NOVA SCOTIA COURT OF APPEAL

Citation: *Disability Rights Coalition v. Nova Scotia (Attorney General)*, 2021 NSCA 70

Date: 20211006
Docket: CA 486952
Registry: Halifax

Between:

Disability Rights Coalition and Beth MacLean, Olga Cain on behalf of Sheila Livingstone, Tammy Delaney, on behalf of Joseph Delaney

Appellants

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia (including the Minister of Community Services and the Minister of Health and Wellness), Nova Scotia Human Rights Commission, J. Walter Thompson, Q.C., sitting as a Board of Inquiry

Respondents

and

Inclusion Canada, the Council of Canadians with Disabilities, and People First of Canada

Intervenors

Judge:	The Court (Wood C.J.N.S., Farrar and Bourgeois JJ.A.)
Appeal Heard:	November 18 and 19, 2020, in Halifax, Nova Scotia
Subject:	*Human Rights Act*, R.S.N.S. 1989, c. 214; *Social Assistance Act*, R.S.N.S. 1989, c. 432; *Employment Support and Income Assistance Act*, S.N.S. 2000, c. 27; *prima facie* discrimination; assessment of damages; and costs
Summary:	In 2014, Beth MacLean, Sheila Livingstone and Joseph Delaney filed complaints with the Nova Scotia Human Rights Commission. They alleged the Province of Nova Scotia had discriminated against them in the provision of a service, contrary to the *Human Rights Act* (the "*Act*"). They alleged the discrimination arose due to their mental disabilities and financial status.

At the same time, the Disability Rights Coalition (the "DRC"), an alliance of disability advocacy groups and individuals, filed a complaint alleging the discrimination experienced by the individual complainants and others was a product of systemic discrimination.

The Province denied it had treated the complainants in a discriminatory fashion and further denied the existence of systemic discrimination in its provision of services to disabled persons.

After a lengthy hearing, a Board of Inquiry found the three individual complainants had each established *prima facie* discrimination under the *Act*. That finding was limited to the time periods when they had been housed in a locked psychiatric unit of the Nova Scotia Hospital. The Board dismissed the DRC's complaint of systemic discrimination.

The Board later undertook a second hearing to address what remedies should flow from its findings of discrimination. It awarded damages of $100,000 to each of Ms. MacLean and Mr. Delaney. Sadly, Ms. Livingstone passed away during the course of the proceeding. However, the Board awarded the sum of $10,000 to each of her sister and niece. The Board further ordered the Province pay costs to the individual complainants' legal counsel.

The DRC appeals the dismissal of its allegation of systemic discrimination. The intervenors were granted permission to participate in the appeal, specifically in regard to the Board's analysis of the systemic discrimination complaint.

The individual complainants (also referred to as the "individual appellants") say the Board's analysis giving rise to the finding of *prima facie* discrimination was flawed, resulting in the time frame during which the discriminatory treatment occurred being unduly shortened. They also say the damage awards were insufficient.

The Province also challenges the Board's discrimination analysis. It submits the Board erred in finding the individual appellants had established *prima facie* discrimination. In the alternative, it takes issue with the quantum of damages awarded.

Issues:

1. Did the Board err in its identification of the test for *prima facie* discrimination?

2. Did the Board err in identifying the "service" in question, and if so, what is the appropriate "service"?

3. Did the Board err by failing to consider, or properly distinguish, the case authorities relied upon by the Province?

4. Did the Board err in not considering, applying and accepting the evidence offered by the Province, which it asserts was relevant to the comparative analysis?

5. Did the Board err by failing to undertake a proper comparative analysis?

6. Based on the law, the Board's factual findings and the record, does a proper *prima facie* analysis support its ultimate conclusion in relation to the individual appellants?

7. Should the finding of *prima facie* discrimination in relation to the individual appellants be returned to the Board for a justification hearing?

8. Did the Board err in concluding a claim of systemic discrimination was unavailable on the evidence before it? If so, does the record establish a *prima facie* case of systemic discrimination?

9. Did the Board's remedy decision disclose an error in principle in the assessment of damages? If so, what is the appropriate quantum of damages to be awarded?

10. Did the Board err in awarding costs to the individual complainants?

Result: The Board did not err in its identification of the test for *prima facie* discrimination as being contained within s. 4 of the *Act*. Contrary to the Province's assertion, the Board did not create a "novel" test in its assessment of the complainants' allegations of discrimination.

The Board did, however, err in law in its identification of the "service" at the heart of the complaints. The Board, in finding that the "service" was services provided by the Province to persons with disabilities, committed the error warned against by the Supreme Court of Canada in *Moore v. British Columbia*, 2012 SCC 61—comparing the treatment of disabled persons to other disabled persons.

The Board did not stray into error by virtue of its failure to consider or properly distinguish the case authorities the Province presented in support of its contention that the proper "service" was the provision of supportive housing. None of the authorities was binding on the Board, and the Court is satisfied all were inapplicable.

A proper analysis, considering the record and relevant legislation, gives rise to a finding that the "service" at the heart of the complaints is social assistance generally.

The Board did not err in failing to make a proper comparative analysis. The Province's assertion in this regard was based upon its proposition, rejected by the Court, that the "service" in question was supportive housing. Further, the Court rejected the Province's assertion that a proper comparative analysis was a necessary precondition to a finding of *prima facie* discrimination under the *Act*.

The Board did not err in its conclusion that the individual complainants had been discriminated against by the Province by virtue of their unnecessary retention in a locked psychiatric hospital. After an initial period of treatment, all of the individual complaints were medically ready to be discharged. Despite being found eligible for social assistance under the Province's legislative regime, the individual complainants did

not receive the benefits to which they were entitled. Able-bodied persons who were eligible for social assistance did not risk being institutionalized in order to receive the benefits to which they were entitled.

The Board's legal analysis was, however, deficient in limiting the finding of *prima facie* discrimination in relation to Beth MacLean and Sheila Livingstone to the period they were unnecessarily housed at the Nova Scotia Hospital. Ms. MacLean's finding of *prima facie* discrimination ought to have included two years when she was a resident of Kings Regional Rehabilitation Centre. Further, Ms. Livingstone's finding of *prima facie* discrimination ought to have included the period of time when she was placed, after her discharge from the Nova Scotia Hospital, in Yarmouth.

In the course of the appeal hearing, the Province requested, for the first time, that should the Court uphold that Board's finding of discrimination relating to the individual complainants' placement at the Nova Scotia Hospital, it be permitted a justification hearing. Before the Board, the Province had waived its right to a justification hearing following the Board's finding of *prima facie* discrimination. None was held, with the Board moving on to a remedy determination. Given this waiver, and that the Province had not earlier raised the potential for a justification hearing, the Court declined to grant this request. The Province would, however, be entitled (if it wished) to a justification hearing in relation to the expanded findings of *prima facie* discrimination made in relation to Ms. MacLean and Ms. Livingstone.

The Court is satisfied the Board erred in law in its analysis of the DRC's complaint of systemic discrimination. The test it applied would result in the vast majority of legitimate claims of systemic discrimination being dismissed. A proper application of the law and the evidence before the Board leads to the conclusion that the DRC's claim of systemic discrimination was warranted. Having found a *prima facie* case of systemic discrimination, the DRC's complaint is

remitted to a differently constituted board of inquiry for the purposes of a justification hearing.

The Court is satisfied the Board's remedy decision was flawed in several respects. Specifically, the Board erred in principle in its assessment of damages in relation to both Beth MacLean and Joseph Delaney by failing to differentially account for the length of time each had been retained at the Nova Scotia Hospital, by not considering the effect of deterrence in the quantification of damages, and by considering the complainants' inability to enjoy their awards as a reason to reduce the quantum.

Having undertaken an assessment based on the appropriate legal principles and the evidentiary record, the Court determined the proper quantum of damages for Joseph MacLean in relation to his discriminatory retention at the Nova Scotia Hospital to be $200,000. The damages assessed in relation to Beth MacLean's discriminatory retention are $300,000. After the Court had made its decision on the appeal, but before its reasons could be released, Beth MacLean passed away. The Court will invite additional submissions from the parties as to what impact, if any, Ms. MacLean's death should have on the damage award.

The Court was of the view that the Board did not err in failing to award damages to the estate of Sheila Livingstone in relation to her retention at the Nova Scotia Hospital. It did, however, err in awarding her sister and niece damages reflective of the care they had provided to Ms. Livingstone during her life.

Finally, the Board committed legal error in awarding costs to the individual complainants. The Board has no jurisdiction to award costs.

Disposition: DRC's appeal of the *prima facie* decision is allowed. The Board erred in its analysis of the systemic discrimination claim. Applying the law to the Board's findings and the

record, we are satisfied that the DRC has established a *prima facie* case of systemic discrimination.

The Province is entitled to attempt to justify the above finding, and the matter shall be remitted to a differently constituted board of inquiry to undertake a hearing pursuant to s. 6 of the *Act.*

The Province's appeal of the *prima facie* decision, specifically the Board's determination that the individual appellants had been discriminated against by virtue of their unnecessary retention at the Nova Scotia Hospital, is dismissed.

The individual appellants' appeal of the *prima facie* decision is allowed in part. Applying a proper analysis, the finding of *prima facie* discrimination should have included the period of 1998 to 2000 for Ms. MacLean, and further covered the period of time Ms. Livingstone was placed in Yarmouth following her transfer from Emerald Hall.

With respect to the expanded *prima facie* findings in relation to the individual appellants set out above, the Province shall, if it wishes, be entitled to a justification hearing before a differently constituted board of inquiry. The Province is not entitled to justify the period of time when the individual complainants were found to be discriminated against by virtue of their unnecessary retention at the Nova Scotia Hospital.

The individual appellants' appeal and the Province's cross-appeal in relation to the remedy decision is allowed. The Board made fundamental errors in both its assessment of damages and the award of costs.

With respect to the discrimination arising from her unnecessary hospitalization, Beth MacLean is awarded damages of $300,000. The Court reserves jurisdiction to determine what effect, if any, Ms. MacLean's death has on the damage award.

With respect to the discrimination arising from his unnecessary hospitalization, Joseph MacLean is awarded damages of $200,000.

The Board's award of costs is set aside.

NOVA SCOTIA COURT OF APPEAL

Citation: *Disability Rights Coalition v. Nova Scotia (Attorney General)*, 2021 NSCA 70

Date: 20211006
Docket: CA 486952
Registry: Halifax

Between:

Disability Rights Coalition and Beth MacLean, Olga Cain on behalf of Sheila Livingstone, Tammy Delaney, on behalf of Joseph Delaney

Appellants

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia (including the Minister of Community Services and the Minister of Health and Wellness), Nova Scotia Human Rights Commission, J. Walter Thompson, Q.C., sitting as a Board of Inquiry

Respondents

and

Inclusion Canada, the Council of Canadians with Disabilities, and People First of Canada

Intervenors

Judges: The Court (Wood C.J.N.S., Farrar and Bourgeois JJ.A.)

Appeal Heard: November 18 and 19, 2020, in Halifax, Nova Scotia

Held: Appeal of the Disability Rights Coalition allowed; appeal of the individual appellants allowed in part; and cross-appeal of the respondent Province of Nova Scotia allowed in part, per reasons for judgment of the Court

Counsel: Claire McNeil and Patrick Cameron, for Disability Rights Coalition
Vincent Calderhead and Katrin MacPhee, for Beth MacLean, Olga Cain, and Tammy Delaney
Kevin Kindred and Dorianne Mullin, for the Attorney General of Nova Scotia
Kendrick Douglas, for the Nova Scotia Human Rights Commission (watching brief)
J. Walter Thompson, Q.C., respondent (not participating)
Byron Williams, Joëlle Pastora Sala, and Miranda D. Grayson, for the intervenors

By the Court:

[1] In 2014, Beth MacLean, Sheila Livingstone and Joseph Delaney filed complaints with the Nova Scotia Human Rights Commission[1]. They alleged the Province of Nova Scotia (the "Province") had discriminated against them in the provision of a service, contrary to the *Human Rights Act*, R.S.N.S. 1989, c. 214 (the "*Act*"). They alleged the discrimination arose due to their "mental disabilities"[2] and financial status.

[2] At the same time, the Disability Rights Coalition (the "DRC")[3], an alliance of disability advocacy groups and individuals, filed a complaint alleging the discrimination experienced by the individual complainants and others was a product of systemic discrimination.

[3] The Province denied it had treated the complainants in a discriminatory fashion and further denied the existence of systemic discrimination in its provision of services to disabled persons.

[4] After a lengthy hearing, a Board of Inquiry, chaired by J. Walter Thompson Q.C. (the "Board") found the three individual complainants had each established *prima facie* discrimination under the *Act*. That finding was limited to the time periods when they had been housed in a locked psychiatric unit of the Nova Scotia Hospital. The Board dismissed the DRC's complaint of systemic discrimination.

[5] The Board later undertook a second hearing to address what remedies should flow from its findings of discrimination. It awarded damages of $100,000 to each of Ms. MacLean and Mr. Delaney. Sadly, Ms. Livingstone passed away during the course of the proceeding. However, the Board awarded the sum of $10,000 to each of her sister and niece. The Board further ordered the Province pay costs to the individual complainants' legal counsel.

---

[1] Ms. MacLean filed the complaint on her own behalf, whereas family members advanced the complaints on behalf of Ms. Livingstone and Mr. Delaney. In these reasons, the three will be collectively referred to as the "individual complainants" or "individual appellants".

[2] As will be discussed later, "mental disability" is a recognized ground of discrimination in the *Act* and is defined therein.

[3] In the complaint to the Human Rights Commission, the DRC describes itself as "a coalition of individuals and over 32 organizations across Nova Scotia which is committed to promoting the equality interests of persons with disabilities".

[6] No one is content with the Board's decisions. The DRC appeals the dismissal of its allegation of systemic discrimination. Inclusion Canada, the Council of Canadians with Disabilities and People First Canada (the "Intervenors") were granted permission to participate in the appeal, specifically in regard to the Board's analysis of the systemic discrimination complaint.

[7] The individual complainants say the Board's analysis giving rise to the finding of *prima facie* discrimination was flawed, resulting in the time frame during which the discriminatory treatment occurred being unduly shortened. They also say the damage awards were insufficient.

[8] The Province also challenges the Board's discrimination analysis. It submits the Board erred in finding the individual appellants had established *prima facie* discrimination. In the alternative, it takes issue with the quantum of damages awarded.

[9] As the reasons to follow will demonstrate, some of the parties' concerns with the Board's discrimination and remedy analyses are well-founded. Despite errors in the Board's reasoning, we are of the view its conclusion the individual complainants had suffered discrimination at the hands of the Province is supported by the record and proper application of the law. We are also of the view the Board's flawed analysis resulted in it improperly narrowing the finding of *prima facie* discrimination to the time frame in which Ms. MacLean and Ms. Livingstone were housed at the Nova Scotia Hospital.

[10] We are satisfied the Board's consideration of the DRC's claim of systemic discrimination was also flawed. A proper application of the law to the Board's findings should have resulted in a *prima facie* finding of systemic discrimination.

[11] The Board's remedy decision also contains fatal errors of law that must be corrected on appeal.

A Word About Language

[12] Words matter. Appropriately used, they can build people up and acknowledge their worth. The careless or insensitive use of words can have the opposite effect.

[13] Throughout this decision we will be talking about people, both individually and collectively. Because the *Act* specifies "mental disability" as a ground of

discrimination, we will necessarily be using that term in our reasons. As we will explain later, that does not mean all persons who may fall within the statutory definition are the same. Quite the opposite.

[14] Despite tailoring our analysis to match the wording of the legislation, we have endeavoured to use language, where possible, that reflects a "person first" approach to discussing the individuals central to these reasons.[4] At times we have quoted passages from documents that use outdated language to describe persons living with differing abilities. We view these quotations, written at a different time, as being important for our reasons and our recitation thereof should be viewed accordingly.

Background

[15] As in all matters that come before the Court, we must be guided by the law. However, we acknowledge that at the heart of this dispute are three people and, as the DRC points out, many more who are financially dependent on the Province due to their mental disabilities.

(a) Who are Beth MacLean, Sheila Livingstone and Joseph Delaney?

[16] It is impossible to adequately capture the nature of the persons at the centre of this matter in a few short paragraphs. But to put the reasons to follow in context, we will provide brief biographical information in relation to the individual appellants. They have a number of things in common, including:

- They are, or were, life-long residents of Nova Scotia and, as such, are subject to the laws of the Province and entitled to the protection thereof;

- They are loved members of families, being sisters, daughters, a son and brother;

- They live, or lived, with a mental disability, and have been financially dependent on the Province for their basic needs for most of their lives;

- They were deemed eligible under the *Social Assistance Act*, R.S.N.S. 1989, c. 432, as amended (the "*SAA*"), to receive social assistance benefits

[4] "Person first" or "people first" language serves to reduce stigma and uses language that refers to the person first, rather than their condition or diagnosis.

by and from the Province through the Department of Community Services; and

- They resided in institutionalized settings, including lengthy periods at Emerald Hall, a locked acute-care psychiatric unit of the Nova Scotia Hospital.

