IN THE MATTER OF: A complaint pursuant to The Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214 as amended; HRC Case No. H14-0418

BETWEEN: **Beth MacLean, Sheila Livingstone, Joseph Delaney** and **Marty Wexler, for the Disability Rights Coalition**

Complainants

- and -

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

- and -

The Nova Scotia Human Rights Commission

Commission

DECISION OF THE BOARD OF INQUIRY ON REMEDY

Board of Inquiry: J. Walter Thompson, Q.C.

Written Decision: December 4, 2019

Counsel: Vincent Calderhead and Katrin MacPhee for the Complainants, Beth MacLean, Sheila Livingstone and Joseph Delaney

Kevin Kindred and Dorianne Mullin for the Respondent

Kymberly Franklin and Kendrick Douglas for the Commission

Heard: September 10, 11, 12, 2019

On March 4, 2019, I delivered an opinion further to the complaints of Beth MacLean, Joseph Delaney and Sheila Livingstone. I said that the Province had discriminated against them contrary to the Nova Scotia *Human Rights Act*:[1]

> I am satisfied that the Province of Nova Scotia, on the facts and law as presented to me, withheld or limited access to benefits the Province provides to disabled people and *prima facie* has discriminated against Beth MacLean, Sheila Livingstone and Joey Delaney in the provision of or access to services or facilities on account of mental and physical disability contrary to section 5(1)(a) of the Nova Scotia *Human Rights Act*.

To be more specific, I found that the Province discriminated by retaining the Complainants at the Emerald Hall unit of the Nova Scotia Hospital for years on end when, by all professional opinion and advice, Beth MacLean and Joey Delaney ought to have been accommodated in a small options home and Sheila Livingstone in some suitable home or facility.

I explained in my opinion that the law sets out a two step process to determine whether there had been discrimination. I said:

> I say *prima facie* because finding discrimination under the law is a two-step process. I am engaged now in the first step only. The law requires that if I find *prima facie* discrimination as a first step, then we should embark as a second step upon the consideration of any defences the Province might have to the *prima facie* discrimination. In particular, the Province will have the opportunity in a second step to argue that its policies and practices under section 6(f)(ii) of our *Human Rights Act* are within "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society." I expect that the Province might then argue that the Province should be excepted from a full finding of discrimination because of the multiple responsibilities of government to all its people, because of its rights to set priorities and dispense the public purse, because of the fiscal realities of a relatively poor province and because of the progress the Province is making to better take care of the disabled. This present opinion is not the final word.

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[1] Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c.214

The Province has elected to accept my *prima facie* opinion and has chosen not to proceed to a the second step. The Province has not appealed my opinion either. The parties proceeded to provide evidence and to make submissions on the remedies I should grant under the *Human Rights Act.*

I grant the following as a remedy:

1. I will state my finding that they were discriminated against.

2. I will order that Beth MacLean and Joey Delaney be placed in a community living facility suited to their capacities and needs.

3. I will maintain jurisdiction to monitor the placement of Joey Delaney and Beth MacLean.

4. I will order the Province to pay $140,000.00 in trust for each of Joey Delaney and Beth MacLean. Their lawyers must be paid. The best course, in my view, is to direct that a term of the trusts provide that $40,000.00 be paid out of each trust to Pink Larkin in payment of legal fees, disbursements and HST. This leaves a balance for each of them of $100,000.00.

5. I will order the Province to pay the sum of $60,000.00 in trust with respect to the claim of now deceased Sheila Livingstone. I will direct that the sum of $40,000.00 be paid out of the trust to Pink Larkin for legal fees, disbursements and HST, and the sum of $10,000.00 be paid to each of Olga Cain and Jackie McCabe-Sieliakus.

I shall, to provide context to this remedy opinion, briefly review the circumstances of each of the Complainants. I begin, however, with a description of Emerald Hall at the Nova Scotia Hospital. Emerald Hall was common to them all and their retention in that unit is the essential act of discrimination.

