IN THE MATTER OF: The Nova Scotia *Human Rights Act*, R.S.N.S.1989, c.214, as amended

-and-

IN THE MATTER OF: Board File No.51000-30-H14-0148

BETWEEN:

Disability Rights Coalition

(Complainants)

-and-

Province of Nova Scotia

(Respondent)

-and-

The Nova Scotia Human Rights Commission

Reporting of Interim Consent Order and Interim Settlement Agreement
and
Decision with respect to Retention of Jurisdiction Pending Final Anticipated Settlement

1. The parties have presented to the Board an "Interim Consent Order" as a proposed remedy for systemic discrimination. The "Interim Consent Order" attaches as Schedule 1 a fifteen page "Interim Settlement Agreement," which has some nine appendices. The systemic discrimination which those documents address was established after a lengthy hearing before a predecessor Board of Inquiry chaired by Walter Thompson, K.C., and a finding declared by the Nova Scotia Court of Appeal in *Disability Rights Coalition v. Nova Scotia (Attorney General)*, 2021 NSCA 70, particularly at paragraphs 208 – 223.

2. In particular, the evidence heard by the predecessor Board of Inquiry established systemic discrimination in relation to the manner in which the Province of Nova Scotia provided assistance to persons with disabilities under the *Social Assistance Act*. The consequence of the systemic discrimination varied:

> . . . but in extreme cases it includes unnecessary extended institutionalization such as experienced by the individual complainants. The results of this differential treatment may also include years-long waits to receive services that persons with disabilities are statutorily entitled to receive, or having to relocate in order to receive these services.: 2021 NSCA 70, at para.222.

3. The *Human Rights Act*, R.S.N.S.1989, c.214, s.34(5) authorizes a Board of Inquiry to respond to a settlement agreement as follows:

> 34(5) Where the complaint referred to a board of inquiry is settled by agreement among all parties, the board shall report the terms of settlement in its decision with any comment the board deems appropriate.

4. A Board of Inquiry has a limited role under that section of the *Act*: *Nova Scotia (Human Rights Commission) v. Grant*, 2017 NSCA 37. That ruling by the Nova Scotia Court of Appeal, at para.13, quoted the following with approval from *Nguyen v. Prince Rupert School District No. 52,* 2004 BCHRT 20, at para.15 to explain why:

> When parties are able to resolve human rights disputes by way of a settlement agreement, considerable public and private resources may be saved. They may be able to resolve the complaint more expeditiously than would a formal hearing process. The parties may also be able to craft a resolution which more closely matches their needs and interests than would a decision of the Tribunal. Finally, the mediation process itself may be better for the parties' relationship than a formal hearing. For all of these reasons, the Tribunal encourages and assists parties in attempting to resolve complaints.

5. Given the "interim" nature of both the Consent Order and the Settlement Agreement proposed here, and as it was explained during a public hearing on June 6, 2023, three other provisions of s.34 of the *Human Rights Act* remain relevant:

> 34(6) Where the complaint referred to a board of inquiry is not settled by agreement among all parties the board shall continue its inquiry.

> 34(7) A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.
>
> 34(8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances.

6. The parties have asked this Board of Inquiry to remain seized with this complaint, but to refrain from proceeding with further hearings on remedy pending the anticipated progress under the "Interim Consent Order." The parties have declared that it is in their common interest to maintain an independent monitoring and resolution mechanism for acknowledging progress, addressing differences and implementation adjustments that may arise or be required over the 5 year life of the "Interim Consent Order." The parties have built into the "Interim Consent Order" a role for the Board of Inquiry to provide this monitoring and difference resolution function.

7. The Province of Nova Scotia desires the certainty of knowing that the path identified by the parties, which will be implemented and funded by the Province, has been chosen after significant consultation and negotiation with counsel for the Disability Rights Coalition (DRC). The path is not something that the Province has imposed upon the parties, nor upon those whose interests are represented by the DRC. Implementation will require substantial resources. The Province therefore expects that this Board of Inquiry will provide an order which recognizes the commitments it is undertaking, and that the Province's efforts are required as a step in providing an appropriate remedy for the discriminatory impact of past government actions.