[17] Each of them, like everyone else, has their own unique life story. The Board's reasons and the record before it provide a great deal of information about Ms. MacLean, Ms. Livingstone and Mr. Delaney. Only Ms. MacLean was able to testify before the Board about her life.

[18] Beth MacLean died at the age of 50 on September 24, 2021, mere days before the anticipated release of this decision. She lived with a mild to moderate intellectual disability. Drawing from the Board's reasons and the record, we note:

- Because of an inability to address her behavioural challenges, Ms. MacLean left the care of her parents at the age of 10;

- As a young child, she was placed in a number of institutions for children;

- In 1986, at the age of 14, she was placed in an adult facility, Kings Regional Rehabilitation Centre ("Kings"). She received no educational or vocational training while a resident of that institution;

- Ms. MacLean lived at Kings for 14 years. During that period the appropriateness of her continued placement there was not assessed. Ms. MacLean testified she did not like living at Kings and had told staff she did not want to continue residing there;

- In 2000, due to her acting out and a resulting incident of property damage, Ms. MacLean was discharged from Kings and transferred to the Nova Scotia Hospital, a psychiatric facility;

- Ms. MacLean's admission to the Nova Scotia Hospital was intended to be a means of regulating her behaviour. She was told she would be there for a year;

- Ms. MacLean remained at the Nova Scotia Hospital for much longer than a year. She was there for 16 years. At first she resided in Maritime Hall, a psychiatric rehabilitation unit. In 2007, she was transferred to Emerald Hall. During much of that time, Ms. MacLean was on a Department of Community Services wait-list for shelter in the community;

- During her placement at the Nova Scotia Hospital, staff members repeatedly told the Province Ms. MacLean did not require psychiatric treatment, should be discharged and was capable of living in the community. Ms. MacLean wanted to leave the hospital and expressed her wish to do so; and

- In June 2016, Ms. MacLean was transferred to the Community Transition Program[5] where she remained until December 2019. Since early 2020, Ms. MacLean resided in a small options home[6] in the community.

[19] Sheila Livingstone was born in 1947, one of 15 children in her family. Her complaint was brought on her behalf by her sister, Olga Cain. As noted earlier, Ms. Livingstone passed away in October 2016, prior to the release of the Board's first decision. In terms of her life experiences, we note:

- Ms. Livingstone lived with a moderate intellectual disability. She had also been diagnosed with schizoaffective disorder, a seizure disorder and other medical issues;

- She had difficulties verbalizing clearly but could be understood by those who were familiar with her speech;

- From the age of 12, Ms. Livingstone lived in a number of institutional settings;

- Notwithstanding her mental and physical challenges, from 1986 to 2004, Ms. Livingstone lived in a non-institutional setting. Residing in a

[5] An institutional placement, the purpose of which is to prepare individuals to transition to community based living.
[6] Small options homes are frequently referenced in this decision. These are residential placements, typically family homes, located in neighbourhoods. They house three residents and are staffed on a 24-hour basis. The homes are operated by third party service providers. The residents are typically persons with disabilities who have been found eligible for assistance under the *Social Assistance Act*.

provincially funded small-options home, she lived in the community, including working at a job and travelling there by bus;

- In 2003 and 2004, Ms. Livingstone had a number of short-term admissions to Emerald Hall for medical treatment. After being stabilized, she was discharged and returned to her home in the community;

- In July 2004, Ms. Livingstone was again admitted to hospital. This stay was longer, but she was ready for discharge by early 2005. Because of the length of her stay in hospital, the Province (Department of Community Services) discontinued the funding for her community placement, and she was unable to return to her small options home;

- The Province (Department of Community Services) placed Ms. Livingstone on a wait-list for another community placement in April 2005. Despite no longer requiring hospitalization, Ms. Livingstone remained at Emerald Hall while on the wait-list. She remained on the wait-list for nine years;

- Based on the evidence before it, the Board found that while placed at Emerald Hall, Ms. Livingstone had been physically assaulted by psychiatric patients in the unit, leaving her often bruised and fearful;

- In January 2014, Ms. Cain accepted the Province's offer of a placement at Harbourside Adult Residential Centre ("Harbourside") in Yarmouth, Nova Scotia, due to concerns for her sister's safety at Emerald Hall. This placement was a significant distance from Ms. Livingstone's family and made the continuation of visits and interaction with her loved ones difficult. It was the only offer of alternative shelter made by the Province for Ms. Livingstone in the nine years she was eligible for assistance; and

- Ms. Livingstone remained at Harbourside until her death.

[20] Joseph Delaney is 49 years old. Mr. Delaney lives with a severe intellectual disability and a cyclical mood disorder. His complaint was originally brought on his behalf by his mother Susan Lattie. Upon her death, Mr. Delaney's sister, Tammy Delaney, continued in her mother's place. Mr. Delaney lives with challenges associated with epilepsy and chronic constipation. In terms of his life history, we note:

- Mr. Delaney spent his early childhood residing with his parents and siblings in Halifax. He started experiencing seizures and behavioural challenges at an early age and entered a residential facility for children around the age of five;

- When that facility closed in 1996, Mr. Delaney was offered a placement in a small options home. He resided in the community for 14 years. During this time, Mr. Delaney worked at a job in the Burnside Industrial Park, travelling to and from by bus;

- In January 2010, Mr. Delaney was hospitalized at Emerald Hall to regulate his medications (a change had caused a drop in his electrolytes);

- Having been hospitalized for over 30 days, the Province (Department of Community Services) stopped funding Mr. Delaney's small options home placement. He lost his spot as a result;

- Mr. Delaney was medically stable and ready for discharge by July 2010. Hospital staff was of the view he did not require hospitalization and could return to a placement in the community;

- Mr. Delaney remained at Emerald Hall until February 2015, when he was transferred to Quest Regional Rehabilitation Centre ("Quest")[7];

- Mr. Delaney was returned to Emerald Hall in January 2017 because staff at Quest had difficulty managing his behaviour. He was verbalizing loudly and banging his head. Mr. Delaney's physical discomfort and resulting behavioural challenges settled quickly following his re-admission to hospital, particularly after it was discovered he was suffering from a kinked bowel and received appropriate medical treatment; and

- At the time of the Board hearing, Mr. Delaney was still at Emerald Hall, ready for and awaiting a community placement.

[21] In addition to the life experiences of the individual complainants, there is additional history relevant to the matter before us.

[7] Quest is an institutionalized setting where residents are intended to temporarily reside while transitioning to a community based placement.

(b) The Province's view and knowledge of the circumstances of its citizens living with mental disabilities

[22] It is unrefuted that society's view of persons living with mental disabilities has undergone significant change. The Board had before it substantial evidence tracing the evolution of how persons living with mental disabilities have been viewed and assisted in this Province. Much of this historic evidence was submitted at the hearing by way of a Joint Exhibit Book, the contents of which were admitted by agreement for the truth of its contents. This material provided important context to the complaints before the Board.

[23] Given the volume of materials, we will set out a sampling of the documents informing the Province's approach to its citizens living with mental disabilities. Although the record contains historic information reaching back to the "poor house" model of assistance, for the purposes of these reasons, we will start our review in the 1980s and continue up to the filing of the complaints with the Human Rights Commission in August 2014. We note the following:

- In 1983, the Minister of Social Services[8] struck a Task Group to consider the future of the care being provided (then through municipalities with provincial funding) to seniors, the disabled and the "mentally handicapped". One of the issues to be considered was "the nature and type of programs and activities required or desirable in such homes to maximize the self-fulfilment and dignity of residents and to encourage their participation in their care to the fullest extent possible". The Group's mandate was later expanded to consider the nature of services being provided more generally to the "mentally handicapped".

The Task Group released its report in June 1984. The Group, comprised of "a core committee of senior staff of the Department of Social Services" described the theme of its conclusions as follows:

> The central theme of this report is that **the needs of each individual**, regardless of age, infirmity, disability or handicap, **must be the paramount concern** of all levels of government and the private sector in maintaining, enhancing and expanding programs and services. Furthermore, regardless of whether the services are provided in institution, home, or community, a quality and standard of care must be maintained which **enriches the lives of the people served**.

[8] The Department of Social Services was later renamed the Department of Community Services.

(Emphasis added)

The Task Group noted the Province had recognized and accepted the principle of "normalization":

> For the past decade, in Nova Scotia and across North America, the development of residential and support services for the mentally handicapped has been guided by the principle of normalization. **Normalization has the following emphasis: the integration of the mentally handicapped into a variety of community living settings; the provision of a broad array of community-based support services; a gradual policy of deinstitutionalization of mentally handicapped persons from large, often remote, institutional facilities; and a rehabilitative rather than custodial orientation within institutions to ensure that persons are moved as quickly as possible to community alternatives.**

(Emphasis added)

- In 1986, the Province amended the *Act* to include "mental disability" as a prohibited ground of discrimination. It recognized, legislatively, that persons were entitled to protection against being differentially treated because they lived with mental disabilities. This amendment made the complaints to the Human Rights Commission and subsequent referral to the Board in this matter possible.

[24] The 1990s saw a continuation of the Province articulating and endorsing increasingly modern concepts regarding the rightful place of persons with mental disabilities in society. In that regard we note:

- In November 1990, the Minister of Community Services submitted a memorandum to the Cabinet Committee on Policy and Planning consisting of recommendations for the care of children with mental disabilities in the Province. Although directed at children, several of the Minister's comments and observations equally applied to adults living with mental disabilities. For instance:

> The 1960's and 1970's produced social change within the field of mentally handicap [*sic*] as they did with most of society. **The concept of normalization was born and developed in this period evolving a philosophical stance which stated that the mentally handicapped should be treated and served in the same fashion as the normal or average citizens in our society. They should go to school, live in the community, work and recreate in the community. They should not be placed outside of the community, i.e. in institutions.**

[…]

Most other jurisdictions in Canada have clearly stated that mentally handicapped persons should be encouraged and enabled to live and participate as fully as possible in community life. While there are and will continue to be differences amongst families, advocates and professionals as to what types of service models best constitute full participation in community life, the placement of mentally handicapped children and adults in large, segregated and often isolated institutional environments is clearly beyond the parameters of this philosophy.

(Emphasis added)

The Minister recommended:

That government adopt a firm statement, recognizing the progress we have already made in community service development, and formalizing a commitment that we shall gradually move resources currently deployed for institutional services to community based programs.

- In February 1995, the Department of Community Services released a Discussion Paper entitled "*Moving Towards Deinstitutionalization*", seeking input of stakeholders, the aim of which was described as:

This brief discussion paper attempts to outline the policy directions the Department of Community Services feels should be pursued **in order to effectively and responsibly replace adult institutional services with community living alternatives for persons with mental handicaps and mental disabilities.**[9]

(Emphasis added)

The Department of Community Services had this to say about the "de-institutionalization" of persons living with mental disabilities:

While some believe the movement from an institutional-based service system to a community-based service system has been too rapid, others believe the opposite. Appendix I, however, illustrates that Nova Scotia has been moving in the direction of deinstitutionalization and towards the development and expansion of community-based services for the past two decades. There is a growing level of commitment at all levels of government, within the generic service community

[9] In the paper, "adult institutional services" are identified as including Adult Residential Centres and Regional Rehabilitation Centres.

and amongst advocacy groups for "de-institutionalization". The questions appear to be how quickly and by what means should this process be accomplished.

The Discussion Paper set out the following "Statement of Principles" forming the basis of the Department of Community Services' policy direction in relation to services for the mentally disabled:

RIGHTS AND RESPONSIBILITES:

> People with disabilities have the very same rights, and the same responsibilities, as other Canadians. They are entitled, as others are, to the equal protection and the equal benefit of the law and require measures for achieving equality.

EMPOWERMENT:

> People with disabilities require the means to assume responsibility for their own lives and their own well being. Efforts are required to encourage them to take control, and to support and promote their own efforts in this regard.

PARTICIPATION:

> People with disabilities require full access to the social, economic and physical infrastructure which supports our society so that they can participate fully and equally in their communities.

- In April 1998, the Department of Community Services released a "*Report of the Review of Small Options in Nova Scotia*", which contained the results of a two-year review of existing community based residential options. The report set out the history of the development of these small, three-resident or less, homes that were not subject to the licensing provisions contained in the *Homes for Special Care Act*, R.S.N.S. 1989, c. 203. These facilities, run by a variety of third-party service providers, offered housing and care to individuals, the vast majority of whom received funding assistance from municipal governments.

The report explained that after April 1, 1995, the Province had provided 100% cost-sharing to municipalities for the expenses incurred by the placement of residents in their Community Based Options Program, but that placement and monitoring of residents would still be the responsibility of the municipalities. This changed on April 1, 1998, when the Department of Community Services assumed responsibility for the delivery of all social services in the Province.

One purpose of the review was to assess "consumer satisfaction" with the existing community based small options offerings. Given that the Province was taking over responsibility for the placement and funding of residents in these facilities, it was important to understand how they were functioning. The assessors noted:

> Consumers expressed to assessors satisfaction with many aspects of their lives in small options facilities. The locations of the accommodations, the level of personal choice afforded residents and the home-like atmosphere of these settings were common themes in the information gathered.
>
> […]
>
> **A noted theme in all information gathered was the residents' pleasure and contentment at being able to remain in their own communities and to maintain their traditions and cultures.** Many residents related satisfaction in being able to continue involvement in community activities such as dances, bowling, service club membership and libraries. Much of this activity occurred with the accompaniment of friends or family from the community.
>
> […]
>
> Individual resident choice was also a theme recognized in the information compiled. Many residents reported that the decision to live in a small options home environment was made personally or with the suggestion of family and/or friends. Residents spoke openly regarding independent decision making on daily activities and freedom to decide on financial affairs.
>
> Decision making and choice also extended to areas such as menus and meal planning for residents. Residents often noted that they participated in menu planning, and in several cases residents assisted in preparing favourite meals. In addition, many residents related that service providers often prepared separate meals should a resident not enjoy a planned meal.
>
> […]
>
> Residents also reported satisfaction in participating in decision making regarding their care/program needs. Through information gathered, it was determined that generally routines within small options homes were client-centred and that the daily operating of the small options home responded to the needs and wishes of the residents. In many instances, residents related satisfaction gained by "helping around the house" with such tasks as washing dishes, setting tables and dusting their own bedrooms.
>
> […]
>
> Results of information gathered from residents during the assessments/reviews of small option operations in the province disclosed ongoing general satisfaction by the residents served. **In the vast majority of cases, residents recognized that**

> **the accommodations and services in these small option operations enhance their potential to live, work and socialize in the least restrictive setting and in the most integrated circumstances available in their communities.**
>
> (Emphasis added)

[25] The early 2000s saw the circumstances of persons living with mental disabilities continue to engage the Province's consciousness:

- In the spring of 2000, the Department of Community Services engaged Dr. Michael J. Kendrick to evaluate the existing system of "community based options". The people using the "CBO" system were described as "typically persons with persistent and significant physical and mental impairments requiring some manner of ongoing assistance". The independent review was tasked with assessing "if the current delivery of services to clients funded by the Department of Community Services in Community Based Options meets the needs of those clients" and to make recommendations for change.

  The final report dated January 2001 exceeded 180 pages. It is impossible in these reasons to summarize the numerous and detailed findings and recommendations set out therein. Two recommendations are particularly relevant to the matter before this Court. Dr. Kendrick found the existing model of community based options required modernization and expansion. He recommended that "<u>The Department of Community Services Should Accelerate Its Efforts To Support The Inclusion Of Persons With Disabilities Within Community Life Who Are Presently in Nova Scotia Residential Institutions</u>" (Emphasis in original). He explained:

  > **It is also the view of this evaluator, and the vast consensus of the field, that the best chance for people to find the life they need and seek, rests within community rather than outside of, or at the margins of community life. Yet, at the moment, there are still far too many people who are spending the vast bulk of their lives largely segregated from community, and placed in a position of involuntary compulsion to live solely with other equally marginalized persons. The most extreme example of this is the continued reliance in Nova Scotia on segregated and congregated residential institutions.** The principal funder of these is the Nova Scotia Department of Community Services. Though to a far lesser degree, the Department of Health still relies quite heavily on short-term institutional care for this population, at least in comparison to some mental health systems elsewhere.

