various moments in time in which the provincial government announced that they had taken an initiative, there was a report issued, there was some kind of indication, usually on paper, that there had been some policy decision made. And then I typically went to that document and I looked at the recommendations that were made there and then I said, "Okay, so provide us all further documentation with respect to what you said you were going to do." So, you know, the basis of our complaint is that unnecessary institutionalization is discriminatory and we're saying that

> institutionalization is systemic, it's not based on people's needs and abilities it's about their disability and their poverty. So we're trying to trace back over time and anticipating the government saying we're doing the best we can we're trying to trace back over time the different junctures at which the government said, "We're going to change this system, we're going to fix this system," and then to follow-up on well what was actually done as a result of those government statements.

I am persuaded that the evidence the Complainants request, by and large, are relevant to their argument. It is incumbent upon me, I think, to enable the Complainants in this case to have the evidence upon which such a broad argument about the system for housing the disabled might be made before me.

Having said that, however, I do agree with the Province, however, that reports of abuse and older general waitlists are irrelevant.

Minister's Advisory Committee for Children with a Mental Handicap

The Complainants submit that this report was instrumental in the Province's decision to close all institutions for children with disabilities and shows that the Respondent was aware in the 1990-95 period "of the harm caused by institutions for people with disabilities and the capacity and need to create community based options." The Province says there is now only limited documentation relating to the work of this Committee, but be that as it may, the documents that do exist are relevant to the general argument about policy formulation for the care of the disabled. Once this disclosure has been made, I repeat that the Province should provide a written confirmation that no other documents exist.

Braemore Institution

Counsel for the Coalition says that Braemore, which it describes as "a large institutional facility for adults with disabilities", underwent a detailed operational review. This review produced recommendations and counsel submit that review and the follow up to these recommendations is relevant and counsel for the individual Complainants submitted to the Province a list of demands beginning "Provide all...".

The Province submits that it will be difficult to trace the effect or implementation of recommendations through documents. I appreciate the point and worry that the efforts might not stand a cost/benefit analysis, but again, if the Complainants

are to make the broad based argument they seek to make, then the documents sought are relevant.

The Province complains that this request and others are vague. Again, be that as it may, the Province must make a start providing what documents it can about the operational review and its implementation. If counsel for the Complainants remain unsatisfied, and the Province believes that they are making a reach too far, then I will hear the parties further then.

Quest Institution

Counsel for the individual Complainants have requested all records relating to Quest from its planning stages, including its links to the former Cole Harbour RRC, through to the present. They argue that this information is relevant since Mr. Delaney resides at Quest. They argue the information is relevant because Quest is unique in that it is a relatively new facility to which the Province has committed resources rather than to providing additional community housing. They point out that Quest has been in the news because of the serious assaults among its patients. They speak of people with disabilities "being subject to needless and harmful institutionalization" and say that Quest "represents a continuation of the unnecessary and, in fact, harmful, institutionalization which is at the centre of this Complaint." Counsel for the Disability Rights Coalition say that:

> The failure to provide community based options, resulting in the unnecessary institutionalisation of persons with disabilities by the Province, is a key focus of this complaint. The specific DRC requests for information regarding this large new institution is relevant to the complaint.

The Province argues that the fact that Quest has been established is not relevant to the complaint that Mr. Delaney, in particular, has been discriminated against by residing there. There is no link, the Province says, between the information demanded regarding Quest and the substance of the complaint. I would agree, if I were to take a narrow view and apply restraint, but the Complainants' argument is broad, and so the hearing is likely to be, and the disclosure must follow accordingly.

Waitlists

The Coalition's request for waitlist related documents is phrased as follows:

> 11. Provide all documentation relevant to the number of months, between date of approval of request for housing and community based supports and services for persons with disabilities (and/or "completion of Form D of the classification process), and the placement of that individual application or recipient, by type of placement/facility, since 1986.
>
> 12. Provide all documentation relevant to the readiness of applicants or recipients for housing and community based supports and services, compared to actual placement (sometimes also known as "waitlists"), and how that information is maintained, monitored and updated by the DSP program in each region in NS, since 1986.
>
> The focus of this request is the length of time persons with disabilities must wait before receiving services, otherwise referred to by DCS as "placement"...

The Province advises that it has supplied information regarding waitlists since 2010 and says that information from prior years is not relevant. I expect that all available information regarding the individual Complainants' placement on waitlists, including redacted waitlists themselves, would be relevant and disclosed. The Province has provided generic waitlist information since 2010. In my view, the generic information available from the past five years is sufficient to enable the Complainants to make any relevant argument about waitlists in general. These older actual waitlists will not add meaningfully to the systemic arguments the Complainants seek to make. I am mindful too that the Province has expressed concern about the retrieval of older documentation. Here, at least, some cost/benefit analysis does enter into the equation. There are limits.

Records of Abuse

The Coalition requests:

> 16. Documents relevant to the annual number of DSP clients living in licensed and unlicensed facilities and hospitals who reported that they were the victim of violence in their place of

residence, by facility type, since 1986.