8. The DRC desires the security of knowing that if the path set out in the "Interim Consent Order" proves itself to have been misguided or impractical – if it somehow fails, that this Board of Inquiry

will still be available to continue the Inquiry as to remedy. Ms McNeil stated during the public hearing on June 6, 2023, that while all had worked very hard in relation to the interim agreement, it was "not in any way a final agreement," and that we remained "a long way from achieving a solution to this problem of systemic discrimination." She said that a "number of uncertainties" remained. The hesitation evident in the submissions of counsel for the DRC at the hearing on June 6, 2023, was consistent with the position that it took during the hearings in 2018, and will be described in more detail below.

9. I have concluded that the "Interim Consent Order" and "Interim Settlement Agreement" do not constitute a "settlement agreement" within the meaning of s.34(5) of the *Human Rights Act.* However they do represent a public commitment by both the Province and those represented by the DRC to an articulated and coherent path towards the potential, and likely final, resolution of the systemic discrimination found by the Nova Scotia Court of Appeal. Pursuit of that path is supported by all of the parties. If the path set out in the "Interim Consent Order" and "Interim Settlement Agreement" reaches its anticipated destination, the current "Interim Consent Order" and "Interim Settlement Agreement" will in fact be recognized in substance as having constituted a final settlement of the complaint which was first made to the Human Rights Commission in 2014. My reasons for that conclusion are set out in more detail below.

10. Even though I have not been presented with a "settlement agreement," the "Interim Consent Order" and "Interim Settlement Agreement" represent a significant and coherent and comprehensive effort by the parties to create a practical and forward-looking path to a remedy for the discriminatory practices which persisted in the past. Remedies for systemic discrimination require systemic remedies because they need to overcome discriminatory institutional practices that have become normalized: Gwen Brodsky, Shelagh Day & Frances Kelly article "*The Authority of Human Rights Tribunals to Grant Systemic Remedies*" (2017), 6 Can. J. Hum. Rts. 1 at p. 4. Policies and structures and attitudes need to change at an institutional level for change to reach

to the human level. For that reason, which I will expand upon later in these reasons, and in order to remain conscious of the public interest by facilitating the ongoing co-operative work of the parties in relation to remedy, I am prepared to defer further hearings in relation to remedy until the call of any one of the parties in accordance with the provisions of the Interim Settlement Agreement.

The Interim Consent Order

11. What was contemplated in *Nguyen v. Prince Rupert School District No. 52* referenced earlier in this decision in fact reflects the evolving wishes of the parties during the progress of this case. Last July I was asked by the DRC to:

> . . . appoint a Board consultant with expertise in government provided supports and services to persons with disabilities. Such an expert would also need experience in transforming disability supports into a modern, human rights-based & person-centred approach. That expert will require resources to complete its task. After the June 27th hearing, the DRC contacted both the Respondent and the Human Rights Commission to make inquiries regarding how an expert could be funded.

I was asked to delay the remedy stage of these proceedings for several months to accommodate such a consultant's potential schedule. The parties were not in agreement at that stage with the DRC's proposal. I granted some time to the parties to explore the feasibility of the DRC's suggestion.

12. Over several months since that deferral the parties were able to come to an agreement on a common consultant, funding, terms of reference for remedial action, and a reporting schedule. Through the efforts of the parties an intense fact finding and consultation process occurred, allowing the independent experts to develop proposals which informed negotiations between the parties. As a result of those negotiations there is now also a detailed process designed to

reach a final resolution of the systemic discrimination identified by the decision of the Nova Scotia Court of Appeal.

13. The Interim Consent Order contemplates a 5 year schedule of specific tasks, benchmarks for success, definitions for what constitutes compliance, and even processes for how to evaluate compliance. Some of those evaluative responsibilities are assigned to an Expert Monitor, and others are assigned to this Board of Inquiry. In particular, the parties have agreed:

> 14. The Parties Agree that their interim agreement should form the basis of an Interim Consent Order, with the Board of Inquiry retaining jurisdiction to issue further interim or final remedial orders as appropriate.