The Department of Community Services is in the unenviable position of being the overseer of the much-discredited practice of enforcing involuntary segregation in institutions upon people. Clearly, as the Department itself believes, the residents of these institutions can live lives much closer to the heart of the community. *The maintenance of these places constitutes* [*a*] *direct and persistent violation of the people's rights to be part of the community. These institutionalized persons ought to have the same chance to live in community that is now routinely available to other clients of the CBO system of the Department of Community Services.*

The Department has recognized and struggled with this contradiction, and has rather slowly moved to expand options for these most completely segregated persons. They will, nevertheless, need some political help from government to complete this job properly. **There is some urgency for those institutionalized as the current pace of offering them community alternatives is so slow that many will surely not live to see the day when they can live equally and proudly amongst their fellow Nova Scotian citizens, neighbours and friends. This tragedy is entirely avoidable within the now routine state of the art "on the ground" in Nova Scotia.** Thus is all the more disappointing.

(Italicized emphasis in original)
(Bolded emphasis added)

Dr. Kendrick also noted the interplay between services offered by the Department of Community Services and the Department of Health. He recommended: "<u>The Department of Community Services And The Department of Health Need To Restructure The Fiscal Incentives Regarding Community Placement</u>" (Emphasis in original). He wrote:

The present arrangement between the two Departments has resulted in two major shortcomings that affect the recipient of services. The first is that, when a person who is currently living in a CBO goes into a psychiatric in-patient unit with the Health Department, the Department of Community Services still has to fund the now vacant space of the person while they are in hospital. If they are unable to do this for a lengthy period while the individual is in hospital, then the person will lose their home. The reason for this is that the Department of Community Services cannot afford to fund empty spaces indefinitely, and therefore has to set some point where the person is no longer a resident. While it is true that many larger providers use their own funds to cushion this effect to a degree, the problem nevertheless remains. **This effect thereby renders people unnecessarily homeless, and denies them the continuity of abode that most reasonable people would see as sensible**.

The second problem relates to the difficulty that occurs when persons who have not historically been part of the CBO system, try to access the system while in placement in the psychiatric unit. Such persons are "unfunded" persons for the

> Department of Community Services, and therefore may not have priority relative to other persons seeking services. The Department of Health, understandably insisting on their prompt placement from hospital, may not realize that the Department of Community Services may not see the person as a funding priority, given the budget it has to work with. After all, there does not exist a line item for Health related community placements in the Community Service budget. Consequently, the Health Department may spend upwards of over a thousand dollars a day waiting for a community placement that may actually cost a small percentage of that cost to the taxpayer, were it available. The individual may wait unnecessarily, inappropriately and indefinitely for a community placement to materialize. They may also, out of desperation, be forced to take whatever is available, even if this is unsuitable for them.
>
> (Emphasis added)

In his report, Dr. Kendrick provided multiple recommendations on how the Departments of Health and Community Services could move towards rectifying the above problems.

- In 2006, the Department of Health commissioned an independent review of programs offered to persons with a "dual diagnosis", being "persons who are diagnosed with intellectual disability and who present with severe emotional and behavioural challenges". The reviewers, Dr. Dorothy Griffiths and Dr. Chrissoula Stavrakaki, were asked to assess two programs, COAST and the Emerald Hall unit of the Nova Scotia Hospital. For the purposes of these reasons, their findings in relation to Emerald Hall are relevant. The report dated April 2006 highlighted three critical challenges with respect to the functioning of that unit:

> **First, because the unit is gridlocked acutely ill clients from the community cannot gain needed treatment services.**
>
> […]
>
> **Second and perhaps even more severe[ly] challenging is that many of the residents of Emerald Hall are being held without justification and against their will in a locked psychiatric unit. More than 10 of the individuals currently living in the acute short term program have been ready for discharge for a very long period of time** (i.e., 10 years) but have been forced to be confined in a locked psychiatric unit because of the failure of the community to develop appropriate community supports that can support these individuals. In our discussions with the individuals who live on the unit, they spoke of their desire to someday be returned to the community, to farm in the country, to a place that would be home. **These individuals are currently being confined in a highly restrictive environment without any foreseeable options for**

community living. STANDARD 7a.7 states that individuals will be discharged from inpatient care to the appropriate community setting. Transition is facilitated through collaboration, coordination and communication between all care providers to address discharge and follow up needs for the individual. This standard is not being met.

Moreover, this current situation clearly undermines the fundamental rights of these individuals. It represents discriminatory treatment because they carry a dual diagnosis. The situation is clearly confinement without justification and cruel and unusual punishment for behaviours which have long since [resolved]. A nondisabled person in the province of Nova Scotia who experienced an acute mental illness and recovered would not likely be held in a locked psychiatric ward for up to ten or more years post recovery. This failure to return these individuals to a less restrictive environment is inhumane and a class action law suit waiting to happen. […]

Third, several other clients on the unit have also been there for a very long time, and while these other individuals have ongoing or recurrent issues, they are not of a severity that would require institutionalization. One man has been living on this acute unit for 40 years. These individuals could appropriately be provided support in a community group home that had specialized training in providing services for persons with intellectual disabilities who have ongoing or long term mental health challenges. These individuals do not require hospitalization but specialized supports with knowledgeable and trained staff and specialized routines.

(Emphasis added)

Included amongst the report's recommendations were:

There is an urgent need for the Department of Health to meet with the Department of Community Services to develop a short term strategy to deal with the confinement of individuals unjustifiably in the Emerald Unit;

There is a need for a long term plan to ensure that future gridlocks do not occur in the system. The two departments need to develop a coordinated plan that will ensure that a policy is created that will not result in a loss of "home" for persons who experience a mental health crisis, . . . and that the requirement for the least restrictive and intrusive environment is not blocked for persons ready for community reintegration to their own home, when the crisis had been appropriately managed.

- In November 2006, the Department of Community Services, Services for Persons with Disabilities Program ("SPD")[10], commenced a review of all residential services for persons with disabilities in the Province. The review

[10] This program is now known as the Disability Support Program.

was conducted by a private consultant, Ms. Helen Patriquin, with the assistance of Department of Community Services staff. Its scope included residential settings licensed under the *Homes for Special Care Act* and unlicensed community based options (small options homes). The resulting "*Report of Residential Services*" was released in June 2008. The Executive Summary of the report explained:

> This report provides a comprehensive examination of current services and supports for individuals with disabilities. It is with great gratification that we can state that because of the tremendous commitment of staff of the Department of Community Services and the many service providers throughout the sector, the system has been able to serve the needs of individuals with disabilities despite the current limitations. **These limitations, however, are at a critical point and must be addressed to ensure that persons with disabilities have access to a range of services and supports that will enable them to live to their fullest potential within their communities.**
>
> The plan outlined further in this document details a long-term strategy to address the gaps in residential services and supports for persons with disabilities. These recommendations have been developed following extensive consultation and review of best practices in other jurisdictions, along with current research, such as the Kirby Report (2006). […]

(Emphasis added)

The report recognized a lack of capacity was a serious limitation resulting in some individuals not being provided residential settings that corresponded with their needs, or waiting for an extended period of time, if not indefinitely, for an available placement. This concern was noted in relation to Residential Care Facilities (RCFs) in particular:

> Examples of stellar commitment and pleasant, home-like surroundings exist. However, there also exists a high prevalence of communal bedrooms (in some instances three to a room), aging infrastructures, sparse furnishings, limited programming (life skills, social or recreational) and vocational opportunities. Most other provinces have either enhanced or discontinued the use of RCFs.
>
> The lack of capacity in the system has made it very difficult to transfer residents to either higher or lower support settings when the support needs of residents change over time. Thus higher needs individuals remain in these settings and are supported by staff who hold [too] fewer core competencies than those working in all other residential settings. Also, more independent residents have few opportunities to move on to greater independence in the community. RCFs are potentially home to many persons with disabilities who would be most

appropriately supported in the Independent Living Support Program or in Group Homes.

[26] Finally, we will set out a number of documents that demonstrate the Province's approach to persons with disabilities in the years immediately prior to the complainants bringing their concerns to the Commission:

- In February 2010, Premier Darrell Dexter wrote to the Minister of Foreign Affairs, expressing the Province's support for the Government of Canada's recent ratification of the *United Nations Convention on the Rights of Persons with Disabilities*. Two articles of that Convention are worthy of note:

Article 1 – Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

[…]

Article 19 – Living independently and being included in the community

States parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

- In a memorandum dated January 12, 2012, the Deputy Minister of Community Services wrote to the Province's Treasury Board requesting a departmental budget increase. The Deputy Minister advised the current budget was "inadequate to address the minimum needs of people with disabilities in need of supports and services". He further noted the SPD program was "under significant pressure to enhance and improve the continuum of services so that people with disabilities have more timely access to the programs they need". The Deputy Minister set out the current situation as follows:

> Approximately 5200 individuals with disabilities are provided services and support under the mandate of the Services for Persons with Disabilities (SPD) program. There is a province wide waitlist of approximately 802 individuals, of which 273 clients have no support, and 529 clients are requesting/requiring different SPD services. There are issues related to flow and capacity of the SPD program. The SPD residential program is "grid locked". There is little if any ability to provide a responsive residential service, due to the lack of vacancies.
>
> At present, there are 36 individuals with disabilities in hospitals in CDHA. All have been medically ready for discharge for an average of two years. The average age is 40 years. Failure to provide additional funding will mean that people stay in the hospital, when they are medically able to leave, but have no place to go. […]

The Deputy Minster further provided an explanation of how the SPD program found itself in its present circumstances:

> In the 1990's and early 2000, consistent with all jurisdictions across Canada, [Nova Scotia] committed to closure of large facility based settings. This included the Children's Training Centres, Nova Scotia Youth Training Centre, for approximately 100 young people with disabilities. In addition, a number of adult residential centres were closed, including 144 beds at Scotia Adult Residential Centre (ARC) and 159 beds at Halifax County Regional Rehabilitation Centre (RRC). While all of the current residents were provided with community living residential programs, there has been no significant increase in residential capacity in our province.
>
> For the past decade, the SPD program has been faced with significant pressures and challenges. The most pressing and long-standing issue is the access to timely and appropriate placement options. Over this period of time, there have been numerous reviews, (Community Supports for Adults, now the SPD program, Review and Re-Design of services), SPD reports on Residential Services and Adult Day Programs in 2008. With these reports there are recommendations. The SPD problems have been compounded by a number of very public issues,

> including […] founded cases of abuse and neglect, resulting in reports and recommendations, such as the Report on Riverview Home Corporation and Braemore Homes Corporation. The financial investment necessary to fully implement all of the changes necessary has been limited. […]
>
> In an effort to mitigate the SPD placement pressures, DCS has invested in the "front end" programs. These are the Direct Family Support (DFS) program for families caring for a family member at home, Alternative Family Support (AFS), and the Independent Living Support (ILS) program. **Despite the enhancement of these programs, there remain 273 clients on a waitlist with no service, and the 36 individuals who are in hospitals ready for discharge. This highlights the urgency of the work that is required to improve and expand the continuum of services.**[11]

(Emphasis added)

- In March 2013, the Minister of Community Services established the "Joint Community-Government Advisory Committee on Transforming the Services to Persons with Disabilities (SPD) Program" ("Joint Committee"). The mandate of the Joint Committee was to:

> Develop a roadmap for transformation of the Nova Scotia Services to Persons with Disabilities Program (SPD), guided by the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

In June 2013, the Joint Committee presented a report to the Minister of Community Services entitled "*Choice, Equality and Good Lives in Inclusive Communities—A Roadmap for Transforming the Nova Scotia Services to Persons with Disabilities Program*".[12] The observations and recommendations made in the report are detailed. We will mention only a few.

The Joint Committee was critical of the Province's continued reliance on institutional residential placements for persons with disabilities:

> With some 1,100 people living in large congregate care facilities, Nova Scotia has a disproportionate reliance on institutional facilities in comparison to other Canadian jurisdictions. Compared to other provinces and territories, it is more likely to support people with disabilities in large residential settings such as

[11] The statutory scheme for the provision of assistance to persons with disabilities will be discussed later in these reasons. For now, it is worthy of note that the persons on the "waitlist with no service" are persons who were found eligible for "assistance" under the *Social Assistance Act*.

[12] This report was referenced in the testimony and submissions before the Board. It is often referred to as the "Roadmap report".

> Regional Rehabilitation Centres and Adult Rehabilitation Centres. While at one point seen as a national leader with respect to deinstitutionalization (e.g. closures of provincial Children's Training Centres) in recent years such efforts have stalled. Significant public funds continue to be spent on an institutional model – a model that universally has been proved to produce less than quality outcomes for persons with disabilities (in comparison to supported community living) and a model that has been unequivocally rejected by persons with disabilities. Nova Scotia remains as the only jurisdiction in Canada that is not taking active measures to reduce/close its institutional facilities for persons with disabilities.

The Joint Committee recommended the Province "[a]nnounce a clear commitment and take steps to phase out, over a multi-year period, use of ARCs, RRCs and RCFs as a response to the residential needs of persons with disabilities, in concurrence with development of necessary community-based alternatives". The Committee further proposed that in achieving this goal, the Province establish a moratorium on new admissions to such facilities as of April 1, 2015. In making that recommendation, the Joint Committee set out a number of rationales and assumptions, including:

> • People with disabilities have a right to live and to be included in the community.
>
> • Everyone should have the opportunity to live and participate in the community they choose. They should be involved in decisions about the support they receive and have maximum control over their lives.
>
> […]
>
> • A comprehensive strategy for the eventual phase out of Nova Scotia's large residential facilities designated for people with disabilities needs to focus simultaneously on two areas: 1) measures which seek to prevent institutionalization and the need for alternative care; and 2) measures aimed at bringing back to the community those people who are currently in institutional care.

[27] We now turn to consider the *Act*, and the provisions applicable to the complaints before the Board.

The Statutory Framework

[28] We do not intend to set out the *Act* in its entirety, but to reference only those provisions most relevant to the issues before us. The purpose of the *Act* is set out as follows:

> 2 The purpose of this Act is to

> (a) recognize the inherent dignity and the equal and inalienable rights of **all members of the human family**;
>
> (b) proclaim a common standard for achievement of basic human rights by all Nova Scotians;
>
> (c) recognize that human rights must be protected by the rule of law;
>
> (d) affirm the principle that **every person** is free and equal in dignity and rights;
>
> (e) **recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons**; and
>
> (f) extend the statute law relating to human rights and provide for its effective administration.

(Emphasis added)

[29] Section 4 is central to the matters before us, as it provides the definition of discrimination:

> 4 For the purposes of this Act, a person discriminates where the person **makes a distinction**, whether intentional or not, **based on a characteristic**, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 **that has the effect of imposing burdens, obligations or disadvantages** on an individual or a class of individuals **not imposed upon others** or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

(Emphasis added)

[30] Complaints of discrimination are brought pursuant to s. 5. The complaints launched by the individual appellants and the DRC were brought in relation to "services" provided by the Province, and pursuant to s. 5(1)(a), (o) and (t), which provide:

> 5(1) No person shall in respect of
>
> (a) the provision of or access to services or facilities;
>
> […]
>
> discriminate against an individual or class of individuals on account of
>
> […]
>
> (o) physical disability or mental disability;

> […]
>
> (t) source of income;

[31] "Physical disability or mental disability" is defined broadly in s. 3(l) and includes the "loss or abnormality of psychological function", a learning disability, a "condition of being mentally impaired" and a mental disorder. There is no dispute the individual appellants live or lived with conditions that are included within the statutory definition.

[32] There are a number of recognized exceptions that preclude a finding of discrimination under s. 5(1). In the present matter, and for reasons that will be addressed later, the Board did not undertake a consideration of whether its *prima facie* findings of discrimination in relation to the individual complainants fell within an exception.

[33] Section 6 sets out various exceptions, with that found in clause (f) being the exception that would have been applicable to the complaints at hand:

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

[34] There is no dispute the Province is bound by the *Act* and may be found to have discriminated against a complainant thereunder (s. 21).

Procedural History and Decisions under Review

The complaints

[35] On August 1, 2014, the individual appellants and the DRC filed complaints with the Nova Scotia Human Rights Commission.[13] The Province, representing the Minister of Community Services and the Minister of Health and Wellness, was

[13] One congregate complaint was filed with the Commission; however, it was divided into discrete sections addressing the specific allegations of each complainant.

named as respondent. Each of the complainants set out individualized and detailed claims of discrimination.

Beth MacLean's complaint

[36] Ms. MacLean asserted:

> **I, Beth MacLean, complain against the Respondent that from 1986 through to the present and continuing, the Respondent ("the Province") has and continues to discriminate against me with respect to the social services provided to me because of the combined effect of my mental disabilities and my source of income (social assistance).**
>
> (Emphasis in original)

[37] She described her protected characteristics as:

> 1. My protected characteristics are the combined effect of my mental disabilities and my source of income (social assistance). They have jointly combined to result in my being discriminated against in the provision of a service provided by the Province. As a person with mental disabilities who needs assistance in basic living arrangements, but without independent financial resources, I am completely dependent on the Province for whatever residential settings the Province makes available to me.

