
Kevin A. Kindred, K.C.
Director

File No.: 22-1240

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VIA EMAIL: mprince@uvic.ca

Dr. Michael Prince
University of Victoria
3800 Finnerty Road
Victoria, BC V8P 5C2

Dear Dr. Prince:

Re: Disability Rights Coalition v. Province of Nova Scotia – H14-0418

We have reviewed in detail the comments provided by the DRC in response to the Province's Annual Progress Report.

The process outlined in the Remedy Order does not provide the Province any formal opportunity to respond to, rebut, or clarify comments made by the DRC. This is by design, as the process of reporting to the Monitor is not intended to be an adversarial, litigious process. The Monitor is asked to "review," "comment," and "assess" compliance with the various requirements of the order, not to adjudicate disputes between the parties as to compliance. Accordingly, the parties did not build in a process by which the Province would respond the DRC's comments, as would be the case in an adjudicative process.

The intention of this letter is therefore not to offer response or rebuttal. However, the Province does wish to comment on the process itself, and the Monitor's role. There are three points which we feel it is important to make.

No indicator, target, or timeline is mandatory

As the Province has pointed out in its Report, the entire premise of the Remedy includes recognitions in s.5 that:

“it is possible for the Province to remedy the discrimination without meeting each specific indicator, or target, or without perfectly complying with the associated timelines”; and

“the ultimate outcome of this Interim Settlement Agreement is the remedying of the discrimination through the achievement of the outcomes, rather than the specific compliance with any particular indicator or target”.

While it is natural that the Progress Reports focus on each individual indicator/target/timeline, it can have the unfortunate effect of pulling focus away from those fundamental principles underlying the entire process.

In that sense, it is somewhat inappropriate to see the DRC's frequent references to "mandated hiring targets," "legally-mandated requirements," and "legally-mandated Remedy timelines". The progress indicators laid out in the Remedy are important, but the only "mandatory" requirement is that the discrimination be remedied within the five-year timeframe. We wish to emphasize that the assessment of progress must be made against the ultimate goal, without undue fixation on any given indicator or timeline.

The Monitor cannot create new requirements

While no individual indicator, target, or timeline is mandatory, as a whole the collective set of indicators set out in the Remedy is intended to be a description of the work required in order to reach the ultimate goal of remedying the discrimination in five years. Progress is to be measured in reference to that work, and not against new requirements which might be proposed over the course of the five years.

For example, the DRC at several points refers to the fact that the statement of Outcomes in Appendix D includes the statement that "policies and practices will ensure that all persons in need with disabilities requiring supports and services are eligible for assistance". The DRC offers detailed comments throughout as to what, in its view, is required to ensure that the DSP's eligibility criteria meet that goal.

However, Appendix D specifically states that the Outcomes statements "are intended to summarize the results of, rather than to add to, the specific work required under the Interim Settlement Agreement." Appendix D does not leave an opening for new work to be required by the Province, simply because that work would go to ensuring that "all persons in need with disabilities ... are eligible for assistance." What is required to meet that Outcome is the specific work outlined in the Interim Settlement Agreement, not new work beyond that scope.

This is not to say that the DRC's comments about eligibility are off-base *per se*. The Province may agree or disagree with the merits of the DRC's suggestions—this is not the forum for such debate. Rather, the Province simply wishes to clarify that progress is to be measured in terms of the work already outlined in the Remedy, not new work over and above that.

A lack of evidence is not evidence of a lack

The DRC notes in a few places that, in its view, the Province has not provided sufficient evidence that it will be on track to meet the five-year timeline for remedying the discrimination:

“...it has not demonstrated the evidentiary basis for its belief that it will still meet the five-year timeframe regarding each indicator.”

“The DRC is gravely concerned the Province will not be able to remedy the discrimination within the five-year negotiated timeline in light of these delays. These concerns are heightened by the lack of any evidentiary basis for the Province’s optimism that it can meet the five-year timeline.”

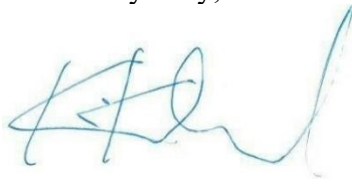
The work involved in the Remedy is complex and ongoing. The process of reporting on progress is equally complex and involved. The Province has sincerely made its best efforts to demonstrate, with evidence, why it is optimistic about meeting the five-year timeline. The onus is on the Province to do so (s.15(c)(iii)).

At the same time, we struggle to find in the DRC’s comments any specific basis for concern that the Province *will not* meet that five-year timeline. We do not necessarily seek to shift the onus, but it is difficult for the Province to provide any additional evidence for its “optimism” without knowing what is specifically driving a concern that the timeline might not be met. We recognize that the DRC expects the Province to “provide an explanation of how it intends to catch up with respect to *each individual requirement*,” (para.15, emphasis added,) which the Province notes is inconsistent with the principle that no individual indicator, target, or timeline is mandatory. Perhaps that difference in perspective explains why the parties do not see the onus the same way.

In any event, it is altogether possible that despite its best efforts, the Province may not have anticipated all possible concerns about not meeting the five-year timeline, and addressed them with evidence. We are confident that we have provided an evidentiary basis for our “optimism” on this question, but we do not wish the Monitor to make any assessments based on evidentiary gaps that we might yet be able to fill. If, in your assessment, there are concerns to which the Province might legitimately respond, we would welcome the opportunity to discuss them before the Monitor comes to any conclusion on that question. We can be available at any time convenient to all parties to discuss.

None of these comments are intended to undermine the valuable input offered by the DRC, even where that input is very critical. That is the DRC’s role, and while the Province continues to engage collaboratively with the DRC it acknowledges that fair criticism is part of the process. However, we are concerned that the process and purpose of reporting to the Monitor may be straying away from the core principles on which the Remedy is based, and we offer these comments in an effort to ensure the Monitor retains the proper focus.

Yours very truly,



Kevin A. Kindred, K.C.

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