The parties further propose that I report the following "order":

> 16. The Board of Inquiry has continuing jurisdiction to adjudicate any issues which arise under the Interim Settlement Agreement, and to issue any further orders as appropriate, as contemplated in the Interim Settlement Agreement.

14. The parties convened with the Board on June 6, 2023, to present and explain the terms of their agreement in a public hearing setting. The Province expressed its eagerness to begin the work contemplated by the Interim Consent Order, and pointed to initial tasks in the schedule which had already begun even without a signed Order. However the Province did want the security of having their agreements with the DRC and the Commission framed in terms of an order. An order would assure the Province of certain obvious benefits of their agreements with the DRC – such as specific task definition, articulable standards against which to measure compliance, and the prospect of an end point to this human rights complaints process.

15. Counsel for the DRC were appreciative of the sincere efforts by the Province to address the resolution of systemic impacts to the vulnerable population represented by their coalition. There

was hope expressed that the planned schedule for re-directing how services were delivered under the *Social Assistance Act* would achieve its objectives of reducing and then eliminating institutionalization, and embedding person-centered planning in the provision of services. However, counsel speaking for the DRC did caution that if the Province did not comply with the Interim Consent Order, or if the provisions of the Interim Consent Order were not meeting expectations for those with disabilities, that it would feel entitled to come back to the Board to resume a remedy hearing.

16. The DRC's position is grounded in a caution that may best be characterized as a hesitant trust. Their expressed position hearkens back to its position during the hearing before Walter Thompson, K.C., in 2018. In the course of the testimony of then Deputy Minister Lynn Hartwell, the following exchange occurred between Mr Kindred and the Deputy Minister about the Province's commitment to de-institutionalization. The exchange starts at p.7193 of the transcript as reproduced in the Appeal Book filed with the Nova Scotia Court of Appeal:

> Kindred: . . . What can you say to help us understand whether this commitment is – is real or whether this is just something that we've heard all before?
>
> Hartwell: A couple of things, I guess. The first is that I – I continue to be really struck by the incredible advocacy of individuals and their families. And so I think people have a right to be skeptical I think that's – it's a reasonable thing to be skeptical for certain; I would disagree that we've – people have heard it all before we're actually saying and doing things that we've never done before, so I don't agree. To the best of my knowledge before the road map was adopted, there has never been a statement that we're going to reduce reliance on larger facilities let alone close them. So I'm not aware that that commitment had been made it may – if it had been it was individuals that certainly didn't seem to be the position of government. Some of it – the statements that we've made about, you know, those three goals that sometimes get lost as people talk about the 10 different activities; those three goals to say that we are going to have support, self-direction and choice. I don't think we've ever quite said that firmly before but I certainly have heard from families what you're saying. I've heard from families directly to my face that they don't believe that we're going to do what we've said we're going to do, and I, again, I have no – they have every right to be skeptical. What I can say though is that we are doing what we said we're going

> to do. We will fully take the criticism, I will take the criticism that maybe we're not going as fast as people would like, we're not doing everything correctly that's for sure, we're not getting it all right, we're not always reading every opportunity, but what I will say is that the commitments that are made to move forward we are committed we are – we're moving forward. And we are also changing things that haven't been changed. So some of the behind the scenes stuff I know it doesn't seem like that is actually transformational but it is inside the Department. And the fact that we've been able to, you know, despite all kinds of – of pressure and – and things that we, you know, people want us to do the fact that we've been able to decrease the number of people in those larger facilities year by year by year for the past few years is a mark of success for us. We were going in the opposite direction we have turned the tide on that. The fact that we've been able to grow the number of community-based options we're moving in the right direction. Every time we are able to create a new Flex Independent, create a new small option, we are moving in the right direction. So again, I will absolutely – you know there's lots of room for people to be critical of – of how fast, but I would really hope that people would acknowledge that the things we're moving on – the things that we're able to accomplish we are moving exactly in the direction that we should be.