[38] After describing the circumstances giving rise to her complaint, Ms. MacLean framed the alleged violation under the *Act* as follows:

> 39. I feel that I am entitled to and should have been given the help and supports that I need to live in the community. The Province does provide assistance for people without disabilities who have no money; they are given the help they need by the Province to live in the community. The Province's failure, since 1986, to take into account and accommodate my different needs in offering supports for me to live in the community is discriminatory and a violation of s. 5(1)(a), (o) and/or (t) of the *Human Rights Act*.

[39] She described the effect of the alleged violation of her rights as follows:

> 42. This affected me in many ways. I have, effectively, been forced to remain in a locked unit in a psychiatric hospital even though I neither wanted nor needed to stay in the hospital. I have been unable to properly develop or to receive an education. I have been deprived of the chance to work and do other things in the community. I have been exposed to the problems of living in a psychiatric ward including noise and the risks of violence.

[40] With respect to her current living arrangement, Ms. MacLean asserted:

> 43. The fact that I remain at Emerald Hall presents two problems for me:
>
> a. I cannot develop as a person to the fullest extent possible – including learning to live and thrive as a member of a community.
>
> b. In addition, my continued detention in Emerald Hall causes my mental and physical health and wellbeing to suffer.

Sheila Livingstone's complaint

[41] In the complaint advanced on behalf of Ms. Livingstone, Ms. Cain asserted:

> 50. **I complain against the Respondent that from 2004 through to the present and continuing, the Respondent ("the Province") has and continues to discriminate against my sister, Sheila, with respect to the social services provided to her because of the combined effect of her mental disabilities and her source of income (social assistance).**
>
> (Emphasis in original)

[42] She described Ms. Livingstone's protected characteristics as follows:

> 51. Sheila Livingstone's protected characteristics are the combined effect of her mental disabilities and her source of income (social assistance). They have jointly combined to result in her being discriminated against in the provision of a service provided by the Province. As a person with mental disabilities who needs assistance in basic living arrangements, but without independent financial resources, Sheila is completely dependent on the Province for whatever residential settings the Province makes available to her.

[43] Ms. Cain articulated the nature of the alleged human rights violation as follows:

> 77. The Province does provide assistance for people without disabilities who have no money; they are given the help they need by the Province to live in the community. The Province's failure to take into account and accommodate Sheila's needs in offering supports to live in the community during the period 2004 to 2014 is discriminatory and a violation of s. 5(1)(a), (o) and or (t) of the *Human Rights Act*. Further, the Province's failure to offer Sheila the help and supports that she needs to live in the Metro Halifax community in the same way that people from Metro Halifax without disabilities who have no money are given the help they need by the Province to live in the community is discriminatory and a violation of s. 5(1)(a), (o) and/or (t) of the *Human Rights Act*.

[44] The impact of the alleged violation on Ms. Livingstone was described by her sister as follows:

> 80. This treatment affected Sheila in many ways; she was unable to resume her life in the community and was excluded from opportunities for social interaction. Also, she was effectively forced to remain in a locked unit in a psychiatric hospital even though she neither wanted nor needed to stay there; she was exposed to the problems of living in a psychiatric ward including noise, risks of and actual, repeated violence at the hands of other people living there.
>
> 81. Throughout her entire stay at Emerald Hall (i.e., from 2004 to 2014), there was no legal reason or requirement for Sheila to be actually living in Emerald Hall.
>
> […]
>
> 83. As a result of being made to live in this locked setting, Sheila was exposed to the risk of *and* actual repeated assaults, including having been assaulted recently on *many* occasions by fellow patients resulting in bruises and black eyes.
>
> (Emphasis in original)

Joseph Delaney's complaint

[45] On behalf of her son, Susan Lattie asserted:

> 91. **I complain against the Respondent that from 2010 through to the present and continuing, the Respondent ("the Province") has and continues to discriminate against my son, Joseph Delaney, with respect to the social services provided to him because of the combined effect of his mental disabilities and his source of income (social assistance).**
>
> (Emphasis in original)

[46] Mr. Delaney's protected characteristics were described as follows:

> 92. Joey's protected characteristics are the combined effect of his mental disabilities and his source of income (social assistance). They have jointly combined to result in his being discriminated against in the provision of a service provided by the Province. As a person with mental disabilities who needs assistance in basic living arrangements, but without independent financial resources, Joey is completely dependent on the Province for whatever residential settings the Province makes available to him.

[47] In the complaint, the alleged violation of Mr. Delaney's human rights was framed as follows:

> 112. I feel that Joey is entitled to and should have been given the help and supports that he needs to live in the Metro Halifax community in the same way that people from Metro Halifax community without disabilities who have no money are given the help they need by the Province to live in the community. The Province's failure to take into account and accommodate Joey's needs in offering supports to live in the community since July 2010 is discriminatory and a violation of s. 5(1)(a), (o) and/or (t) of the *Human Rights Act*.

[48] Ms. Lattie described the effects of the alleged violations on her son:

> 115. This affected Joey in many ways, including that: he was effectively forced to remain in a locked unit in a psychiatric hospital even though he neither wanted nor needed to stay there; he has been unable to develop as fully as possible, to live and work and do things in the community that almost everyone else does; he has been exposed to the problems of living in a psychiatric ward including excessive noise and risk of violence.
>
> 116. When he lived in a small options home, Joey was able to work at Dartmouth Adult Services Centre 5 days a week and he enjoyed interacting with the people there on a day-to-day basis and at staff celebrations.
>
> 117. Joey connected well with the staff at his community home, and enjoyed going on car rides and shopping trips, working on puzzles, singing, and dancing around the home. Joey is denied these opportunities while he resides at Emerald Hall, and also suffers from adverse impacts by continuing to live there.
>
> 118. Emerald Hall is a locked unit designed for people with dual diagnosis in acute crisis situations. In this disruptive, institutional, and isolated setting, the skills that Joey gained while living in community placements that allowed him to interact socially and function more independently are deteriorating.
>
> 119. Joey is currently developing skills and behaving in ways that help him cope in the institutional setting of Emerald Hall. This institutionalized behaviour may be functional in an institutional setting, but it is detrimental and counterproductive to Joey learning to live in a community setting.

The DRC's complaint

[49] The DRC's complaint will be reviewed in more detail in the reasons to follow. By way of background, the discriminatory conduct alleged by the DRC was described as follows:

> 135. Although DRC has had no direct involvement with any of the individual complainants, this complaint relates to the types of experiences with which DRC is all too familiar. Our organization is acutely aware of the barriers and challenges to community living experienced by many persons with disabilities, and in particular the harmful effects of long-term residence in institutions such as

Emerald Hall. In our advocacy role in pursuit of deinstitutionalization, the DRC has endorsed the following definition of "institution," which the Emerald Hall unit of the Nova Scotia Hospital fits:

> An Institution is any place in which people who have been labeled as having an intellectual disability are isolated, segregated and/or congregated. An institution is any place in which people do not have, or are not allowed to exercise, control over their day to day decisions. An institution is not defined merely by its size.[14]

136. The Province's treatment of the individual complainants, and the adverse impact of the Province's failure to provide meaningful access to public assistance that will enable them to live in the community, is part of a systemic failure that will adversely affect many persons with disabilities who are in need of public assistance in Nova Scotia at some point in their lifetime. In the case of the individual complainants, these adverse impacts include both the harmful effects on their physical and mental health of being effectively forced to live in a locked psychiatric ward and the adverse consequences of being deprived of the opportunity to live and participate to the extent possible in the community. These are typical of the types of impacts of the Province's failure to provide supports and services to persons with disabilities.

137. At a systemic level, some individuals with disabilities need supports that non-disabled individuals do not need in order to live in the community and exercise some control over their lives. Thus, for persons in need and in receipt of social assistance, equality/non-discrimination require recognition of differential need; it is discriminatory not to provide for the necessary supports tailored to individual needs as they may change over time.

[50] The DRC asserted the adverse consequences of the discriminatory treatment for persons living with disabilities were wide-ranging, including:

155. Inadequate supports and services impact individuals with disabilities in a number of ways; physically, mentally and psychologically. Where inadequate supports and services result in unnecessary institutionalization, as occurred to the individual complainants in this case, the harm that can result is especially serious.

156. Individuals placed outside their community of origin may find their contact with family and friends greatly curtailed, and thus their emotional and psychological support and health undermined, due to financial and health constraint that prevent people from travelling.

157. Depending on the nature of the institution, and the condition of the other residents, detention in an institution may result in assault or other threats to

[14] For the purposes of these reasons, we adopt the above definition of "institution".

> personal security. It may result in psychological harm and mental deterioration, as persons are deprived of interactions with the community at large.
>
> 158. The unnecessary institutionalization of disabled persons creates a barrier to their social inclusion, and perpetuates stigma and stereotypes associated with disabled persons and their abilities to participate in society and their communities. Effectively, it separates disabled persons from their communities, and excludes them from an equal opportunity to enjoy a full and productive life, contrary to the purposes of the *Human Rights Act*.

[51] The DRC alleged offering services to disabled persons in settings that do not appropriately meet their needs not only violates the *Act*, but also the *Convention on the Rights of Persons with Disabilities*, to which Canada is a signatory. It relied in particular on Article 19 as set out earlier.

The prima facie hearing

[52] The parties agreed the complaints before the Board would be heard in stages. First, the Board would address whether the complainants were able to establish a case of *prima facie* discrimination. Only after that issue was addressed would the Board then, if warranted, consider whether any proven discrimination could be justified by the Province (as mentioned earlier, the second "justification" hearing did not take place). Finally, the Board would address the issue of remedy for any unjustified discrimination.

[53] The *prima facie* hearing commenced on February 5, 2018 and was a substantial undertaking. It spanned 25 days, with numerous witnesses being called by the complainants and the Province. In addition, the Board was presented with a voluminous quantity of documentary evidence. Most of that material was presented to the Board by way of a Joint Exhibit Book, and as explained earlier, the parties agreed the documents could be accepted for the truth of their contents.

[54] Our review of the hearing transcript and exhibits demonstrates the evidence was directed to a number of topics, including:

- The life circumstances of the individual complainants, including those leading to their residency at the Nova Scotia Hospital;
- The general nature and purpose of the Nova Scotia Hospital, particularly Emerald Hall and, to a lesser extent, Maritime Hall;

- The nature of benefits available to eligible applicants under the *SAA* and the *Employment Support and Income Assistance Act*, S.N.S. 2000, c. 27 (the "*ESIA*);

- The types of services available to persons living with disabilities under the Disability Support Program, as administered by the Province's Department of Community Services;

- The nature of residential options offered and funded by the Disability Support Program, including statistical evidence relating to numbers of clients being served, those found eligible for assistance but not being provided with any service at all, and wait-lists for specific offerings, particularly for small options homes;

- Expert evidence relating to the approach to providing meaningful support and assistance to people living with disabilities;

- Evidence with respect to disabled individuals other than the complainants, and their experiences receiving services from the Province; and

- The nature of the public housing program offered by the Province.

[55] At the conclusion of the hearing, the parties provided detailed written submissions. Because these closely mirror the arguments heard on appeal, we will set out key aspects of the submissions. The individual complainants and the DRC filed a joint post-hearing brief. It provided a review of the evidence relevant to the complaints and set out their views as to how the individual and systemic claims of *prima facie* discrimination had been established.

[56] In asserting the evidence established a violation of the *Act*, the complainants submitted the Board should be guided by the principles set out by the Supreme Court of Canada in *Moore v. British Columbia (Education)*, 2012 SCC 61 ("*Moore*"). Justice Abella's reasons in *Moore* will be addressed in further detail later, but for now it is useful to set out the guidance found therein:

> [33] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the

> burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[57] The complainants argued the above framework was applicable not only to establish individual claims of discrimination but also those that were systemic in nature.

[58] With respect to the first *Moore* factor, the complainants asserted it was clear they had characteristics protected under the *Act* (mental disability and source of income).

[59] They went on to argue the evidence presented to the Board clearly established they had suffered adverse impacts in relation to the Province's provision of a "service"—social assistance.

[60] Although the submissions were tailored to address the adverse impacts experienced by the three individual complainants personally, there was significant overlap. With respect to the individual complaints, the adverse impacts were alleged to include:

- Unnecessary institutionalization and the resulting harm arising therefrom;

- Experiencing an unreasonable delay to receive social assistance that is accommodative to their needs;

- Being subject to removal from their communities of choice as a condition of receiving the assistance for which they were eligible; and

- The negative impact of the Province's view that its obligation to disabled persons found eligible for social assistance was discretionary, not obligatory. The submission explained:

> 486. […] [I]n the face of the legal obligation to provide assistance in the *Social Assistance Act*, the discrimination lies in the fact that the Province has chosen to treat both its statutory and its Human Rights duties to provide accommodative social assistance to persons with disabilities as a matter of discretion compared to the rigorous entitlement approach that it takes to the provision of assistance under the *ESIA* for people who either have no disabilities or, if they do, do not require residential supports and services.

[61] The individual complainants submitted it was clear the adverse impacts they suffered were due, at least in part, to being persons with disabilities. As such, they contended a *prima facie* violation of the *Act* had been established.

[62] With respect to the allegation of systemic discrimination, the DRC argued:

- The evidence established the Province had failed to accommodate poor people with disabilities in its provision of social assistance;

- The overwhelming weight of the evidence demonstrated the Province's practices and policies had a clear adverse effect on people with disabilities in relation to their access to social assistance;

- The adverse effect of the Province's policy choices in the provision of social assistance was demonstrated by the unnecessary institutionalization of people with disabilities; the moratorium on the funding of small options homes; the wait-lists for services for the disabled; and the faulty classification system used to determine access to services.

[63] With respect to the institutionalization of persons with disabilities, the DRC submitted:

> 577. It is the complainants' position that the institutionalization of persons with disabilities is discriminatory and can only be justified on the same basis as for the non-disabled – when it is necessary for health treatment. Just as for the non-disabled, institutionalization is otherwise justifiably regarded as a form of punishment. The rationalisation in favour of providing institutional arrangements and facilities for persons with disabilities depends upon an ableist construct of "separate but equal" treatment, the rejection of which was remembered in *Moore*. The Province's continued reliance on institutions as residential options for persons with disabilities, results in a society based on "mainstream" attributes where persons with disabilities are segregated and arbitrarily grouped based on their perceived "otherness" or disabilities. This form of segregation itself is a form of discrimination.

[64] With respect to the alleged adverse impact due to the moratorium, the DRC explained:

> 578. The evidence is clear that from 1986 until 1995, persons with disabilities in the Halifax area had access to community based options, in the form of "small options homes". The municipal system of supports for persons with disabilities was evolving away from larger congregate settings, in favour of smaller, more

> natural homes. During the same period, the Province instituted the closure of all institutions for children with disabilities in the Province, a process which was completed in 1996.
>
> 579. In 1995, the Province assumed full administrative[15] and financial responsibility for social assistance from the municipalities. Shortly after the Province imposed a "moratorium" on the creation of new small option homes; effectively imposing a freeze on this service, a service that had been a key part of the municipalities response to the needs of persons with disabilities who required supports and services. The freeze can be justifiably seen as a cutback or withdrawal of services to persons with disabilities – especially for persons who weren't then already using the service. It meant that their needs for accommodative social services would have to wait. As in *Moore*, where the services for students with disabilities were cut back, this withdrawal of services had an adverse impact on persons with disabilities who could not live in the community without these services.
>
> (References omitted)

[65] The alleged adverse impact of wait-lists for services was described as follows:

> 582. According to the most recent statistics available there are currently almost 1500 people on the waitlist for DSP services. Even today the waitlist system is not transparent. Where someone is on a waitlist, how many people are in front or behind, how long it will take to access services are unknown. It is apparent that many people wait years to get access to services. Everyone on the waitlist is eligible and has been assessed as requiring DSP services and supports.
>
> 583. Where are people while they are waiting for access to DSP services? More than 400 people on the current waitlist are categorised as receiving no services. Ms. Bethune testified that they could be living on the streets, in a homeless shelter, in prison or some other setting. Some of those continue to be detained in the forensic hospital, with significant restrictions on their liberty, for years. The harm of being placed on waitlist is clearly evident. While a waitlist is not a denial of service, the lengthy delays, in terms of years that people wait to receive services is tantamount to a denial.
>
> 584. Even those who are receiving services may be living in vastly inappropriate settings, or with inadequate access to the supports and services they need. Some of those individuals may be in their parent's home, or living on their own in the community.
>
> (References omitted)

---

[15] The evidence satisfies us that the Province did not take on full administrative responsibility for the administration of assistance under the *SAA* until 1998.