Emerald Hall is a locked unit located at the Nova Scotia Hospital on the ground floor of one building of the Hospital complex. Emerald Hall is currently programmed for 15 beds. It has a central administration centre with wings of private rooms extending from it. It has access to an area of lawn enclosed by a high fence. Sheila Livingstone, Beth MacLean and Joey Delaney each spent many years on Emerald Hall. Joey Delaney continues to reside there.

The purported purpose of Emerald Hall is to provide short term psychiatric treatment to people who are mentally disabled but who also have become acutely ill psychiatrically. Then, when their psychiatric illness has stabilized, they are to be discharged to their home or some care facility. They are no different from anyone else with an acute illness or condition. One is discharged from hospital when the acute illness or condition has been treated. Emerald Hall was never intended to be a place for long term care.

Emerald Hall is locked. Residents are not able to leave unless a staff or family member can take them out. Excursions in groups are dependent upon the availability of staff members and hospital vehicles. Staff rotate on shifts and turnover is high. Building personal relationships between staff and residents is difficult. Residents have to conform to the hospital clock. Meals arrive on hot carts. Even bathing is scheduled. Visitors are welcome, but as one would expect in a hospital, privacy and opportunities for normal social interactions are limited. Psychotic patients are present. They are often noisy and disruptive.

Emerald Hall is not a rehabilitation service and so programming is limited. A resident's ability to function may deteriorate over time as tasks are performed for them. They may soon need staff for even ordinary tasks. They may even lose the will or the capacity to carry out personal care. Residents lose social skills, their ability to interact socially and their ability to relate to the community. Residents may lose the skills to navigate and live in the community. Residents may not have family and friends in the area. Visiting may involve travel. Residents may lose connection with friends, family and the community at large.

Emerald Hall was not functioning as an acute psychiatric unit and had not been for a long time. Emerald Hall, in reality, became a custodial place. Ms MacLean wanted out. The families of Sheila Livingstone and Joey Delaney wanted them out. The staff of Emerald Hall knew that their facility and their service was being misused. They wanted Beth MacLean, Joey Delaney and Sheila Livingstone out. The Complainants' treatment had been completed. They no longer needed the acute service Emerald Hall was purposed to provide. It was no longer in their best interest to remain there. Still, against all advice, the Province retained them in a custodial setting for years on end.

I do, however, wish to make it clear that the placements of Joey Delaney, Sheila Livingstone and Beth MacLean in Emerald Hall is unique relative to the evidence I heard of other disabled people. It is not my intention that, in the

consideration of damages, the case of Beth MacLean, Joey Delaney and Sheila Livingstone be extrapolated or analogised to other disabled people in other facilities. The assessed damages relate only to the specific cases of MacLean, Delaney and Livingstone and their time in Emerald Hall.

It must also be remembered that the staff of Emerald Hall, according to the evidence before me, were professional and dedicated to the welfare of the Complainants. The physical setting and administrative arrangements were very limiting, but I find no fault with the people who worked there. I am satisfied that Beth MacLean, Joey Delaney and Sheila Livingstone received professional, compassionate care. Emerald Hall, in that sense, was not custodial.

Beth MacLean

The Province placed Beth MacLean at the now long closed Nova Scotia Youth Training Centre in Truro at the age of 12. Two years later, in July, 1986, the Province placed her in the King's Regional Rehabilitation Centre (King's) in Waterville. She remained at King's for 14 years. The Province transferred her to the Nova Scotia Hospital in October, 2000. The Province and the Nova Scotia Hospital then agreed that she would remain at the Hospital for no longer than one year. As of the date of her complaint, July 22, 2014, she was still in Emerald Hall at the Nova Scotia Hospital. She later moved to Quest, a less restrictive institutional facility in Lower Sackville. She remains there as of this writing. The Province is working towards placing Ms MacLean in a small options home.

Ms MacLean has some intellectual and physical disabilities. There has never been any psychiatric diagnosis. From time to time over the years, however, Ms MacLean has been given to outbursts, some of them physical. These outbursts led first to her placement in Truro, then to King's and then to the Nova Scotia Hospital. A couple of placements in small options homes have failed for the same reason. I hasten to add, however, that the evidence presented at the hearing was unanimous in saying that Ms MacLean, with proper preparation in advance and support afterwards, could live in a small options home in the community.