Mr Calderhead followed up with Deputy Minister Henshaw at page 7227 of the transcript:

> Calderhead: Okay. And – and – but my question is whether the Government – whether the – the Department today also accepts its role to – to adopt a leadership position in terms mf promoting acceptance . . .
>
> Henshaw: Yes
>
> Calderhead: . . . for the inclusion of persons with disabilities?
>
> Henshaw: Yes.

After referring to recommendations in several reports that had been commissioned or supported by the Department in 1984, 1989, and 1995, but not implemented, the Deputy Minister explained, at p.7381:

> Henshaw: I'm – I'm not using the word aspirational to mean – perhaps I'm incorrectly using the word and maybe meaning inspirational. This certainly wasn't a – an intent for it to be

> something that we could all – I was describing the brighter future that we actually agree on. The aspirational part is that there were things that we were going to be trying that had not been tried with the level of detail that we were planning on doing and so our aspiration was around, although we were saying we want to create you know we want to end reliance on larger facilities, or have – you know within five years do that. I certainly understood that while we could aspire to do that it was going to depend on a number of factors including readiness of individuals to move and most importantly the ability to ensure a network and structure of supports so that they could move. So it was aspirational in the sense that we - until we actually got started doing the heavy lifting we weren't – we couldn't with certainty guarantee exactly what the path would look like.

17. I appreciate the adversarial position of the DRC and the Province at that point in time. There had been no finding at that time of systemic discrimination. Since then there has been a finding rejecting the systemic discrimination claim, an appeal which led to a different finding, granting the systemic discrimination claim, an application by the Province for leave to appeal to the Supreme Court of Canada which was unsuccessful, the appointment of a new Board of Inquiry, and further decisions by the Province as to how to address the finding of systemic discrimination. The result of all that was a decision by the Province to engage, with DRC's counsel particularly, on what an appropriate remedy for the systemic discrimination could look like, and what the process would be to get there.

18. I have heard and understand that over the past year the parties have engaged in the following:

a) Made an agreement to engage in a collaborative process to work towards a systemic human rights remedy;
b) Agreed to the appointment of an independent review team to provide a report and recommendations for options to address the Province's systemic discrimination in relation to how services were provided under the *Social Assistance Act*;
c) Identified independent experts to provide recommendations on how to remedy the systemic discrimination finding;
d) Participated in the data collection and consultative aspects of the work of the experts; and,

e) Drew on the Final Technical Report of the experts (the Bartnick/Stainton Report) to negotiate the objectives, tasks, timetable, and progress markers of the proposed remedy, together with both expert and Board of Inquiry monitoring roles.

19. That work has been substantial. The parties have crafted a path forward which they (a) believe will result in full compliance with the *Human Rights Act*, and (b) believe is within the practical capacity of Government to provide. They have achieved this through a more extensive consultation process than would have been possible through an inquiry process under the *Act*. They have reached this stage of resolution in a more cost-effective fashion than would have been likely within an adversarial litigation process.

20. All of the foregoing demonstrates to me a commitment by the parties through their counsel to a common objective, as well as a commitment to the means by which they expect to reach it, and what they expect the result to look like at the end of five years. The parties, in my view, have given their sincere and genuine mutual undertakings to support that path towards a final remedy. However, because the parties have agreed to a process, and because the parties recognize that the means, and even the ultimate end result, may have to be adjusted or changed, this is not a "settlement agreement" within the meaning of s.34(5) of the *Human Rights Act*. It is not, at least not yet, the kind of settlement that was considered in *Nova Scotia (Human Rights Commission) v. Grant*, 2017 NSCA 37. This is not final the way the proposed settlement in *Grant* was final.

Authority to Supervise and Monitor Progress

21. In their presentations to this Board of Inquiry on June 6, 2023, the parties asserted that this Board could report a settlement agreement, and then retain jurisdiction to provide the kind of supervision and monitoring functions that are set out in the Interim Consent Order and Interim Settlement Agreement. They acknowledged the absence of precedent in Nova Scotia for such an acceptance of jurisdiction even after being alerted in April that this was a concern for the Board.