[66] Finally, the adverse impact of the Province's classification system was described by the DRC as follows:

> 585. Since 1995 the Province has assumed responsibility for funding and administering programs for persons with disabilities. As part of the program for persons with disabilities, the Province has maintained a system of classification/assessment that purports to fit people within an "array" of DSP services. Since the 2001 independent evaluation by Michael Kendrick, the Province has been aware of significant deficiencies in the classification system. While the classification/assessment tool was changed in 2014, the Province admits that outcomes do not ensure that people's needs are appropriately met. A classification/assessment policy which results in people being denied access to the services they need has an obvious adverse effect.
>
> (References omitted)

[67] In explaining how the adverse effects suffered by many persons in need of social assistance were related to their disability, the DRC argued:

> 599. In the case of institutionalisation, the segregation itself forms the basis of a finding that disability was a factor in the disadvantageous treatment experienced by people with disabilities. In other words, this type of treatment is unthinkable among the non-disabled population.
>
> 600. Similarly, the moratorium and consequent waitlist, arbitrary and highly discretionary classification/assessment practices, years-long delays in accessing services, denial of services based on the label "unclassifiable" are disadvantages experienced by persons with disabilities precisely because they require supports and services to live in the community. This is highlighted when we compare the treatment of persons with disabilities who are persons in need and therefore eligible for social assistance, with non-disabled "persons in need".
>
> 601. These practices and policies had a disproportionate if not exclusive effect on a particular subset of persons with disabilities based on their different need for supports and services to live in the community. The evidence unequivocally establishes a sufficient link between disability and the adverse impacts in this case.

[68] The Province filed thorough post-hearing submissions that also provided a comprehensive review of the evidence presented before the Board. It submitted the complainants had not discharged their burden of showing a *prima facie* case of discrimination under the *Act* and requested the complaints be dismissed.

[69] In summarizing the Province's view of the complaints, it is useful to begin at the end of its submissions:

> 201. This Board of Inquiry has been presented with a great deal of evidence indicating the need for reform to the way the Province provides residential supports to persons with disabilities. The Respondent does not disagree. Reform is a necessity, and is underway. Although the model of care for individuals in facilities has evolved, the continued reliance on large congregate care facilities, very much a model of the past, is not appropriate for the present or the future.
>
> 202. The Board, however, is not tasked with planning and implementing that reform. Its mandate is not to assess the quality or general fairness of this or other government social programs. This Board's mandate is to apply the concept of discrimination under the *Human Rights Act*. While there is no question that problems with the system have been identified, resolving problems with the delivery of social services is the work of government. An intervention under the *Human Rights Act* is only justified if the government discriminates in doing so. Whatever merit there may be to the issues highlighted by the Complaint, the human rights case law makes it clear that the issues raised [d]o not meet the test for discrimination.

[70] The Province's response addressed the arguments advanced on behalf of the individual complainants and the DRC in significant detail. We note the following general assertions in particular:

- Many of the alleged incidents of discrimination were historic and should not be considered to fit the definition of "ongoing discrimination" under the *Act*. This served to bar the complaint regarding Ms. MacLean's time at Kings;

- The complainants' assertion that the Province is legally obligated under the *SAA* to provide access to services immediately and as of right is not a determination that falls within the Board's jurisdiction[16];

- This Court's decision in *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31 ("*Skinner*") should govern the Board's analysis. Although adopting the test in *Moore*, it was argued *Skinner* highlights the requirement to undertake a comparative analysis and, if properly done, the Board should conclude the complainants had not been differentially treated from another group; and

- Relying on the Supreme Court of Canada's reasons in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC

[16] Although the Board's jurisdiction to interpret legislation beyond the *Act* was originally raised by the Province in its cross-appeal, it was later abandoned.

> 78 ("*Auton*") the Province argued governments have the discretion to determine what social benefits to provide, and how to provide them. A legislative choice not to provide a particular benefit, or to limit the scope of a benefit provided, is not discriminatory. When the government does provide a benefit, it cannot do so in a way that makes unjustified distinctions based on enumerated grounds, but anti-discrimination does not require the government to provide a particular benefit, or to provide it in a particular way, even where that benefit would serve the needs of a disadvantaged group.

[71] With respect to the specifics of the claims, the Province's response mirrored the complainants' *Moore*-based analysis. It asserted:

- There was no dispute the individual complainants and the general population served by the Disability Support Program fall within the prohibited ground of mental disability and meet the first step set out in *Moore*;

- With respect to the second step of the analysis, the Province took issue with the characterization of the "service" in question as being "social assistance". It asserted the complainants' comparison of services under the *SAA* and the *ESIA* was not an "apples to apples" comparison;

- The Province argued the "service" at the heart of the complaints was residential or housing supports and encouraged the Board to so find; and

- A proper characterization of the "service" as residential support would lead to a comparison to the public housing program, which shares the same broad limitations identified by the complainants within the Disability Support Program. As such, the complainants were not able to demonstrate a distinction, and this would necessarily lead to a finding the complainants had not established a *prima facie* case of discrimination.

The Board's prima facie decision

[72] The Board released its decision, in excess of 100 pages, on March 4, 2019. The Board concluded (at p. 72)[17]:

> - [T]he Province has *prima facie* discriminated against Beth MacLean by placing and retaining her in the Nova Scotia Hospital, by retaining Joey Delaney at Emerald Hall after his health stabilized in July, 2010, and by retaining Sheila Livingstone in Emerald Hall after her bout of mental illness had stabilized.
> - All disabled people are, by virtue of the Supreme Court of Canada's opinion in *Moore*, entitled to meaningful access to generally available services. Extended time on a waitlist, depending on the individual circumstance, may be a limiting or a denial of a benefit or opportunity available to others and *prima facie* be discrimination.
> - Even if placing and retaining Joey Delaney, Beth MacLean and Sheila Livingstone at the Nova Scotia Hospital was not *prima facie* discriminatory in and of itself, then it was *prima facie* discriminatory over the long term to limit or deny them meaningful access to other available services.
> - The definition of disability under the *Human Rights Act* includes all the disabled and not just those who are serviced through the Department of Community Services. Discrimination does not recognize silos.
> - One cannot say, however, that disabled people generally are discriminated against by being placed on a wait list or by any particular placement. Each case must be examined to determine whether the particular individual has been denied meaningful access.

[73] Although the Board's analysis leading to the above conclusions will be addressed later, at this juncture we will set out several of its significant observations and findings of fact. We start with the Board's more general views, before addressing those more specific to the three individual complainants.

[74] The Board devoted significant time in reviewing the evidence of Lynn Hartwell, the Deputy Minster of Community Services. Called by the Province, the Board found her evidence to be "authoritative and clear". Ms. Hartwell's evidence was particularly informative regarding the nature of services available to persons

[17] In these reasons, we have chosen to quote directly from the official reasons of the Board, as published by the Commission and posted on its website, as opposed to versions available through third-party reporting services.

with disabilities through the Department of Community Services. The Board noted (at p. 63):

> Ms. Hartwell said it was clear that departmental approaches had not kept up with the evolution of thinking in the care of the disabled. As a result, departmental policies were not having the impact the Department now wanted them to have. The Department has been going through a foundational rethinking of what support should look like. The Department is not taking the status quo as a given, but rather looking at the best practice. Ms. Hartwell said a significant shift is going on, a turning of the ship is very much underway.
>
> Community Services administers the Disability Support Program. The DSP provides support to those who need support with their daily activities to enable them to live their best lives. The Department is looking beyond beds to provide a more robust supply of services. Fifty-four hundred people are receiving support under the Disability Support Program.
>
> Ms. Hartwell, when she was a less senior civil servant, was a principal of the *Roadmap* committee. **A starting assumption of the *Roadmap* was that everyone can live in the community. That continues to be the view of the Department of Community Services.**

(Emphasis added)

[75] The history of care provided to persons living with disabilities was addressed in the Deputy Minister's evidence. The Board noted (at p. 64):

> The system of care for the disabled was just bits and pieces when the Province took over from the municipalities in the mid-1990's. Many small option homes were not licensed, and they varied in quality. This prompted the conversation about what the standard of care should be and how to set up the best practices; "how to determine the how". The so-called "moratorium" followed, but Ms. Hartwell's understanding is that the "moratorium" was never a formal policy, but rather a part of a process focussed on providing alternate community supports.
>
> At the same time, the provincial takeover of municipal small options homes increased the costs of the system. Part of the discussion was about ways to manage those costs, and whether small options homes were becoming the only path. Notwithstanding the fact that few new small option homes have been created, the overall budget has doubled in the last 10 years and so there were all kinds of investments being made to broaden services.
>
> Everyone involved in the *Roadmap* evinced an urgent desire for change. Ms. Hartwell said the process was informed by the *UN Declaration on the Rights of the Disabled*. The Province is doing the work of progressive implementation of the goals of the *UN Declaration*.

[76] The Board noted aspects of the Deputy Minister's evidence, particularly relating to the differences between the Disability Support Program and the Income Assistance Program (at pp. 66–67):

> Mr. Calderhead cross-examined Ms. Hartwell about the relationship between the Disability Support Program and the Department's Income Assistance Program. Both programs are constituted under the *Social Assistance Act*.[18] For both, eligibility is determined by being a person in need based on a budget deficit system, comparing income with expenses. The shelter allowance for someone who is a beneficiary of Independent Living Support would be the same as the shelter allowance under Income Assistance. Both Income Assistance and the Disability Supports Program refer to basic needs and special needs. Income Assistance has accommodative features. For example, Income Assistance will increase benefits for those needing a special diet and will provide for a higher wage for some before assistance is clawed back. Many of the special needs policies are the same. Ms. Hartwell said she was not sure if the Income Assistance and the Disability Support programs are entirely mirrored, but the intention is that the programs be as consistent and as seamless as possible.
>
> **Ms. Hartwell agreed with Mr. Calderhead that people on income assistance receive that assistance as of right when they qualify. That assistance is mandated by law. Income assistance is portable. No one is told where to live to receive the benefit.**[19]
>
> Ms. Hartwell agreed that, under a DSP, a person once found to be in need may be put on a waitlist, but she added that there is no waitlist for a disabled person needing basic income support where they presently live. The basic program has a budget, but the funding is a function of need. Other programs may be limited by availability and resources. There may be people whose preference might be a small options home. A worker would work with them to meet their needs at their present residence. If a small options home remains the choice, and a place is not available, then the person may have to wait and one may have to move from one's own community to access a home.
>
> **Ms. Hartwell agreed that there is no cap on the number of people who may receive income assistance**. If budgets are exceeded, then the Department may have to find money elsewhere.
>
> […]
>
> Ms. Hartwell agreed that the largest waitlist is for small options homes. She agreed that the formal waitlist may be shorter than the total of those who actually

[18] This is a misstatement by the Board. The Disability Support Program is delivered pursuant to the *SAA*. However, the Income Assistance Program is provided pursuant to the *ESIA*. This error is not, however, material to the appeal.

[19] This evidence is central to the individual complainants' as well as the DRC's assertion that there are clear distinctions in how the Province chooses to provide social assistance to the disabled through the Disability Support Program (under the *SAA*) and the non-disabled through Income Assistance (under the *ESIA*).

> want placement. There may be parents who are looking after disabled offspring who may be discouraged by the length of the waitlist and may not be applying. **The growing waitlist is an expression of a need that the Province is not meeting, but she says the Department is making inroads into moving people into the community.**
>
> (Emphasis added)

[77] In her testimony, the Deputy Minister set out the Province's current view and plan with respect to the supports available to persons with disabilities. The Board noted (at p. 67):

> Ms. Hartwell agreed that the Province wanted to be sure that policy was reflective of the *United Nations Declaration*, and inspired by a rights-based process. She agreed that the Province has embraced the *UN Declaration*. **She agreed that people are to have access to supports in a way that is responsive to their choices. Segregation and isolation are to be avoided. She agreed that implementation means that disabled people are to have access according to their needs and access which responds to their own choices.**
>
> Ms. Hartwell said the Province is now doing the work to get away from the congregate facilities. The idea is one of progressive realization. She believes that the Province's efforts are steps towards the realization of the goals. The Province is not, however, able to immediately implement the goals. Ms. Hartwell agreed that there are some cases that do demand immediate implementation of placement. […]
>
> (Emphasis added)

[78] The Board also received significant evidence regarding the Nova Scotia Hospital, Emerald Hall in particular, and the effects of living there. The Board wrote (at p. 37):

> Joanne Pushie described what is was like to live at Emerald Hall. Other witnesses confirmed her description. I accept it.
>
> Emerald Hall is an acute psychiatric unit forming part of a psychiatric hospital in Dartmouth, the Nova Scotia Hospital. The purpose of Emerald Hall is to provide short term psychiatric treatment to people who are very ill and then, when their illnesses have stabilized, see that they are, depending on their needs and existing supports, discharged to their families, the community, or some care facility.
>
> Emerald Hall is locked. Staff turnover is high and staff rotate on shifts making the building of personal relationships with residents difficult. Residents have to conform to the hospital clock. Meals arrive on hot carts. Even bathing is scheduled. 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. 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 lose even the ability to carry out personal care and soon need staff for even ordinary tasks. 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.

[79] The Board reached a strong conclusion regarding the use of Emerald Hall as a placement for persons living with disabilities who were not mentally ill. It wrote (at p. 78):

> **The Province knew that it should not hold people in Emerald Hall who were not mentally ill.** The Province's own staffs repeatedly told the Province it should not. The Province's outside consultants repeatedly told the Province it should not. The involvement of counsel and indeed this proceeding, now four and a half years old, moved it not. I refer to Dr. Griffiths' specific report of April, 2006. The Province knew then that it should move people who were disabled, but not acutely ill mentally, out of Emerald Hall. The Province, year in and year out, was simply obdurate.
>
> (Emphasis added)

[80] Regarding Ms. MacLean's placement at the Nova Scotia Hospital, the Board observed (at pp. 16–17):

> I am satisfied from the above that Ms. MacLean's behaviours, whatever may be said about them while she was at King[s], had improved after a year to the point where the Province should have placed her in a small options home, or at the very least, some other facility. No witnesses and no documents say that there was any change in Ms. MacLean over the ensuing years. **The Province, impervious to all, continued to ignore her.**
>
> I refer to other remonstrances to the Province later in this opinion. Suffice it to say for now, however, that I cannot imagine how frustrating and even soul-destroying it must have been for Ms. MacLean to live in hope and to have those hopes dashed day by day. I cannot imagine how frustrating it must have been for the good and faithful servants of the Province, all dedicated to Ms. MacLean's welfare, to have their opinions and advice ignored in 2002 and for the next 13 or

> 14 years. **The Province met their pleas with an indifference that really, after time, becomes contempt.**
>
> (Emphasis added)

[81] With respect to Ms. Livingstone, the Board wrote (at p. 19):

> Ms. Livingstone had lived for many years in a small options home. She was often in and out of hospital for treatment of her chronic illnesses. One note dated March 3, 2006 says she'd had 58 admissions to the Nova Scotia Hospital. The Province provided extra staffing for her support at Topsail.[20]
>
> Ms. Livingstone's September, 2004 admissions to the Nova Scotia Hospital turned into a very long stay, but the evidence is clear that the professional staff of Emerald Hall recognized she was suitable for placement somewhere else and should not remain there. The reports mention Adult Residential Centres and nursing homes. Regardless of where the placement might be, the point was to get her out of Emerald Hall. She would act out, make threats, strike out, and certainly the Province seized on her behavioural difficulties to block access to services, but I am well satisfied that what was said about her in a Community Services Individual Assessment and Support Plan dated June 11, 2012 is accurate:
>
> > Residual symptoms of psychosis-muttering accusations of others, occasional unprovoked strike or scratch (no one actually gets hurt). Increase in agitation, threatening language, self-abuse and physical aggression towards others.
> >
> > Can be unpredictable at times, will sometimes mutter, her face will turn red, breathing quickens.
> >
> > Always check for physical causes of change in behaviour as Sheila has numerous health issues.
>
> Ms. Livingstone was disabled and ill. She was no danger to anybody.
>
> (References omitted)

[82] With respect to Mr. Delaney, the Board observed (at pp. 23–24):

> I refer to the materials, mostly from the Nova Scotia Hospital, which record Mr. Delaney's long term stay at Emerald Hall. Mr. Delaney's behaviour and his health had deteriorated late in 2009 and into 2010. He was screaming, banging his own head, hitting staff and other residents. He had a number of admissions beginning in 2009 to Emerald Hall and after a time, staff formed the opinion that he needed a higher level of care than could be provided in a small options home. He lost his bed at the Skeena Street small options home in July of 2010. He was

[20] "Topsail" is a reference to Ms. Livingstone's small options home.

then classified for placement in a Regional Rehabilitation Centre. In other words, he was, by July 21, 2010, "medically discharged" from Emerald Hall.

The notes of a Clinical Care Planning Meeting of September-October, 2012 say that:

> Joey has been classified and ready for placement for over a year. The only barrier to placement is availability. Joey has never been offered a placement in metro or outside of HRM.

Ms. Pushie wrote the Care Coordinator again on November 28, 2012 pleading with the Department "to take immediate steps to secure an appropriate community placement" for Mr. Delaney.