Sheila Livingstone

Olga Cain filed a complaint dated July 23, 2014 on behalf of her younger sister, the now late Sheila Livingstone. Ms Cain is now a woman in her

eighties. Ms Cain testified that she is the third of 15 children. Sheila was the 12th. Ms Cain and her daughter, Jackie McCabe-Sieliakus, supported Ms Livingstone throughout.

Ms Livingstone had intellectual and mental disabilities and was completely dependent upon the Province from the time she was 12 years old. The Province placed her in the Children's Training Centre in Truro where she lived for 10 years. She then lived at the Halifax Mental Hospital for about two and a half years before being moved to the Abbie Lane Hospital. She remained at the Abbie Lane for the next 15 years. From there, she was moved to the Regional Rehabilitation Centre at Cole Harbour for four years. In 1986, she came to live in a variety of small options homes paid for by the Province and operated by the Regional Residential Services Society (RRSS).

Ms Livingstone lived contentedly and successfully in small options homes for 18 years, but she came to have exacerbations of her mental illnesses. She was admitted to Emerald Hall a number of times and then released back to her home in the ordinary course. In July 2004, however, she was admitted to Emerald Hall for a longer time and lost her place at RRSS. She had no where to go. She spent the next nine years as a resident of Emerald Hall. In January, 2014, the Province transferred her to Habourside Lodge, an Adult Residential Centre ("ARC") in Yarmouth. Ms Livingstone, on the evidence, was content living at Harbourside. Ms Livingstone, who had a succession of physical illnesses over the years, succumbed there in October, 2016 at age 67.

Joseph Delaney

Joey Delaney was born September 10, 1972. He has always been disabled. The Province, on his mother's request, took over his care, placing him at the Dartmouth Children's Training Centre at an early age. In 1998, the Province placed him in an RRSS small options home. He was, on the evidence, content living there.

In January, 2010, Mr. Delaney was admitted to Emerald Hall. His troubles are difficult to diagnose because of his inability to communicate, but they appear to be physical rather than psychiatric. In July, 2010, clinical staff advised that he was medically ready for discharge. As in the case of Ms Livingstone, he had lost his bed at his small options home. In November, 2010, the Province put Mr. Delaney on a waitlist for placement out of Emerald Hall. Mr. Delaney has been eligible for placement in the community ever since. The Province has been making plans to place him in a small options home, but as of this writing

he still remains a resident of Emerald Hall.

Mr. Delaney is, and has always been, severely disabled. He only speaks a few words. He also communicates with gestures, and a lot of screaming. He can hum his ABC's, can say his name, and communicate with grunts and pointing. He has epilepsy. He has chronic severe bowel problems and can only express his distress by screaming. He is prone to self-harm, especially by banging his head. He wears a helmet. From time to time, he strikes out at caregivers. All of these have shown themselves to be intractable conditions. Again, I hasten to add that the evidence presented at the hearing was unanimous in saying that Mr. Delaney, with proper preparation in advance and support afterwards, could live in a small options home in the community.

The Complainants' Submission

All of the Complainants request that I make a formal declaration that the Province discriminated against them contrary to the *Act*. All claim compensation in the range of $275,000.00 - $500,000.00 per year for the years they were retained at Emerald Hall, plus interest at the rate of 2.5% per year. Mr. Delaney and Ms MacLean claim an order requiring the Province to fund or provide community living.

The Province's Submission

The Province submits that this Board should not make a conclusive finding of discrimination and should not grant the remedy of a formal declaration. The Province submits that I should limit myself to my finding of March 4, 2019. I restated that finding on page one of this opinion.

Similarly, the Province submits that I should again rest with my *prima facie* finding and trust the Province to implement a community living plan for them. The Province submits I should not order them to do so. The Province does acknowledge, however, that the Complainants ought to be awarded money as general damages. The Province says that $50,000.00 for each is the appropriate amount.

