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

Scope of Hearing

Style of Cause

1.The claims against the Province of Nova Scotia by Beth MacLean, Sheila Livingstone, and Joseph Delaney have been finally resolved by a consent order signed by me, and reported to the Nova Scotia Human Rights Commission, on April 22, 2022. The remaining complaint before me is that of the Disability Rights Coalition, which is the proponent of the systemic discrimination claim recognized by the Nova Scotia Court of Appeal in its proceedings CA 486952, reported as 2021 NSCA 70. The heading of this proceeding now reflects those changes under the same Human Rights Commission Complaint File Number.

NSCA Finding of Systemic Discrimination

2. This Inquiry assembled on Friday, April 22, 2022, for the purpose of argument about the scope of any "justification" or "exception" hearing being sought by the Province consequent on the Nova Scotia Court of Appeal's *prima facie* finding of systemic discrimination. That finding was articulated as follows at 2021 NSCA 70, at paras.222 - 223:

> 222 There is ample evidence in the record and the findings of the Board to support the conclusion that the manner in which the Province provides social assistance to persons with disabilities under the *SAA* [*Social Assistance Act*] creates a disadvantage that is unique to them and not applicable to assistance given to non-disabled persons under the *ESIA* [*Employment Support and Income Assistance Act*]. The impact varies depending upon

> the circumstances of the individual, 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.
>
> 223 In our view, the DRC has met its burden of establishing a *prima facie* case of discrimination and the systemic complaint must proceed to a hearing before a new board of inquiry. At that time, the Province will have the opportunity to adduce evidence and make submissions with respect to the applicability of the exceptions found in s. 6 of the Act.

The Human Rights Act and Grounds of Complaint

3. Discrimination is defined in s.4 of the *Human Rights Act* as the making of a distinction based on a characteristic or perceived characteristic that:

> - imposes burdens, obligations, or disadvantages on a class of individuals not imposed upon others, or
>
> - limits access to opportunities, benefits, or advantages which are available to other classes of individuals in society.

4. A claim of discrimination can be made under the *Act* in relation to specific kinds of services and activities based on particular grounds. The particular grounds engaged by the discrimination complaint here are "physical disability or mental disability," and "source of income": s.5(1)(o) and (t) of the *Human Rights Act*. The discriminatory treatment, or effect, was in relation to the provision of, or access to, services or facilities: s.5(1)(a) of the *Human Rights Act*. These statutory criteria were specifically pleaded by the DRC in its complaint: see paragraph 171 of the original written complaint dated July 30, 2014; NSCA Complete Appeal Book, at pp.33 and 44.

The Human Rights Act and "Justification"

5. Now that the *prima facie* claim of systemic discrimination has been made out, the Province has an opportunity under s.6 of the *Act* to show that its behaviour is, or should be, excepted from the human rights obligations generally established by the *Act*. Exceptions of this nature are limited, but in this case potentially included s.6(1)(a), (b), (e), (f), and (i) of the *Human Rights Act*.

6. The Province has stated (Provincial Submission dated February 28, 2022, at p.5) that it would not raise a s.6 argument at all with respect to the finding that it was discriminatory for the Disability Support Program to impose institution-based placements as a condition for the receipt

of benefits. "Unnecessary extended institutionalization" was one of the three effects or manifestations of systemic discrimination found by the Nova Scotia Court of Appeal.

7. The two other *effects* of the systemic discrimination described as found "in extreme cases" by the Nova Scotia Court of Appeal were years long waits for the provision of services, and the requirement of relocation from a person's own community in order to access services. With respect to those latter two manifestations of discriminatory impact, the Province does propose to argue exceptions (Provincial Submission dated February 28, 2022, at pp.6 – 7) based on:

- s.6(f)(i), (f)(ii): arguments based on bona fide qualification or reasonable limits on the provision of services; and

- s.6(i): arguments based on an ameliorative program exception.

8. In the course of the hearing dialogue on April 22, 2022, counsel for the Disability Rights Coalition took the position that the only other effect of the systemic discrimination was the loss of dignity suffered by those comprising the "disabled community" in being systemically deprived of their statutory entitlement to services. The Province had essentially acknowledged that as a recognized impact or consequence of the systemic discrimination already: Province Reply Submission, March 11, 2022, at pp.7 – 8, paras.23 – 25.

9. Institutionalization, wait lists, and forced relocation from a person's community of preference, are each proven manifestations of the systemically discriminatory policies and practices followed by the Province since 1998: 2021 NSCA 70, at para.179. So is the loss of human dignity when services that should be provided as of right are instead made conditional. However, none of these effects or consequences are the actual "differential treatment," or the actual "cause" of the differential treatment. All of these "effects" are instead outcomes that were created by some systemic policies or practices exercised by the Province.