Dr. Mutiat Sulyman, on behalf of the Emerald Hall clinical team, wrote Claire McNeil, counsel to the Coalition in these proceedings, on April 22, 2013 outlining Mr. Delaney's history and status. Dr. Sulyman confirmed that by the end of July, 2010 "the issues leading to Joseph's admission to Emerald Hall were addressed and he was considered ready for medical discharge with the expectation that he would return to the community". She remarks that as of the date of the letter, he had not been offered a placement. She concludes by saying that "his care needs can be very well managed in the community" and that:

> Mr. Delaney will require a small option home with 24 hour supervision and support with the activities of daily living, in particular daily adherence to his bowel regime and ongoing supervision of bowel function.

An Individual Assessment and Support Plan dated January 19, 2015 confirms his status saying his needs may be met with community resources and the long term goal is to place him in a small options home.

(References omitted)

[83] With respect to the individual complainants, the Board concluded (at pp. 92–93):

> All professional staff who testified and whose reports I have read argued strenuously that Ms. MacLean, Ms. Livingstone and Mr. Delaney be placed somewhere else. Lawyers put their shoulder to the wheel. Effort and advocacy over years came to naught. **The uppermost echelons of government were, by all the evidence, utterly impervious to it all. The Province would not find or create a solution. They could have done something. They chose not to. The moratorium prevailed.**
>
> One wonders about the dynamic of indifference. Departmental staff and, I am persuaded, the Department as an entity itself through its repeated commissioning of reports and studies, begged for the resources to place Ms. MacLean, Ms. Livingstone, Mr. Delaney, and I presume others, out of Emerald Hall. **Successive governments of all political stripes simply ignored everyone over decades and**

> **condemned our most vulnerable citizens to a punishing confinement**. I cannot think in systems here. The "system" through its people knew well what had to be done and strenuously recommended it. People with the final authority were blind, deaf and especially dumb to the effects of what they were doing.
>
> I reject the argument that the Province had no option to retain the three in Emerald Hall. There was no shortage of evidence presented to me about what could have been done, what ought to have been done, or at least tried – design and implement a plan for the three to live in the community. None of the people experienced in these matters, Dr. Bach, Mr. Wexler, Dr. Griffiths and Jim Fagan, thought that it would have been particularly difficult to do so. **Deputy Minister Hartwell readily acknowledged that all disabled people may be accommodated in a small options home.** Certainly, on the basis of their testimony, I am satisfied that Ms. MacLean and Mr. Delaney could have been accommodated in the community and Ms. Livingstone in a nursing home or some similar facility.
>
> (Emphasis added)

[84] The Board concluded the individual complainants had established a *prima facie* case of discrimination (at p. 73):

> In my opinion, the Province's placement or retention of Joey Delaney, Beth MacLean and Sheila Livingstone in the Nova Scotia Hospital and in Emerald Hall was, in and of itself, *prima facie* discriminatory. The Province imposed disadvantages not imposed on others.

[85] It further noted in relation to Ms. Livingstone (at pp. 96–97):

> The Province eventually offered a placement in Yarmouth, but it gave Ms. Cain no option but to agree to Sheila Livingstone's placement there. Ms. Cain wanted her sister out of Emerald Hall. Harbourside Lodge in Yarmouth is over 350 kilometers from Stewiacke where Olga Cain lives. Olga Cain and Sheila Livingstone were very close. Ms. Cain is an older woman. Sensibly, she had a niece, including the witness, Jackie McCabe-Sieliakus, travel with her to visit. Visits were expensive. Ms. Cain and the niece had to stay overnight in Yarmouth when they visited.
>
> To so limit Sheila Livingstone's access to her only family and community supports was, in my view, a denial of meaningful access. Each case will depend on its own circumstances. […] In my view, however, the Province cannot willy-nilly place people at a significant distance from family and friends without risking a denial of meaningful access.

[86] Despite the above observations, it does not appear the Board made a finding of *prima facie* discrimination in relation to Ms. Livingstone's placement in Yarmouth.

[87] In addressing the DRC's complaint of systemic discrimination, the Board was of the view that in order to assess whether "meaningful access" to services had been provided, it was necessary to consider the circumstances of individuals, not groups that share a characteristic. It wrote (at p. 102):

> I am not satisfied that all disabled people who do not have immediate access to services, that is to say are on waitlist, or people who are not on waitlists but are residents of "institutions", are suffering adverse [e]ffects. No general statement, in my view, can be made. Adverse [e]ffects on each individual will have to be assessed before meaningful access can be determined.

[88] On the basis of the above, the DRC's complaint was dismissed.

The remedy hearing

[89] Contrary to what was originally contemplated, the Board did not undertake a justification hearing, but rather proceeded directly to consider remedy. A word of explanation is in order.

[90] The record shows that following the release of the *prima facie* decision, the Province waived the opportunity to justify the findings made in relation to the discrimination experienced by the individual complainants. As such, the Board scheduled a hearing to address what remedies ought to flow from the findings made in its *prima facie* decision.

[91] The remedy hearing was held over three days in September 2019. Given its complaint had been dismissed, the DRC did not participate. To summarize, counsel for the individual complainants sought:

- A declaration that their respective rights to be free from discrimination in the Province's provision of "services" were violated. For Ms. MacLean, this was sought from October 2000 "through to and including the present." For Ms. Livingstone, the period was identified as April 2005 through to her death and for Mr. Delaney, from July 2010 "through to and including the present";

- A mandatory order against the Province in relation to Ms. MacLean and Mr. Delaney to ensure its compliance with the *Act*; and

- An order of financial compensation to Ms. MacLean, Mr. Delaney and the Estate of Ms. Livingstone in the nature of $275,000 to $500,000 per year for each year their respective rights were violated. The complainants submitted the range of awards given in cases of wrongful imprisonment were appropriate comparators to quantifying their financial damages. They further sought pre-judgment interest from the date the complaints were filed.

[92] In response, the Province countered:

- The Board should decline to make a declaration of discrimination, as the Board's *prima facie* decision "speaks for itself";

- The Board should not make any mandatory orders regarding services to be provided to Ms. MacLean and Mr. Delaney as it had "taken significant steps in that regard and no Board order could adequately capture the contingencies involved in providing further residential support" for them;

- It agreed the Board's "ultimate finding of a violation of the *Act*" ought to lead to a financial award "in an amount that goes beyond nominal damages". However, the damages sought by the complainants were not in line with human rights awards. Appropriate financial compensation would be $50,000 for each of Ms. MacLean and Mr. Delaney; and

- The Province did not take a position on the Board's ability to make an award of damages to a complainant's estate but did specifically oppose an award of damages to any individual other than the complainants.

The remedy decision

[93] The Board released its remedy decision on December 4, 2019. It will be discussed in further detail later. For now, it suffices to note the Board's summary of the remedies granted in relation to the individual complainants (at p. 2):

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.

Issues

[94] As noted earlier, all of the parties took issue with the Board's conclusions relating to its *prima facie* discrimination analysis. Further, the individual appellants and the Province assert the Board's remedy decision was flawed, but for different reasons.

[95] After having considered the pleadings along with the written and oral submissions of the parties and Intervenors, we are of the view that the issues to be determined are:

1. Did the Board err in its identification of the test for *prima facie* discrimination?

2. Did the Board err in identifying the "service" in question, and if so, what is the appropriate "service"?

3. Did the Board err by failing to consider, or properly distinguish, the case authorities relied upon by the Province?

4. Did the Board err in not considering, applying and accepting the evidence offered by the Province, which it asserts was relevant to the comparative analysis?

5. Did the Board err by failing to undertake a proper comparative analysis?

6. Based on the law, the Board's factual findings and the record, does a proper *prima facie* analysis support its ultimate conclusion in relation to the individual appellants?

7. Should the finding of *prima facie* discrimination in relation to the individual appellants be returned to the Board for a justification hearing?

8. Did the Board err in concluding a claim of systemic discrimination was unavailable on the evidence before it? If so, does the record establish a *prima facie* case of systemic discrimination?

9. Did the Board's remedy decision disclose an error in principle in the assessment of damages? If so, what is the appropriate quantum of damages to be awarded?

10. Did the Board err in awarding costs to the individual complainants?

Standard of Review

[96] There is consensus among the parties as to the appropriate standard of review. As this is a statutory appeal, the normal appellate standards apply.[21] The *Act*, however, confines our review to questions of law:

> 36(1) Any party to a hearing before a board of inquiry may appeal from the decision or order of the board to the Nova Scotia Court of Appeal on a question of law in accordance with the rules of court.

[97] Based on the above, we will apply a standard of correctness to the issues before us provided they give rise to questions of law or mixed questions of law and fact with an extricable legal principle.

[98] It is also useful to recall the powers of this Court on appeal. *Civil Procedure Rule* 90.48(1) provides:

> Without restricting the generality of the jurisdiction, powers and authority conferred on the Court of Appeal by the *Judicature Act* or any other legislation the Court of Appeal may do all the following:
>
> (a) amend, set aside, or discharge a judgment appealed from;

[21] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

(b) draw inferences of fact and give any judgment, allow any amendment, or make any order that might have been made by the court appealed from or that the appeal may require;

(c) make such order as to costs of the trial, hearing, or appeal as the Court of Appeal considers is in the interest of justice;

(d) direct a new trial by jury or otherwise, on terms the Court of Appeal considers is in the interest of justice, and for that purpose order that the judgment appealed from be set aside;

(e) make any order or give any judgment that the Court of Appeal considers necessary.

Analysis

1. Did the Board err in its identification of the test for prima facie discrimination?

[99] The Province argues on appeal that the Board failed to apply the proper test for discrimination and erred by looking to the *Act* to ground the basis of its analysis. In its factum, the Province explained:

> 46. In this case, all parties in their submissions to the Board proposed that the three-part analysis from *Moore*, […] was the proper framework. The Board notes the test from *Moore*, but does not use it as the framework for the discrimination analysis. **Instead, the Board develops a novel approach based on the wording of s. 4 of the Act**
>
> […]
>
> 47. The Board then applies this analysis at pages 122-127 (though replacing "imposing disadvantages on an individual" with "… an adverse impact … at page 125.)
>
> 48. While it may not be an error in every case to use a different framework than the one set out in *Moore* and adopted by this Court in *Skinner*, it is not clear why the Board in this case chose a framework that no party used as the basis of their arguments. More importantly, the Board's application of its own **novel framework** leaves out considerations that would have been front and center if the framework from *Moore* had been adopted.
>
> (Emphasis added)
> (References omitted)

[100] We are satisfied the Board did not err in law as alleged by the Province. Although it is not uncommon to see reference in the case authorities to the "*Moore* test", the Supreme Court of Canada did not create a test for establishing *prima*

facie discrimination in its judgment. Rather, Justice Abella set out what was required by the British Columbia *Human Rights Code*, R.S.B.C 1996, c. 210 to establish discrimination under that legislation.[22] Although Justice Abella's description is also applicable to the Nova Scotia legislative definition, it is a misnomer to say the "test" is as established in *Moore*. The test is established by the *Act*, interpreted with *Charter* values in mind and with guidance in its application from *Moore* and other authorities.

[101] Further, contrary to the Province's argument, there is nothing in this Court's decision in *Skinner* that supports its assertion the test is found in *Moore* and not the *Act*. The question before the Court in *Skinner* was whether it was discriminatory under the *Act* for a private drug plan to limit reimbursement for the cost of drugs to those approved by Health Canada.

[102] Writing for the Court, Justice Bryson noted "the starting point is the definition of discrimination in s. 4 in the *Act*". He had this to say about *Moore*:

> [33] […] Summarising similar principles to those in the Nova Scotia *Act*, the Supreme Court in *Moore* […] described the test for discrimination in the British Columbia's *Human Rights Code* […]

[103] Justice Bryson's analysis, while referencing *Moore*, is solidly grounded in what s. 4 of the *Act* requires to establish discrimination. For example, when considering the required "distinction" in question he poses:

> [60] The Board does not say how the foregoing constitutes a "distinction" within the meaning of s. 4 of the *Act*. […]

And further:

> [71] Section 4 of the *Act* requires that an impugned "distinction" be "based on" an enumerated ground—in this case a "physical or mental disability." […]
>
> […]

---

[22] Section 8 of the British Columbia legislation provided:

8(1) A person must not, without a bona fide and reasonable justification,

(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or class of persons.

> [73] There must be a connection between the distinction and the adverse treatment or effect—s. 4 says so. So does the Supreme Court.

[104] It is the *Act* that establishes the legislative regime for making, assessing and remedying complaints of discrimination. It identifies what characteristics can ground a finding of discrimination. Although case authorities can provide guidance as to how to apply the schemes created by legislatures, it is the *Act* that must be the starting point of any discrimination analysis.

[105] We have set out several provisions of the *Act* earlier. The "test" for establishing *prima facie* discrimination is found in s. 4:

> 4 For the purpose of this Act, a person discriminates where the person **makes a distinction**, whether intentional or not, **based on a characteristic**, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 **that has the effect of imposing burdens, obligations or disadvantages** on an individual or a class of individuals **not imposed upon others** or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.
>
> (Emphasis added)

[106] The Board did not identify a "novel" framework for its discrimination analysis when it referenced the elements contained in the *Act*. The Province's assertion otherwise is unconvincing. We dismiss this ground of appeal.

> *2. Did the Board err in identifying the "service" in question, and if so, what is the appropriate "service"?*
>
> *3. Did the Board err by failing to consider, or properly distinguish, the case authorities relied upon by the Province?*

[107] The above two issues are related, and we will deal with them together. They are both relevant to the identification of the "service" in question. As we will explain, the answers to the above questions are "Yes" and "No" respectively.

[108] Again, the starting point is the *Act*. Section 5(1)(a) prohibits discrimination on account of mental disability and source of income in "the provision of or access to **services** or facilities" (Emphasis added). "Service" is not defined in the *Act*, but there is guidance to be found in the case authorities.

[109] Consistent with principles of interpretation that apply to human rights statutes as quasi-constitutional documents, "service" is to be interpreted broadly to give effect to the purpose of the *Act* as established by the legislature—as long as the plain meaning of the word is not strained. In *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 the Supreme Court of Canada confirmed a liberal approach is to be taken in considering what may constitute a "service":

> [7] A true purposive approach looks at the wording of the statute itself, with a view to discerning and advancing the legislature's intent. Our task is to breathe life, and generously so, into the particular statutory provisions that are before us.

[110] The identification of the "service" is often determinative of the outcome of a discrimination complaint. This is such a case.

[111] As outlined earlier, before the Board the complainants identified the "service" as being the Province's provision of social assistance generally. The individual complainants submitted they had suffered burdens and disadvantages in their receipt of social assistance that others did not. The DRC identified the same "service" in relation to the systemic claim. The Province argued the "service" in question was not social assistance but suggested to the Board that "supportive housing" was what was at the heart of the complaints.

[112] The Board accepted neither of the options put forward. Rather, without explaining why the "services" proposed by the parties were inappropriate, the Board identified the "services" in question as being "services offered generally to disabled people". On appeal, all of the parties say the Board erred, but for different reasons. We agree the Board's identification of the "service" was in error. To explain why, we will begin by addressing the complaints raised on appeal.

The Province's view

[113] The Province says the Board erred by finding that a complaint of discrimination could be grounded in the provision of a social benefit. In support of this position, the Province relies on *Auton* as well as this Court's decision in *Skinner*. As we will later explain, neither of those cases support the Province's view that social assistance should not be a "service" under the *Act*.

[114] The nature of the dispute in *Auton*, a s. 15 *Charter* case, was summarized by McLachlin C.J., writing for the Court:

> 1 This case raises the issue of whether the Province of British Columbia's refusal to fund a particular treatment for preschool-aged autistic children violates the right to equality under the *Canadian Charter of Rights and Freedoms*. The petitioners are autistic children and their parents. They argue that the government's failure to fund applied behavioral therapy for autism unjustifiably discriminated against them. In the background lies the larger issue of when, if ever, a province's public health plan under the *Canada Health Act*, R.S.C. 1985, c. C-6 ("*CHA*"), is required to provide a particular health treatment outside the "core" services administered by doctors and hospitals.
>
> 2 One sympathizes with the petitioners, and with the decisions below ordering the public health system to pay for their therapy. However, the issue before us is not what the public health system should provide, which is a matter for Parliament and the legislature. The issue is rather whether the British Columbia Government's failure to fund these services under the health plan amounted to an unequal and discriminatory denial of benefits under that plan, contrary to s. 15 of the *Charter*. Despite their forceful argument, the petitioners fail to establish that the denial of benefits violated the *Charter*.
>
> 3 The government must provide the services authorized by law in a non-discriminatory manner. Here, however, discrimination has not been established. First, the claim for discrimination is based on the erroneous assumption that the *CHA* and the relevant British Columbia legislation provided the benefit claimed. Second, on the facts here and applying the appropriate comparator[23], it is not established that the government excluded autistic children on the basis of disability. For these reasons, the claim fails and the appeal is allowed.