The Human Rights Commission

The Commission takes no strong position on the submissions of either party other than to say that past decisions of Boards of Inquiry have applied the general law of damages in considering awards to be made for the psychological

and emotional harm arising from discrimination and remarking upon the duty of the Board to consider the public interest factor under the *Act.* The Commission, in the particular case of Ms Livingstone, submits that an award should not, as a matter of principle, be made to an estate. The Commission does acknowledge, however, that there are long standing precedents of Boards making awards to non-parties.[2]

The Remedy

I am guided and constrained by the *Human Rights Act.* Section 34 provides:

> (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 therefore 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. (emphasis added)

Courts have given broad and liberal interpretations to the remedy provisions of Human Rights Acts and thereby enhanced the power to tailor remedies to circumstances. I refer particularly to *C.N. v. Canada (Canadian Human Rights Commission),* [1987] 1 S.C.R. 1114. *C.N.* reaffirms the proposition that Human Rights Acts do have a special nature and purpose. They are more than ordinary legislation (at page1136). A restrictive interpretation which would defeat the purpose of the legislation is to be avoided (at p. 1138).

How do I formulate an order to the Province to fully comply with the *Act,* to rectify injury caused and to make compensation?

A Declaration

The Province did not move to a second stage of this proceeding nor appeal my *prima facie* opinion. This means that, in effect, my opinion of March 4th is final and conclusive.

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[2]Johnson, Willow, Johnson v. Halifax Regional Police Services 2003 CarswellNS 621 (at para. 97), [2003] N.SH.R.B.I.D No. 2
Lindsay Jane Willow v. Halifax Regional School Board et al, 2006 NSHRC 2

I should make the finding of discrimination clear. I should not leave it to anyone, if so inclined, to say that there had only been a *prima facie* finding of discrimination, that there had only been a half finding. The Province has decided not to proceed to the second stage. In my opinion, the Province has conceded the point; the long term placement of the Complainants in Emerald Hall cannot be justified within "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society."

I heard many days of evidence about Emerald Hall. One might argue that long term placement in some more institutional setting than a small options home was so justified, but not Emerald Hall.

I find that the Province of Nova Scotia discriminated against Beth MacLean, Joey Delaney and Sheila Livingstone contrary to section 5(1)(a)(o) of the *Human Rights Act*, that is to say, on account of physical disability or mental disability under section 5(1)(o).

Having said that, however, I am not satisfied that a formal declaration, as that term is understood in Supreme Court practice, is necessary. A statement of the finding of discrimination in the order as a "whereas" in preface should suffice.

Retention of Jurisdiction

I acknowledge that neither party sought my continued involvement, but Mr. Delaney and Ms MacLean have been awaiting a community placement for so very long and even yet, as of November, 2019, the placements have not been accomplished. The placement of Joey Delaney and Beth MacLean in small options homes must be done to achieve "full compliance with the Act" and to "rectify" the "injury caused". I describe their journey at length in my March opinion. They are not home yet. There are still, it is apparent from the remedy hearings, obstacles to be overcome. It would be unjust of me now to simply fade away and not see the remedy through. While I must trust, I feel obliged to also verify. I fear that if I simply make an order, then the Province may not accomplish full compliance with the goal I direct and then Ms. MacLean and Mr. Delaney will be without remedy. I have no contempt power. Indeed, as I read the *Act*, the only sanction for failure to abide by the terms of the order of a Board of Inquiry is a prosecution under section 38 of the *Act*. All the effort over many years may be in vain if some external authority is not monitoring progress and, to the extent necessary, pushing it. I am also aware that life is seldom simple; circumstances may change militating against community placements for them. It would not be fair of me to put the Province in a box

either. It seems to me that this continued involvement may require the grant of further remedies if, for whatever reason, efforts to place Ms MacLean and Mr. Delaney in a small options home became stymied or impossible.