10. During oral argument in reply, counsel for the Province described paragraph 170 of the Nova Scotia Court of Appeal's decision as the "epicentre" of the Court's systemic discrimjnation finding. I agree. That decision was:

> 170 With respect to the first element, the distinction lies in the Province's statutory obligation to provide "assistance" to "persons in need" within the regime it created to support its poorest citizens. Despite having similar statutory obligations regarding the "assistance" to be provided to both persons with and without disabilities, the Province makes clear distinctions in how it carries out its obligations. It views its statutory obligation under the *ESIA* as being mandatory. Notwithstanding the clear wording of the *SAA*, the Province has adopted a contrary approach to persons found "eligible" under that legislation. [2021 NSCA 70]

The justification/exception hearing will have to deal with the Province's obligation to explain that "contrary approach." The policies and practices underpinning the Province's "contrary approach" are what must be at the core of this hearing going forward.

11. This is different from what the Province proposed. The Province contended that by addressing the identified effects or outcomes, all appropriate remedies could be achieved: *e.g*., Province's Reply Brief, March 11, 2022, at p.6, para.18. I believe that little would be accomplished by hearing justifications for different kinds of burdens placed on the disabled community, or by alleviating only specific types of social or personal injury. I also believe that such an approach would be contrary to the law as understood and expressed by the Nova Scotia Court of Appeal.

12. The justifications offered by the Province, if any, must address the question of why the disabled community was required to suffer "burdens, obligations or disadvantages" not imposed on others; or why the disabled community should be limited in its access to "opportunities, benefits, and advantages" that were provided to others: s.4, *Human Rights Act*. This is evident from the Nova Scotia Court of Appeal's reference to and quotation at para.190 [2021 NSCA 70] of this passage from the 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:

> To a large extent the systemic discrimination that needs to be addressed in Canada today is the result of historical attitudes, stereotypes and practices that have become embedded in the normal operation of institutions. This discrimination is not always the result of overt, intentional acts but of discriminatory practices that remain in place because they have become normalized. Institutional inertia helps to entrench these practices and hold them in place. To address that inertia, to make systems change, it is not sufficient to simply identify discrimination and mete out individual corrective remedies, one by one. Systemic problems require systemic remedies.

By proposing to remedy symptoms or manifestations of discrimination, rather than the source of the discrimination, is the wrong solution for a systemic problem. Looking for justifications of outcomes rather than the *prima facie* discriminatory "approach" to the Province's obligations would be a misdirected inquiry.

13. The DRC pointed to several well-established principles in the jurisprudence about what needs to be justified after a *prima facie* finding of discrimination. Very simply, where a service is provided by government to meet a need that has been acknowledged by statute, it is the reason for the deviation from that standard which needs to be justified: *e.g., Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, at para.33. What the Supreme Court of Canada said in *Moore* has been echoed by the comments of the Nova Scotia Court of Appeal, 2021 NSCA 70, at para.170:

> . . . Despite having similar statutory obligations regarding the "assistance" to be provided to both persons with and without disabilities, the Province makes clear distinctions in how it carries out its obligations. It views its statutory obligation under the *ESIA* as being mandatory. Notwithstanding the clear wording of the *SAA*, the Province has adopted a contrary approach to persons found "eligible" under that legislation. [2021 NSCA 70]

It is evident that what must be justified by the Province here is its "contrary approach."

14. It is therefore my view that any justification offered by the Province under s.6(f)(i) and (f)(ii), and s.6(i) of the *Human Rights Act* must:

> - identify the policies and practices that produced the adverse outcomes (unnecessary extended institutionalization, wait times, obligation to relocate, and loss of dignity);
>
> - justify each of the impacts of those policies that have not yet been acknowledged (unnecessary extended institutionalization and loss of dignity).

15. Any justification offered by the Province under s.6(f), or (i), of the *Act* may certainly address how manifestations of disadvantage - such as wait times, or compelled relocation to access services - were created. The justifications may include an explanation as to why those *prima facie* discriminatory effects were contemplated as a preferable choice by policy makers and policy implementers. Contextual evidence about the circumstances in which those policy decisions were made would certainly be relevant – as it was in *Moore v. British Columbia (Ministry of Education)* referenced above.