[115] The Province relies in particular on two passages within the reasons. We have set out the paragraphs in their entirety, with the portions recited by the Province in its written submissions bolded:

> 41 It is not open to Parliament or a legislature to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect does not offend this principle and does not give rise to s. 15(1) review. **This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner**: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28, at para. 61; *Nova Scotia*

[23] As will be discussed later, the continued requirement of "the appropriate comparator" in s. 15 and human rights challenges has been discredited.

> *(Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83, at para. 55; *Hodge, supra*, at para. 16.

And:

> 46 Such a claim depends on a prior showing that there is a benefit provided by law. **There can be no administrative duty to distribute non-existent benefits equally.** Had the legislature designated ABA/ IBI therapists (or a broader group of therapists which included them) as "health care practitioners" under the *MPA* at the time of trial, this would have amounted to a legislated benefit, which the Commission would be charged with implementing. The Commission would then have been obliged to implement that benefit in a non-discriminatory fashion. However, this is not the case. Here, the legislature had not legislated funding for the benefit in question, and the Commission had no power to deal with it.

[116] The Province says this Court has adopted the principle from *Auton* in *Skinner*. In its factum it explains:

> 44. Without explicitly citing *Auton*, this Court came to a similar conclusion in *Skinner* (which involved a private health plan rather than the public health plan in *Auton*.) In both cases, the service in question was intended for the benefit of the sick or disabled. While the limits of each plan did in each case mean that some disabled people did not receive the benefit of the plan, this did not amount to a distinction based on a disability. The fact that some disabled people's needs were met under the plan did not mean that the failure to meet every need was discriminatory. The adverse effect would be based on the individual's "particular needs" and not the enumerated ground, *per se*.
>
> (Reference omitted)

[117] Before the Board, the Province relied on a number of decisions from tribunals and courts to support its view that the grievances raised by the complaints (which it characterizes as the demand for enhanced disability supports by way of supportive housing) should not be entertained. On appeal, it says the Board erred by failing to consider these authorities. The Province explains in its factum:

> 84. This line of cases clearly establishes that allegations of inadequate benefits for persons with disabilities, of poor treatment of individual recipients, or of general unfairness in the system **are not allegations of discrimination**, and that human rights legislation does not impose an obligation on government to provide supportive community-based housing for persons with disabilities. The Board made no effort to assess or distinguish this line of cases, and in fact made no reference to the cases argued by the Province at all. It is not clear that the Board even turned its mind to the need to address the precedents set by prior tribunal and

> court decisions. This error is worse than that encountered by this Court in *Skinner*, where at least the Board had made an effort, however unpersuasive, to distinguish relevant cases.
>
> (Emphasis added)

[118] The Province submits "services to the disabled" was not a proper "service" for the purposes of a discrimination complaint and the Board erred in so concluding. It further submits, based on the argument outlined above, "social assistance" as proposed by the appellants should also be precluded on the same basis. If there is a "service" to be considered under the *Act*, the Province says it is the provision of housing.

The appellants' view

[119] The appellants say the Board erred in narrowing the "service" in question to those benefits provided by the Province to persons with disabilities. This resulted in the Board's subsequent analysis being "tainted" and leading to an improper comparative analysis (an argument addressed later in these reasons). They submit *Auton* is no longer good law, and there is nothing precluding "social assistance" being a "service" subject to the protections afforded by the *Act* and in accordance with principles of substantive equality. As they had before the Board, the appellants argue the legislative framework under which the Province provides benefits to those in financial need, clearly supports a finding that the "service" under consideration is social assistance generally.

[120] We agree with the appellants' characterization of the "service" in question. To explain why we view the social assistance provided by the Province as the appropriate "service", we will begin with our reasons for rejecting the arguments advanced by the Province.

[121] We do not agree the Province's provision of a social benefit falls outside of the scope of the protections afforded against discrimination in the *Act*. There is nothing in the *Act* that supports such a conclusion. The Supreme Court of Canada has affirmed that given its quasi-constitutional nature, exemptions from human rights legislation must be clearly stated (see for example *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81).

[122] The Province's argument is anchored in case authorities, *Auton* in particular. This Court heard argument as to whether the principle in *Auton* upon which the Province relies remains good law. For the purposes of these reasons, it is not

necessary for us to make such a determination.[24] We are satisfied *Auton* does not assist the Province in its argument relating to the *prima facie* discrimination analysis in the circumstances of this case.

[123] In our view, *Auton* does not stand for the proposition that governments should not be questioned as to whether their provision of social benefits is discriminatory within the meaning of human rights legislation. It does stand for the proposition governments should not be forced, as part of a claim of discrimination, to create benefits that do not exist. Importantly, it expressly recognizes that should a government offer a benefit, it cannot do so in a discriminatory fashion. In our view, the complaints here involve an allegation that the Province is providing an **existing** benefit in a discriminatory manner. We do not view this matter as being one in which the complainants are seeking a non-existent benefit and, as such, *Auton* is of little relevance.

[124] Similarly, *Skinner* does not support the Province's view. In that case, Mr. Skinner's complaint failed because he could not establish a "distinction" as required by the *Act*. Nobody under the plan received coverage for medication unless it was approved by Health Canada, and therefore his denial of non-approved medical marijuana was not a distinction within the meaning of s. 4. Nothing in *Skinner* precludes social assistance from being a "service" within the context of the *Act*.

[125] The Province's argument is also undercut by the existence of case law recognizing government-provided social assistance and benefits as a "service" within the meaning of human rights legislation. See for example *Saskatchewan (Human Rights Commission) v. Saskatchewan (Department of Social Services)*, [1988] S.J. No. 464 (CA); *Alberta (Minister of Human Resources & Employment) v. Weller*, 2006 ABCA 235 and *King v. Govt. of P.E.I. et al*, 2018 PECA 3 ("*King*").

[126] We turn now to the Province's complaint the Board failed to consider "relevant jurisprudence" supportive of its proposition that social assistance should not be the subject of a discrimination complaint or be considered a "service" within the meaning of the *Act*. It again relies on *Skinner*. The Province has presented no other authority in support of the proposition that it was an error of law (the only type of error we can consider) for the Board to not reference, consider or properly

[24] There is no dispute that the "mirror group comparison" espoused in *Auton* has now been overruled by the Supreme Court in subsequent decisions. The Province argues the principle upon which it relies has not been.

distinguish case authorities from other jurisdictions. The Court in *Skinner* did not identify such a failing as an error of law, and explicitly acknowledged the authorities, in that case from Ontario, were not binding on the Board. The same can be said for the authorities the Province presented to the Board and this Court on appeal.

[127] Notwithstanding their lack of binding effect, the Province asks this Court to apply the principles in the authorities overlooked by the Board. It says doing so will lead to a conclusion that the Board's finding of *prima facie* discrimination must be set aside because it erroneously based its conclusion on the "service" in question being services for the disabled. It further argues these authorities should preclude this Court from finding the "service" is social assistance as proposed by the appellants.

[128] Having reviewed the authorities the Province says "favoured [its] position", we are of the view all are distinguishable from the matter before us and do not support the proposition that social assistance cannot be considered a "service" within the context of a human rights complaint.[25]

[129] The appellants say the reasoning in *Moore* supports a conclusion the "service" in question is social assistance generally and not the narrower approach taken by the Board. Indeed, the appellants submit the Board, in confining the "service" in question to those provided to persons with disabilities, made the very errors the Supreme Court of Canada has cautioned against. We agree.

[130] At this juncture, a closer look at *Moore* is warranted. That case concerned the educational needs of Jeffrey Moore, a child with a severe learning disability. Because the intensive remedial instruction Jeffrey required in order to learn to read was not available in the public school system, his parents enrolled him in a specialized private school.

[131] Jeffrey's father subsequently filed a complaint on his behalf under the British Columbia *Human Rights Code* alleging discrimination due to being denied

---

[25] The Province relied upon four Ontario Human Rights Tribunal decisions (*Wood v. Director, Ontario Disability Support Program*, 2010 HRTO 1979; *Glover v. Ontario (Community Services)*, 2010 HRTO 2412; *Northey v. MacKinnon*, 2014 HRTO 1836; and *C.B. v. Ontario (Community and Social Services)*, 2016 HRTO 1409), a decision of the Prince Edward Island Human Rights Tribunal (*Wonnacott v. Prince Edward Island (Department of Social Services & Seniors)*, [2007] P.E.I.H.R.B.I.D. No. 2), a decision of the Ontario Superior Court of Justice (*Brock v. Ontario (Human Rights Commission)*, [2009] O.J. No. 137) and the judgment of the New Brunswick Court of Appeal in *New Brunswick Human Rights Commission v. Province of New Brunswick (Department of Social Development)*, 2010 NBCA 40.

a service on the ground of disability. As it turned out, defining the service in question was the central issue at every level of adjudication that followed. Mr. Moore argued the service was public education generally. The Province of British Columbia said the service should be more narrowly construed as "special education services".

[132] At first instance, the Tribunal identified the service as being public education generally. The failure of the Province of British Columbia to provide the remedial supports Jeffrey required was determined to be *prima facie* discrimination. The Tribunal's decision was challenged before the British Columbia Supreme Court and then the Court of Appeal. In the Supreme Court of Canada reasons, Justice Abella described the outcome of those matters:

> [23] In the Supreme Court of British Columbia, Dillon J. allowed the application for judicial review ([2008] 10 W.W.R. 518). She found that Jeffrey's situation should be compared to other special needs students, not to the general student population as the Tribunal had done. There was no evidence about this comparison, nor was there evidence about how students with special needs were affected by funding mechanisms such as the high incidence/low cost cap or the closing of the Diagnostic Centre. The failure to identify and compare Jeffrey with the appropriate comparator group tainted the entire discrimination analysis. As a result, she set aside the Tribunal's decision.
>
> [24] A majority in the Court of Appeal dismissed the appeal, agreeing that Jeffrey ought to be compared to other special needs students ([2011] 3 W.W.R. 383). To compare him with the general student population was to invite an inquiry into general education policy and its application, which it concluded could not be the purpose of a human rights complaint.
>
> [25] In dissent, Rowles J.A. would have allowed the appeal. In her view, special education was the means by which "meaningful access" to educational services was achievable by students with learning disabilities. She found that a comparator analysis was both unnecessary and inappropriate. The Tribunal's detailed evidentiary analysis showing that Jeffrey had not received sufficiently intensive remediation after the closing of the Diagnostic Centre, justified the findings of discrimination.

[133] Again before the Supreme Court, the identification of the appropriate service was a central issue. Justice Abella concluded:

> [29] […] Defining the service only as 'special education' would relieve the Province and District of their duty to ensure that no student is excluded from the benefit of the education system by virtue of their disability.

> [30] To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Comparing Jeffrey only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396.
>
> [31] If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to. This, as Rowles J.A. noted, "risks perpetuating the very disadvantage and exclusion from mainstream society the *Code* is intended to remedy" (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1237; Gwen Brodsky, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (2012) (online), at p. 41).
>
> (Emphasis in original)

[134] The appellants, correctly in our view, say an overly narrow interpretation of the "service" in question is inconsistent with the liberal approach afforded to human rights legislation and risks repeating the error demonstrated in *Moore*. Applying a narrow lens to the identification of the "service" could lead to prematurely concluding an inquiry into discriminatory treatment before a review on the merits can be conducted. The appellants say such an approach would rob many claimants of the protections intended by the *Act*, and substantive equality.

[135] The appellants argue a review of the legislative framework governing the Province's provision of social benefits to impoverished Nova Scotians, in light of the objects of the *Act*, dictates a finding that social assistance generally is the appropriate "service" and the Board erred in failing to make that finding.

The service is social assistance

[136] Having found the Board erred in principle in its identification of the "service" in question, we will undertake our own analysis. Determining the "service" is a contextual exercise. Here, this necessarily includes consideration of the legislative regime under which the proposed "service" is provided. The *SAA* is the starting point.

[137] From its passage in 1958 until 2001, the *SAA* was the primary statutory vehicle for providing assistance to impoverished Nova Scotians. People needing

assistance, including those with and without disabilities, had their eligibility and entitlement determined under the same regime.

[138] Originally the *SAA* created an obligation on municipalities to provide assistance to eligible persons in need. As referenced earlier, the Province contributed financially to the services administered by municipalities. In 1995, the Province became entirely responsible for funding, and in 1998, the Province became responsible for the administration of all services under the *SAA*.

[139] Prior to 2001, s. 4(d) of the *SAA* defined a "person in need" as a "person who, by reason of adverse conditions, requires assistance in the form of money, goods or services". This definition was applied to both persons living with disabilities as well as the non-disabled who sought financial assistance from the Province. In 2000, the *SAA* was amended, and a "person in need" was confined to "a person who requires financial assistance to provide for the person in a home for special care or a community based option", with the non-disabled to be assisted under the *ESIA*.

[140] Notwithstanding the passage of the *ESIA*, and the change to the definition of "person in need", many of the provisions that had formerly applied to all persons seeking assistance from the Province remain in the *SAA*. We note in particular:

> 9(1) Subject to this Act and the regulations the social services committee **shall** furnish assistance to all persons in need, as defined by the social services committee, who reside in the municipal unit.
>
> (Emphasis added)

[141] Also of note are the *Municipal Assistance Regulations*, first passed under the *SAA* in 1981, and which still remain in effect. In the regulations, "assistance" is defined broadly and encompasses many types of aid:

> 1 In these regulations
>
> […]
>
> (e) "assistance" means the provision of money, goods or services to a person in need, including
>
> (i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,
>
> (ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements,

> funeral and burial expenses and comforts allowances. The Director may approve other items of special requirement he deems essential to the well being of the recipient,
>
> (iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,
>
> (iv) care in homes for special care,
>
> (v) social services, including family counselling, homemakers, home care and home nursing services;
>
> (vi) rehabilitation services.
>
> […]

[142] The regulations further set out standards expected in the provision of assistance. We note:

> 2(1) The Social Services Director of the Committee **shall**
>
> […]
>
> (c) determine the immediate and continuing eligibility of each applicant;
>
> (d) provide assistance in accordance with the provisions of the Act, these regulations and the municipal social services policy;
>
> […]
>
> (k) grant assistance to those persons who are eligible **effective**
>
> (i) **the date of the application**, if the person meets the eligibility requirements of the Act, these regulations and the municipal social services policy on that date, or
>
> (ii) the day the person meets the eligibility requirements of the Act, the regulations, and the social services policy;
>
> […]
>
> (Emphasis added)

[143] A further standard is set out as follows:

> 4(1) Assistance **shall** be provided on the budget deficit system whereby a person's financial needs are calculated pursuant to these regulations and the municipal social services policy as approved pursuant to these regulations. Where

> the needs exceed the income, assistance **shall** be granted in the amount by which the needs are in excess of the income.
>
> (Emphasis added)

[144] Since the Province took over administration of the *SAA* from the municipalities, it has not sought to amend the legislation. The statutory obligations previously placed on municipal Social Services Directors or committees now rest with the Province's Minister of Community Services. We are satisfied the above provisions of the *SAA* and regulations create a statutory obligation on the Province to provide eligible persons with assistance effective as of "the date of application".[26]

[145] The *ESIA* contains similar provisions in many respects to the *SAA*. For example, "assistance" is defined as:

> 3 In this Act,
>
> (a) "assistance" means the provision of money, goods or services to a person in need for
>
> (i) basic needs, including food, clothing, shelter, fuel, utilities and personal requirements,
>
> (ii) special needs,
>
> (iii) employment services.
>
> […]

[146] Further "person in need" means:

> a person whose requirements for basic needs, special needs and employment services as prescribed in the regulations exceed the income, assets and other resources available to that person as determined pursuant to the regulations.

[147] Finally, similar obligatory language appears in the *ESIA* regarding the provision of assistance:

> 7(1) Subject to this Act and the regulations, the Minister **shall** furnish assistance to all persons in need.
>
> (Emphasis added)

[26] Recall that the individual appellants had all been found to be "eligible" to receive "assistance" under the *SAA*.

[148] We are satisfied given the historical development of the legislation, the *SAA* and *ESIA* should not be viewed as separate vehicles for the delivery of social benefits to eligible Nova Scotians, but rather a single comprehensive scheme to address poverty. The testimony of Deputy Minister Hartwell entirely supports such a conclusion. Notably, she described the services offered by virtue of the two statutes as "functionally intertwined", and that those found eligible for assistance under either should expect to seamlessly transition between programs if their needs change.

[149] The Province would have this Court look at one narrow aspect of the assistance available to disabled persons—the provision of housing—as the "service" in question. In our view, the ameliorative objects of the *Act*, its liberal interpretation, the statutory context outlined above and the warnings to be vigilant against applying approaches that impede substantive equality, all support a broader view. The "service" at the heart of the complaints is properly framed as social assistance generally. When using this term, we mean benefits available to a person deemed "eligible" under the *SAA*. As the next section demonstrates, the identification of the relevant "service" is determinative of whether the complainants can establish a "distinction" based on mental disability as required by s. 4 of the *Act*.