The *Act*, in my view, speaks for itself in mandating full compliance. In any event, the *Act* has to be the authority. The Legislature cannot be understood to have intended, in my opinion, that Board orders should be vain or that a Board should ignore that prospect by making an order and disappearing. I also refer to the Supreme Court's decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62 (CanLII). Ms Doucet-Boudreau was one of a number of parents of Francophone children who sued the Province under the *Charter* for an order requiring the Province to provide certain French language facilities and programs to their school children. The trial judge declared the parent's right to a Francophone education and ordered the Province to use its best efforts to provide the programs and facilities. The trial judge also decided to retain jurisdiction to hear reports respecting the Province's compliance with his order. The trial judge recognized that while the Province had said after extensive lobbying that it would provide the requested facilities, the Province did not proceed and then officially put the provision of the facilities on hold. (para. 38) The real issue before him became not whether the facilities were required, but the date on which they would be implemented; not if, but when.

The Province contested the trial judge's retention of jurisdiction. The essential issue in the Supreme Court was whether the actual trial justice should monitor compliance with the order or leave enforcement to the ordinary processes of the court through further proceedings. The majority held that the trial justice's decision to retain jurisdiction and supervise was appropriate. The dissenters said it was not. In my view, however, the reasoning of the majority is applicable, with more reason, to the position of a Board of Inquiry in such a case as this. An order for full compliance in these circumstances requires supervision.

I do not think that I trench on the prerogatives of the Crown by maintaining jurisdiction to monitor and, if necessary, to push the placement of Mr. Delaney and Ms MacLean. The goal whose pursuit I am to monitor is agreed upon by all. The goal is a discrete one applying to only two individuals. My reasons and order may have other implications, but their current effect is narrow and confined. I do not pretend to interfere with policy formulation.

I am advised by counsel at the time of this writing in November, 2019 that progress continues to be made, albeit slowly, to the placement of Mr. Delaney and Ms. MacLean. Although I am confident that my involvement will probably

be minimal, I want to be sure, subject to the contingencies of life, that Mr. Delaney and Ms MacLean are well settled in their respective new homes.

Damages

The Complainants, both living and dead, seek an award of an extraordinary amount of money in compensation. They seek payment of $275,000.00 - $500,000.00 for each year of their life spent at the Nova Scotia Hospital and the Quest facility. I have not done the arithmetic; suffice it to say that the Complainants seek millions from the public purse. The Complainants seek these damages under the law arguing that their plight is analogous to those who have been improperly imprisoned or institutionalized.

In my opinion, an award of such an amount is wrong in principle. The amount greatly exceeds what I understand to be the appropriate amount of an award for a human rights violation. I repeat the views I expressed in *Willow* (*supra,* at pp. 36-37, paras. 123-4.) For better authority, I also refer to the words of Dickson, C.J. in *C.N. v.* Canada[3] in the context of the *Canadian Human Rights Act*:

> The purposes of the Act would appear to be patently obvious, in light of the powerful language of s. 2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", The Act seeks to prevent all "discriminatory practices" based, inter alia, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

See also *Robichaud v. Canada.*[4]

In my view, the scale of damages sought on behalf of the Complainants would be to punish.

Furthermore, Sheila Livingstone is dead. She has no husband, and she has no children. She has no parents. She has no will. Her heirs, by virtue of the

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[3] *supra* at p. 1134

[4] Robicaud v. Canada, 1987 CarswellNat 1105, paras. 9 & 10, per McIntyre J., quoting *Ont. Human Rights Commission and O'Malley v. Simpson-Sears,* 1985 CanLII 18 (SCC)

Intestate Succession Act, become her siblings or her siblings' children if siblings have died. Ms Livingstone was the third youngest of 15. She was born in 1947. Her sister, Olga Cain, and her niece, Olga's daughter, Jackie McCabe-Sieliakus, are the only ones who, on the evidence, took an interest in her. I will order that the Province pay each of them $10,000.00. I see no point in paying money to the other surviving siblings and the children of those have died. I conclude that such payments would constitute a significant and unwarranted windfall to them and bring the whole process into disrepute.

I have fixed upon the net sum of $100,000.00 for each of Ms MacLean and Mr. Delaney as a sum which makes adequate compensation for the wrenching diversion of their lives. The Supreme Court says an award is to be functional (see *Ward, post).* 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.