All parties extolled the advantages of the Board's ongoing familiarity with the evidence as well as the past and current proceedings. All parties spoke to the cumbersome requirements and potential inadequacy of enforcement through the Supreme Court.

22. The parties also referred the Board to the decision of the Canadian Human Rights Tribunal in *First Nations Child & Family Caring Society of Canada et al. v. Canada (Attorney General),* 2016 CHRT 10. That decision addressed systemic discrimination remedies in social services funding to First Nations. The Tribunal's remedial authority under the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6, s.53(2) is different from anything in s.34 of the Nova Scotia *Human Rights Act*, specifically authorizing that Tribunal to:

> . . . order any of the following terms that the member or panel considers appropriate:
>
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
>
> (ii) making an application for approval and implementing a plan under section 17;

23. Even leaving the statutory differences from Nova Scotia aside, there is a procedural context to consider with respect to the *First Nations Child & Family Caring Society* case. The Canadian government disagreed with the Canadian Human Rights Tribunal's authority to make an order and then to, effectively, repeatedly rule on its enforcement. The case was eventually resolved and settled in the Federal Court without there ever being a judicial ruling upholding the Tribunal's assertion of jurisdiction. While interesting, the decision in *First Nations Child & Family Caring Society of Canada et al. v. Canada* is not precedential authority for interpreting the scope of jurisdiction for a Board of Inquiry in Nova Scotia.

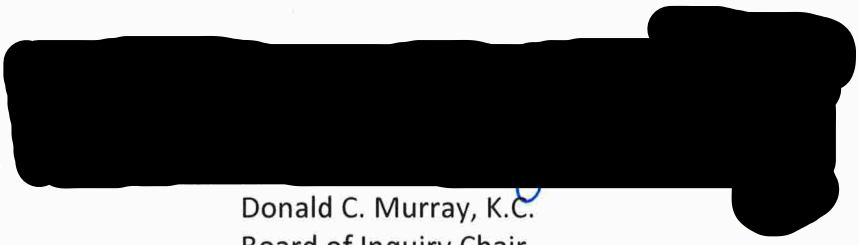
24. I am also aware of the continuing judicial discussions as to the scope of a superior court's jurisdiction to take on a supervisory and monitoring role in relation to its own orders – particularly where those orders require other branches of government to provide financial support for specific government programs. See, for example: *Doucet-Boudreau v. Nova Scotia*, 2003 SCC 62; *The Acadian Society of New Brunswick v. The Right Honourable Prime Minister of Canada et al.*, 2022 NBQB 85, at para.72. While some authority appears to exist for *Constitution Act, 1867*, s.96 courts to retain jurisdiction to ensure *Charter* compliance, I remain dubious about whether a statutory tribunal such as this Board of Inquiry can pretend to claim the same authority. I do not need to decide that issue now, and would need further submissions from counsel on these and other cases to do so.

Conclusion

25. Fortunately for the parties, and fortunately for the process that they have designed which is anticipated to continue until 2028, I believe that the desire to have this Board continue in a supervisory and monitoring role with respect to the path towards final settlement can be met within the scope of this Board's statutory jurisdiction. That can be achieved by ***not*** reporting a settlement under s.34(5) of the *Human Rights Act*, but instead by exercising the Board's authority to defer further hearings on remedy under s.34(8), which I have already been doing at the parties' request since last July. This new deferral is based on the parties having undertaken the process contained within the Interim Consent Order, with the objective of achieving the outcomes also identified in the Interim Consent Order and Interim Settlement Agreement. As I understand the parties, the continuing role of the Board will support and encourage adherence to the remedial path outlined in their agreements.

26. That is the report I am making, and I have endorsed the Interim Consent Order provided to me by the parties.

Dated at Halifax, Nova Scotia, this 28th day of June, 2023.



Donald C. Murray, K.C.
Board of Inquiry Chair