16. As a result, it is my view that when the Province wishes to make s.6 justification or exception arguments in relation to systemic discrimination against the disabled community, it must intend to address its justifications under s.6(f) and (i) to the underlying policies and practices that resulted in the proven and acknowledged disadvantages. The types of disadvantage created have essentially been agreed, but it is the policies and practices that produced those disadvantages which must be justified or excepted from the requirements of the *Human Rights Act*.

Conclusion on Scope of Justification Hearing

17. I am, based on the submissions of the Province, anticipating arguments that those policies and procedures which created the difference between those supported under *SAA,* and those supported under the *ESIA*, were justified because of either:

> a) a bona fide qualification requirement;
>
> b) a reasonable limit on the provision of services; or,
>
> c) the measures were part of an otherwise ameliorative program.

I understand that the Province will not argue that unnecessary extended institutionalization was an appropriate policy choice.

18. I also anticipate, based on the decision of the Nova Scotia Court of Appeal, that the Province's proposed justification and exception arguments will span all of the years since 1998: 2021 NSCA 70, at paras.179, 311(4), and footnote 15.

Particulars

19. In order for the justification or exception hearing to proceed in an orderly fashion starting on the scheduled dates (currently booked to start on October 3 and continue with some gaps to November 4, 2022), it is essential that the Province assemble for disclosure to DRC's counsel, and counsel for the Commission, all documented policies and practices not previously disclosed which relate to the provision of benefits under the *ESIA*, and particularly any documentation which addresses or identifies differences between provision of benefits under the *SAA* and the *ESIA*. This would include disclosure of evidence, starting in 1998, of any funding limitations established by the Province with respect to benefits under the *SAA* and *ESIA*.

20. The Province acknowledged during oral argument at the scope hearing on April 22, 2022, that "limits on funding" were a contributing cause to the Province's response to the needs of the disabled community. Counsel for the Province did not acknowledge that "limits on funding" were a separate basis for a finding of discrimination. In my view the acknowledgment that the Province did make on the issue of funding has acknowledged the relevance of funding to the justification hearing.

21. I appreciate that program funding by government is a tool and an expression of government policy and practice with systemic impact. Documentary evidence relevant to any "limits on funding" may exist in a variety of forms within government. If the parties need assistance in identifying the relevant material, and discussing a manageable way to convert that material into a format that is useful for the justification or exeption hearing, I am available to assist. Until that evidence is identified and considered, I will not be adopting the DRC's language describing a "freeze," or "cap," or similar term relating to the Province's support of the needs of the disabled community. I believe that that posture is consistent with the opinion of the Nova Scotia Court of Appeal: 2021 NSCA 70, at para.220.

22. If the disclosure direction given in paragraph 19 above is insufficient in the view of counsel for the DRC, or overbroad in the view of counsel for the Province, I am willing to receive further written submissions by May 18, 2022, on that issue. We are scheduled to re-assemble on June 27, at which time I would be appreciative of any further oral submissions about the progress of disclosure. I am willing to hear the Commission on these issues as well at their pleasure. Hopes that we could attempt an in-person meeting on May 18 to more directly address any remaining particulars and disclosure issues have, regrettably, been overtaken by my own schedule.

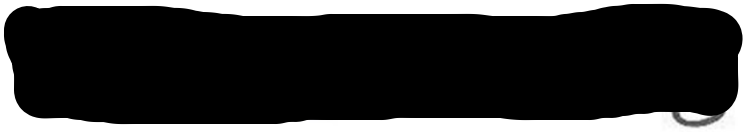
Interim Remedy

23. It was suggested during the hearing on April 22, 2022, by counsel for the DRC that because the Province was not going to be offering a justification for any "unnecessary institutionalization," that the parties could negotiate a declaration of some type, and then return with an agreement, or commence argument for an interim remedy order containing a declaration and an "award." As the decision that I have made on the scope of the justification or exception hearing makes clear, the Province's concession that it will not seek to justify the unnecessary institutionalization of members of the disabled community between 1998 and 2014, or today, does not pre-empt an assessment of the policies and practices that created or contributed to that outcome.

24. Again, as the Nova Scotia Court of Appeal's citation of the Brodsky article at 2021 NSCA 70, para.190 makes clear, systemic problems demands systemic remedies. While the Province and the DRC and the Commission are certainly entitled to discuss and to resolve anything they wish, a series of piecemeal resolutions about particular effects will not really change the assignment that I have been given in this Inquiry. That assignment is this:

> a) whether there is a justification or exception for the systemic discrimination found by the Nova Scotia Court of Appeal, and,
>
> b) if not, what is the appropriate systemic remedy for the policies and practices that have created disadvantage since 1998?

Dated at Halifax, Nova Scotia, this 30th day of April, 2022.



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