More broadly, in the context of the goals of human rights, I do not see a function in the large awards sought on behalf of Ms MacLean and Mr. Delaney. This does not mean no award, but rather a measured one.

There is tragedy throughout this saga. Quite apart from the consequences of so much time in Emerald Hall, Mr. Delaney and Ms MacLean live lives in which their potential is severely compromised by their disabilities. We ache as a society for their suffering and the their loss of potential, but we have not yet found sufficient ways to overcome or adequately accommodate their disabilities and alter their life trajectories. The payment of a very large amount of money, although simple and perhaps satisfying, is in my view not an answer.

I acknowledge that the law recognizes the deterrent effect of damage awards, but awards must be fair to the body politic and also to the people at large who ultimately bear the burden of these costs. I refer to *Vancouver (City) v. Ward* [2010] 2 S.C.R. , 2010 S.C.C. 27, para. 53. *Ward* involves the issue of damages for a violation of the *Canadian Charter of Rights and Freedoms.*

> Just as private law damages must be fair to both the plaintiff and the defendant, so s. 24(1) damages must be fair - or "appropriate and just" - to both the complainant and the state. The court must arrive at a quantum that respects this. Large awards and the

> consequent diversion of public funds may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective. In considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests.

The court describes a functional purpose of damages as that of "providing substitute comforts and pleasures." (*Ward,* par. 50) Regrettably, this is impossible for Ms Livingstone, very difficult for Mr. Delaney and difficult for Ms MacLean.

Ward also makes the point that compensation for "pain and suffering" in tort law is "fixed at a fairly modest conventional rate" (at para. 50). The amounts advocated on behalf of the Complainants vastly exceed the limits of general damages to be awarded, as an example, for all of the suffering and loss inherent in quadriplegia arising out of a motor vehicle accident. This is not a torts case, but in my view the amounts awarded for "pain and suffering" in tort are a relevant limiting consideration.

A goal of damages is to restore the complainant to the position they would have been in had the breach not occurred. (*Ward* para. 45). The present goal is, of course, to see Mr. Delaney and Ms. MacLean placed in a small options home, but money will not restore to them that which they have missed. The Province does, and always has, provided them with all the necessities of life. What, besides seeing them safe, clean, warm, fed, clothed and healthy in a home, can one reasonably ask for them?

I have two considerations in awarding damages; an allocation of funds that may provide some "comforts and pleasures" over and above what might be available to them as residents of a small options home and, secondly, a fund to pay their legal costs. I agree that these funds ought to be paid to a trustee under what is commonly known as a Henson trust. The goal of the trusts is to have funds available to Ms MacLean and Mr. Delaney over and above those funds which the Province provides to other beneficiaries in the same situation.

The Province is to be obliged to continue to provide all the benefits Mr. Delaney and Ms MacLean would ordinarily receive. The Province is also to respect the integrity of the trusts which have been set up as a result of this decision. The Province must not encroach upon them.

The terms of the trusts should provide, again in the absolute discretion of the trustee, that other residents of the community home in which they come to live may also benefit. If Ms MacLean, for example, wants to provide pizza for everyone on an evening, or an added streaming service for the television, then the trustee should have that discretion. The trusts should provide for a gift over to a registered charity of any residue upon death. I leave it to counsel to suggest other terms of the trust to make it effective for the broad purpose of providing Ms MacLean and Mr. Delaney with some joy.

My second consideration is payment of the Complainants' lawyers. Lawyers are very often paid out of the proceeds of the litigation. Even if there is no formal contingency agreement, the reality often is that there can be no payment without an award. If I made an award remotely of the size the Complainants seek, then generous payment of legal fees would not be an issue. I have, however, not made such an award to the Complainants.