The Coalition argues that the quality of care in institutions is highly relevant to the "burden" and disadvantage" faced by those deprived of community placements. The Province challenges the relevance, arguing again that the information requested does not relate to the complaints.

The Complainants seek to have me inquire into the quality of care in institutions, including the susceptibility of residents to violence or abuse. The Coalition's requests are said to reach into that domain. In my view, however, the reports of incidents of abuse are likely to be problematic in themselves begging questions of fact and responsibility that will be beyond my power to determine. Even if I did find that "abuse" had taken place, I am not satisfied that I could conclude anything meaningful from the reports of individual incidents about the overall security of individual residents in larger institutions relative to those living in smaller community facilities.

Moratorium

The Complainants say that the Province imposed a moratorium on the creation of new small options homes on itself. They say that this moratorium "can be seen as the reason for both the very limited capacity over the past twenty years and, therewith, the resulting waitlist for a placement in a small options home." The Complainants say they have nothing documenting the lead up to this moratorium, why, when and by what authority it was imposed, and the form it took. The Province in its oral submission said:

> With respect to the moratorium information, I mean our position is that it was a temporary kind of interim measure and it's not relevant. And in fact even if you, kind of take it to its extreme there were hundreds of small options homes created or a few small options homes created still I think it begs the question of how it's relevant and links to the Human Rights complaint.

Regardless, however, of what kind of measure it was, even if it was temporary or interim, the documents are relevant to the argument the Complainants wish to make.

Cost to Community Services for People at Emerald Hall at the Nova Scotia Hospital

This item had been overlooked and I had not prepared a ruling in the penultimate draft of this opinion. Mr. Calderhead, on behalf of the three individual Complainants, brought it to my attention. I asked for submissions and received one each from the Province and from Mr. Calderhead.

Mr. Calderhead puts the issue this way. Emerald Hall is a ward of the Nova Scotia Hospital. The Nova Scotia Hospital is a unit of the Central Region of the Nova Scotia Health Authority. In the ordinary course, the care for residents of the Nova Scotia Hospital, Mr. Calderhead says, is paid for by the Province through the Department of Health and Wellness. The Department of Community Services is, however, responsible for the care and well being of certain people capable of living in the community with appropriate social and financial supports who do not need to be in any hospital for health reasons.

Mr. Calderhead seeks to find out, through documentation he says the Province has, what financial responsibility the Department of Community Services bears for the care of its own clients while they are resident at Emerald Hall and, if it does bear responsibility, then in what amounts. He seeks "anonymized summaries of DCS expenditures for people on DSP waitlists, we also seek Departmental memoranda, letters, emails, etc that discuss whether/to what extent DCS had a financial responsibility for people in these circumstances." He says that if Community Services pays nothing, then it may be motivated to protect its budget by maintaining its clients at the expense of Health, and if it does pay, then the cost of maintaining the same client with proper supports in the community may be less. Either way, he argues, the costs are important information to the Complainants to show that the wait for community based housing is discriminatory.

The Province replies that it has already provided cost particulars for the three individual Complainants and argues that "the expenses of other anonymous persons at Emerald Hall are irrelevant." The Province argues that the money all comes from the Province and which department may pay is not relevant. The Province submits that in any event if the requested information is deemed relevant, then "a snapshot of a few years would suffice".

I agree that a snapshot should suffice, but in general the requested material is relevant and the Province must provide the appropriate memoranda etc. that discuss the Community Services financial responsibility for such people as the

Complainants. It will be helpful to me to have a context to the cost of keeping the individual Complainants.

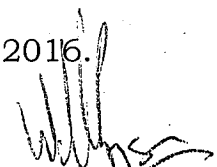
A Further Thought

It also occurs to me that I should consider, when the time comes, whether a Human Rights Board of Inquiry ought to make a decision which, in effect, dictates the financial and social policies of the duly elected government of the Province of Nova Scotia. This consideration, it seems to me, invokes the following provision of our *Human Rights Act:*

> 6 Subsection (1) of Section 5 does not apply
>
> (f) where a denial, refusal or other form of alleged discrimination is
>
> (i) based upon a .....or
>
> (ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society;

Generally, and to conclude, I feel I should add that I am mindful of being, especially as an inferior tribunal, a constitutionally irresponsible person. Should I then not exercise, within a reasonable limit, some deference to the Province of Nova Scotia about how the public money should be spent and how, more generally, it cares for disabled people? Arguably "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" is one that says I should not take the application of public monies and the creation of social policy upon myself at least in this particular case. Costs, benefits and the formulation of social policy are relevant to this consideration and invokes the production of the materials the Complainants seek. I might say I have no idea whatsoever what "reasonable limit..." may mean in Nova Scotia in the context of our *Human Rights Act,* but the broad relevance I have directed in this opinion may be important to any opinion I might have on the exception for "reasonable limits".

Dated at Halifax, Nova Scotia this 15th day of March, 2016.



J. Walter Thompson, Q.C.
Board Chair