The Complainants' lawyers undertook and conducted this litigation in the public interest. I daresay the litigation expanded beyond their imagining and consumed them. We spent 32 days hearing evidence. In addition, there were many meetings, disclosure motions and then an issue of recusal that took the parties to the Court of Appeal. The Complainants have been successful throughout. In my opinion, for this case at least, public interest advocacy of this kind should not be actively deterred by saying that Boards of Inquiry may not ever make provision for the payment of counsel. I am confident that the amount I award will not be understood, given the economic realities of the private practice of law, as any encouragement to such enormous undertakings. In the end, however, I do not see how the goals of the *Human Rights Act* may be fulfilled in such a large and important proceeding without the provision for payment of private counsel acting on behalf of indigent complainants or Commission counsel actually conducting the proceeding. In this case, as I said above, it was Complainants' counsel who presented the case.

I add that I have presumed that Complainants' counsel have undertaken this litigation entirely *pro bono* and have not been paid by anyone else. I trust counsel will advise if I am wrong and will provide me with details of what they have received in compensation. I may then amend my decision in the final order.

All counsel advise I have no jurisdiction to award a payment of "costs" as a judge may do in the Supreme Court. I rebel against this since it seems to me that if, indeed, Boards of Inquiry have the broad discretion to award remedies to fulfill the objects of the *Human Rights Act*, then it does not follow that Boards

are to be circumscribed by rules about the lack of inherent jurisdiction of inferior tribunals. I am tempted to assert jurisdiction and award costs, but I defer. I do not, on the other hand, think it to be consistent with the goals of the *Human Rights Act* to say that "costs follow the event" and are to be expected in human rights proceedings. Circumstances alter cases.

The *Act,* in section 34(8) quoted above, actually does make provision for the payment of costs. It says a Board "where authorized by and to the extent permitted by the regulations, may make any order ... as to costs as it considers appropriate in the circumstances." The Province added this provision to the *Act* in 2007.[5] The Province, 12 years later, has made no such provision and I think one can reasonably assume, has no present intention of doing so.

I have decided that the best course for me to follow is to make allowance in my award for the payment of counsel and make that payment a term of the trust. I set those fees in the aggregate amount of $120,000.00 inclusive of disbursements and HST. I acknowledge that this sum is somewhat arbitrary and less than what "costs" would amount to after litigation of this complexity. I make the award to constitute some meaningful compensation for the work to accomplish the goals of the *Human Rights Act,* recognizing and seeking to maintain the *pro bono* spirit which underlay it.

I ask counsel for the Complainants to please provide me with the name of a trustee for each of Beth MacLean and Joey Delaney. I ask counsel to provide a form of trust. I would expect it to be in the form of a "Henson trust" providing the respective trustees with the absolute discretion to make payments to third parties for the benefit of each of the respective beneficiaries.

I ask counsel to provide the name of a trustee to receive and disburse the award I make with respect to the Livingstone claim. The trust should include a direction to pay counsel legal fees of $40,000.00. The trust should also provide for the sum of $10,000.00 to be paid to each of Olga Cain and Jackie McCabe-Sieliakus as token compensation to them in recognition of their many years of care and concern for Sheila Livingstone, their work to see her out of Emerald Hall and their service to the disabled generally through the pursuit of this matter.

I am ordering the Province to pay $100,000.00 net to each of Ms. MacLean and Mr. Delaney. This amount is, a significant amount of money, particularly in

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[5]Human Rights Act, 2007, c. 41, s. 8

the context of human rights' awards. In the end, I acknowledge, the number is arbitrary. Although $100,000.00 is nothing like what has been sought by the Complainants, it is no small sum. In my view, $100,000.00 is sufficient compensation for Ms MacLean's and Mr. Delaney's long stay at Emerald Hall within what I understand to be the policy limits of awards in human rights cases. The awards are also, in my view, sufficient to vindicate the Complainants and to fulfill the deterrent purpose of damages.

The Complainants have argued that I should follow the precedents where large awards have been made to those who have been imprisoned in error [*Henry v. British Columbia (Attorney General) Commission of Inquiry Concerning the Adequacy of Compensation Paid to Donald Marshall, Jr.* ,[June 1990] or, in the one case, confined as "mentally defective" and sterilized [*Muir v. Alberta* 1996 CanLII 7287 (AB QB)]. I am not persuaded that an analogy can be drawn with the plight of the Complainants and those who have been imprisoned in error or with the particular case of Ms Muir. The Complainants' cases are extraordinary. Emerald Hall is unique, but the Complainants also fall into the more general category of disabled people waiting placement.

The plight of disabled people awaiting placement is very common, ordinary. Regrettably, it is a fact of life that governments generally have not provided the services to the disabled that the disabled and their families need. As I tried to explain in my opinion, the definition of disability under the *Act* is very broad and would include most people, for example, occupying beds in hospitals awaiting placement in nursing homes or other more suitable facilities. There are long waitlists in Nova Scotia and, indeed, in other provinces. I conclude from the extensive evidence at the hearing that those people on waitlists have been found by government professionals to be in need and suited to placement in a particular facility or provided with certain services. The Complainants in Emerald Hall are at the extreme of a failure to provide services to the disabled.

It would be an error, in my view, to extrapolate a conclusion that the many, many people who may have been denied reasonable access as I have interpreted in *Moore v. British Columbia (Education),* [2013] 3 S.C.R. 360, 2012 SCC 61 (CanLII) even at the extreme are deserving of substantial compensation as if they had spent years in prison having been convicted in error or having suffered confinement and sterilization as Ms Muir did.

One should also be mindful, I think, that the Province has, at considerable cost, provided care to the Complainants throughout their lives. It is always easy to be critical, (and I realize that may be said about me!), but one should also appreciate that the people of Nova Scotia, through their government and

their servants, have kept the Complainants safe, clean, warm, fed, clothed and healthy. There should be more to life obviously, and I do not diminish the unhappy effects of Emerald Hall, but just the same, the care they have received should not be taken for granted and should not be ignored. Furthermore, the cost of their future care will be in the hundreds of thousands of dollars per year.

It has to be acknowledged too, I think, that although the Province of Nova Scotia treated Joey Delaney, Beth MacLean and Sheila Livingstone badly, the mistreatment was not born of any particular notice of them or of any ill will. Successive governments of all colours decided to spend little or no more money providing facilities to the disabled. I echo the distinction made by my colleague Eric Slone between "personal" and "institutional" discrimination in *Yuille v. The Nova Scotia Health Authority,* 2017 CanLII 17201 (N.S.H.R.C.).

I am also mindful that the public servants in Emerald Hall, by all the evidence, provided good care to the Complainants within the limits that government had imposed. It may be thought ironic, but the quality of the care they did receive is also a moderating factor I have considered in my award.

I doubt the deterrent effect of larger awards against government. It seems to me that governments are likely to be relatively impervious. In the end, damages as such do not impact the decision-makers as individuals and, above a certain amount, lose meaning as a public deterrent. I daresay the findings I have made and am delivering about their indifference towards Ms MacLean, Mr. Delaney and Ms Livingstone will affect them more than a money award. My findings affect them politically and in their self-regard as people concerned about the disabled.

It also seems to me that if I were to award the kinds of damages the Complainants seek, then I would be, in effect, positing a systemic remedy. I would be imposing a remedy that seeks to force systemic change by applying what may almost be said to be fines on the Province.

That disabled people are not being placed is, in the end, a function of political decision-making in the allocation of resources. The electorate itself should come to this realization. No doubt more money could be allocated to the care of the disabled, but politicians in a democracy are also faced with demands to twin more highways, to support ferries, to pay Crown Prosecutors more, to clean up polluted sites and on, and on and on.

An Order

I ask counsel for the Complainants to please to prepare a draft order under section 8 of the *Human Rights Act* incorporating the results of my opinion, to propose trustees for each of the Complainants and to prepare a draft trust which, I suggest, may be attached to my order and included in it by reference. The form can be agreed upon by the parties, or submitted to me in draft and made the subject of argument. The order should also provide a date when we may reconvene to see what progress is being made in placing Ms. MacLean and Mr. Delaney. I suggest early April.

Dated: December 4, 2019

J. Walter Thompson, Q.C.
Board of Inquiry