> *4. Did the Board err in not considering, applying and accepting the evidence offered by the Province, which it asserts was relevant to the comparative analysis?*
>
> *5. Did the Board err by failing to undertake a proper comparative analysis?*

[150] These issues are related and will be dealt with together.

[151] Again, there is unanimity in the view the Board erred in its comparative analysis. In searching for a distinction, the Board compared the circumstances of the individual appellants to other persons with disabilities in receipt of benefits for the disabled. The individual appellants say this approach is flawed as it is an example of the now discredited "mirror comparator group" analysis. We agree. As we will discuss later when reviewing the Board's rejection of the DRC's claim of systemic discrimination, its comparison of the individual appellants to others who are disabled was one of the errors that led it astray.

[152] The Province asserts the Board failed to undertake a "meaningful comparative analysis" and explained this concern in its written submissions as follows:

> 61. Discrimination, as a concept, is inherently comparative. As this Court points out in *Skinner, supra*, courts have evolved the methodology for comparisons, and rely less on a "mirror comparator group approach", but comparison remains key to the analysis. In this case the Board failed to give life to the comparative nature of equality by failing to do any meaningful comparative analysis.
>
> 62. The comparison proposed by the Province was not the kind of problematic search for a mirror comparator group with precisely the same characteristic as the Complainants, which was the approach criticized in *Withler*. The Province's position is simply that the appropriate analysis should compare the experience of disabled and non-disabled persons when it comes to the service in question, residential support from the Province. This is a broad and general comparison, specific to the context of the actual service in question. It is exactly the sort of comparison which would have allowed the Board to assess whether the Complainants' experiences were "based on" the enumerated ground of disability.
>
> 63. To make this comparison, the Province provided evidence as to the residential supports it provides to persons without disabilities, through Housing Nova Scotia. This evidence—which was not disputed—showed that supportive housing for persons without disabilities was not guaranteed as of right, involved limited capacities, did not always provide beneficiaries their preferred living environment, and involved waitlists. This is very similar to the limitations of the DSP which affected the Complainants. The bottom line is, there is no guaranteed right to government-provided housing in Nova Scotia, for disabled or non-disabled persons alike. As much as there are dissatisfactions with the residential supports provided for persons with disabilities, as much as there are legitimate calls for reform, the problems do not involve a differential treatment of persons with disabilities compared with non-disabled persons, and so are not problems of discrimination under the Act.
>
> […]
>
> 65. There is nothing in the Board's decision which even acknowledges this comparative argument by the Province, let alone addresses it. And, the Board adopts no meaningful comparative argument in the alternative. This error alone is enough to make the Board's decision not just incorrect, but unreasonable.

(Reference omitted)

[153] In addition to *Skinner*, the Province relies on the Prince Edward Island Court of Appeal's reasons in *King* in support of its view that a comparative analysis remains mandatory in establishing discrimination. In *King*, the Court set aside a

board's finding of *prima facie* discrimination because it had failed to identify an appropriate comparator group in its consideration of whether the claimant had shown differential treatment. The Province says on this basis, the Board's finding of discrimination in relation to the individual appellants should be similarly set aside.

[154] We reject the Province's submission on two bases. First, this complaint relies upon the acceptance of its earlier argument the appropriate "service" is residential housing, and not social assistance. We have rejected this argument. Therefore, the "meaningful comparative analysis" sought by the Province is inapplicable. In this context, the Board choosing not to reference the evidence it heard about the nature of public housing does not give rise to an error of law.

[155] We could dismiss the Province's complaint regarding the Board's comparative analysis at this point—the Board cannot, in considering whether a distinction was established, be faulted for failing to compare the complainants' circumstances to those who apply for public housing. However, we are of the view that it is also of benefit to address the Province's broader assertion that the failure to undertake a "meaningful comparative analysis" as part of a *prima facie* discrimination determination constitutes an error of law. In our view, boards and courts should exercise caution in viewing a structured comparative analysis as being a mandatory aspect of a discrimination analysis as asserted by the Province. We will explain.

[156] The *Act* does not say a comparative analysis to another identifiable group is mandatory. That being said, we acknowledge doing so may, in some cases, assist a claimant in establishing *prima facie* discrimination. We return to the wording of the *Act*:

> 4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

[157] The definition of discrimination contemplates a distinction being drawn between a claimant and "others" in relation to the imposition of "burdens, obligations or disadvantages". Although "others" could in some complaints be an identifiable group, it does not have to be. Recall that in considering a similar

statutory provision in *Moore*, Justice Abella articulated three factors to demonstrate *prima facie* discrimination:

- The complainant has a characteristic protected under the legislation;
- The complainant experienced an adverse impact with respect to the service; and
- The protected characteristic was a factor in the adverse treatment.

[158] Notably, in setting out these requirements, Justice Abella did not mandate a "meaningful comparative analysis". Indeed, referencing principles from *Charter* equality jurisprudence, she cautioned:

> [30] […] It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396.

[159] The Province, in arguing the Board ought to have compared the barriers being experienced by the individual appellants to the similar hurdles experienced by those accessing public housing services, despite its arguments to the contrary, is endorsing the same problematic approach Justice Abella cautioned against.

[160] The use of comparator groups is one area where *Charter* equality jurisprudence has "cross-pollinated" the human rights jurisprudence.[27] It has long been recognized that human rights legislation is quasi-constitutional in nature and must be given a large, purposive and liberal interpretation with *Charter* values incorporated into the interpretive process.[28] Principles emanating from *Charter* jurisprudence serve to enhance the interpretation and scope of human rights legislation. However, caution must be taken not to permit s. 15 jurisprudence to restrict the expressed intent of legislators in the human rights context.[29]

[161] With the above in mind, we turn to the relevant *Charter* jurisprudence. The Supreme Court's decision in *Withler v. Canada (Attorney General)*, 2011 SCC 12 marked a new approach to the use of comparison for equality-seekers, with the

---

[27] See the comments of Rowles J.A. in her dissenting reasons in *Moore*, 2010 BCCA 478.
[28] *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571.
[29] See *International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6.

pursuit of substantive equality animating the change. Writing for the Court, Chief Justice McLachlin and Justice Abella wrote:

> [39] Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.
>
> [40] It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.

[162] Further, the "proper approach to comparison" was set out as follows:

> [61] The substantive equality analysis under s. 15(1), as discussed earlier, proceeds in two stages: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp*, at para. 17.) Comparison plays a role throughout the analysis.
>
> [62] **The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).**
>
> [63] **It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based**

> **on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.**
>
> [64] In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). This will often occur in cases involving government benefits, as in *Law*, *Lovelace* and *Hodge*. In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds. Thus in *Granovsky*, the Court noted that "[t]he CPP contribution requirements, which on their face applied the same set of rules to all contributors, operated unequally in their effect on persons who want to work but whose disabilities prevent them from working" (para. 43). In that kind of case, the claimant will have more work to do at the first step. Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group.
>
> (Emphasis added)

[163] In the years that followed, the Supreme Court of Canada consistently reinforced the cautionary use of identifiable groups as an aspect of establishing an actionable distinction in the equality jurisprudence. In *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 Justice Abella wrote:

> [25] Since *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, this Court has emphasized substantive equality as the engine for the s. 15 analysis (*R. v. Kapp*, [2008] 2 S.C.R. 483; *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61; *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548). The test for a *prima facie* violation of s. 15 proceeds in two stages: Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds? If so, does the law impose "burdens or den[y] a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating . . . disadvantage" (*Taypotat*, at paras. 19-20).
>
> [26] **The first step of the s. 15(1) analysis is not a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases. Rather, its purpose is to ensure that s. 15(1) of the *Charter* is accessible to those whom it was designed to protect. The "distinction" stage of the analysis should only bar claims that are not "intended to be prohibited by the *Charter*" because they are not based on enumerated or analogous grounds — which are "constant markers of suspect decision making or**

> **potential discrimination"** (*Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, at para. 33; *Taypotat*, at para. 19, quoting *Corbiere v. Canada (Minister of Indian and Northern Affairs*), [1999] 2 S.C.R. 203, at para. 8). The purpose, in other words, is to exclude claims that have "nothing to do with substantive equality" (*Taypotat*, at para. 19, quoting Lynn Smith and William Black, "The Equality Rights" (2013), 62 *S.C.L.R.* (2d) 301, at p. 336). For that reason it is not appropriate, at the first step, to require consideration of other factors — including discriminatory impact, which should be addressed squarely at the second stage of the analysis. The focus must remain on the *grounds* of the distinction.
>
> [27] And when identifying the distinction and the grounds for it, this Court in *Withler* rejected a search for "mirror comparator" groups:
>
> > […] a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed . . . . What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context . . . . [para. 40]
>
> A mirror comparator group analysis "may fail to capture substantive inequality, may become a search for sameness, [and] may shortcut the second stage of the substantive equality analysis" (para. 60).
>
> (Italicized emphasis in original)
> (Bolded emphasis added)

[164] Recently, Justice Karakatsanis confirmed the continuation of the above principles in *Ontario (Attorney General) v. G*, 2020 SCC 38 at paras. 44–47. She also noted the importance of the pursuit of equality for persons with disabilities:

> [61] In our society, persons with disabilities regrettably "face recurring coercion, marginalization, and social exclusion" (R. Devlin and D. Pothier, "Introduction: Toward a Critical Theory of Dis-Citizenship", in D. Pothier and R. Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (2006), 1, at p. 1). As this Court has recognized, "[t]his historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw" (*Eldridge*, at para. 56). In reality, persons with disabilities are not flawed, nor can they all be painted with the same brush. While they may share experiences of "[s]tigma, discrimination, and imputations of difference and inferiority" (D. Wasserman et al., "Disability: Definitions, Models, Experience" in E. N. Zalta et al., eds., *Stanford Encyclopedia of Philosophy* (2016) (online), at §3.2), diversity within those labelled disabled is not the exception but the rule (see, e.g., E. Barnes, *The Minority Body: A Theory of Disability* (2016), at p. 9). Section 15's promise of respect for "the equal worth and human dignity of all persons" (*Eldridge*, at para. 54) requires that those with

> disabilities be considered and treated as worthy and afforded dignity in their plurality. And s. 15's guarantee that discrimination not be given the force of law requires careful attention to the diverse impacts that government action will have on those with disabilities.

[165] We are satisfied the same principles should animate the pursuit of equality under human rights legislation. Although the *Act* sets out a definition of discrimination that engages comparisons to "others", a finding of *prima facie* discrimination does not require the identification of any particular comparison group or any formulistic comparative analysis. Although a complainant may use comparison to another identified group as **evidence** of a distinction and resulting burden or disadvantage (which is what the complainants did here), a failure to do so does not necessarily doom the complaint. We do not accept the Province's assertion this Court in *Skinner* has said otherwise.

[166] Further, we acknowledge *King* is supportive of the Province's position that some formal comparative analysis is necessary. There, the Court of Appeal opined "[l]ocating the appropriate comparator is necessary in identifying differential treatment and the grounds of the distinction".[30] With respect, we disagree. In doing so, we note the court did not consider the applicability of the principles outlined above in the *Charter* equality jurisprudence and, accordingly, do not regard its view that an appropriate comparator group is required as being persuasive.

[167] For the above reasons, we reject the Province's assertion the Board erred in law by failing to undertake a "meaningful comparative analysis".

> *6. Based on the law, the Board's factual findings and the record, does a proper prima facie analysis support its ultimate conclusion in relation to the individual appellants?*

[168] We are satisfied a proper analysis fully supports the Board's conclusion that the Province *prima facie* discriminated against the individual complainants by virtue of their unnecessary institutionalization at the Nova Scotia Hospital. However, we are also of the view that broader findings of *prima facie* discrimination should have been made in relation to Beth MacLean and Sheila Livingstone.

---

[30] 2018 PECA 3 at para. 45.

[169] In relation to each of the individual appellants, the *Act* dictates they establish:

- The Province made "a distinction" in "the provision of […] services";
- The distinction was "based on" a protected characteristic; and
- The distinction "has the effect of imposing burdens, obligations or disadvantages" on them "not imposed upon others".

[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.

[171] The following distinctions are relevant to the individual appellants' assertions of discrimination:

- There is no expectation or risk that a non-disabled person found eligible for "assistance" may find themselves unnecessarily placed in an institution.[31] The individual appellants clearly had a different experience in their receipt of social assistance. To retain them in an institutional setting (here the Nova Scotia Hospital), when they did not need to be there in order to receive the assistance that the Province was obligated to provide, is a clear and compelling distinction from others in receipt of social assistance; and
- In order to receive the "assistance" for which they have been found eligible, persons without disabilities are not faced with moving from their communities of choice in order to receive it. The Board referenced Deputy Minister Hartwell's evidence that "people on income assistance receive that assistance as of right when they qualify. That assistance is mandated by law. Income assistance is portable. No one is told where to live to receive the

[31] Our use of the term "unnecessary" institutionalization (which includes hospitalization) is meant to convey that nothing about the individual's personal circumstances necessitates their residency in a congregate care facility or medical facility. Importantly, in considering whether a placement is necessary or unnecessary, that determination rests upon the needs of the individual, not the convenience or financial implications to the Province.

> benefit". In contrast, Sheila Livingstone's receipt of assistance from the Department of Community Services was contingent on agreeing to a placement in Yarmouth. Although the placement could have been declined, given the physical abuse to which she was being subjected at Emerald Hall (as found by the Board), she really had no meaningful "choice".

[172] With respect to the second element, the Board committed no legal error in concluding "mental disability", a protected characteristic under the *Act*, was a factor in the distinctions noted above.

[173] Regarding the final element, the Board made strong findings the individual appellants suffered serious detriment by virtue of their extended stay at the Nova Scotia Hospital well past the time their medical conditions required. Given the evidence, this conclusion is irrefutable and fully supports that the individual complainants suffered disadvantages not imposed on others.

[174] Although the Board defined the "service" too narrowly, and then erroneously compared the individual appellants to other disabled persons, its conclusion that their unnecessary institutionalization at the Nova Scotia Hospital was discriminatory is correct. In our view, the issues raised by the parties on appeal have overly complicated what is a simple analysis. The DRC in its post-hearing submissions to the Board succinctly captured the nature of the discrimination suffered by the individual appellants:

> 577. It is the complainants' position that the institutionalization of persons with disabilities is discriminatory and can only be justified on the same basis as for the non-disabled – when it is necessary for health treatment. Just as for the non-disabled, institutionalization is otherwise justifiably regarded as a form of punishment. The rationalisation in favour of providing institutional arrangements and facilities for persons with disabilities depends upon an ableist construct of "separate but equal" treatment, the rejection of which was remembered in *Moore*. The Province's continued reliance on institutions as residential options for persons with disabilities, results in a society based on "mainstream" attributes where persons with disabilities are segregated and arbitrarily grouped based on their perceived "otherness" or disabilities. This form of segregation itself is a form of discrimination.

[175] Simply put, at the heart of the claim of the discrimination is this: to place someone in an institutional setting where they do not need to be in order to access their basic needs, which the Province is statutorily obligated to provide, is discriminatory.

[176] Having reached the above conclusion, we are satisfied broader findings of *prima facie* discrimination should have been made in relation to Beth MacLean and Sheila Livingstone. We will address each in turn.

[177] Ms. MacLean, as a result of being found "a person in need" under the *SAA* was, from an early age, placed in institutional settings. In our view, the evidence establishes, as does the Board's factual findings, her circumstances were not such that she required institutionalization. Her complaint sought to cover the time frame from 1986, when "mental disability" was added as a protected characteristic to the *Act*, to present; a request she repeated on appeal.

[178] We do not agree it is appropriate to extend the finding of discrimination back to 1986. The named respondent in the complaint is the Province of Nova Scotia. However, the Province did not take over administration of the *SAA* from municipalities until 1998. Ms. MacLean argues the Province's provision of funds to municipalities is sufficient to anchor its responsibility for her discriminatory treatment. Given the evidentiary record, we decline to do so.

[179] However, the Province did have the obligation to deliver social assistance to Ms. MacLean in a non-discriminatory fashion from 1998 forward. We are satisfied the record establishes she was unnecessarily institutionalized at Kings from 1998 to 2000 and this constitutes a distinction from the provision of social assistance to non-disabled persons at that time. Although there was less evidence about Ms. MacLean's placement at that facility, the record demonstrates that well before 1998, the Province recognized the institutionalization of persons with mental disabilities did not serve to meet their needs. We are satisfied being unnecessarily institutionalized from 1998 to 2000 was a disadvantage for Ms. MacLean. Finally, we are satisfied the distinction in Ms. MacLean's treatment was based, at least in part, upon her mental disability. Having concluded the three elements required to establish *prima facie* discrimination are met on the record before us, we extend the Board's finding of discrimination to cover the period of 1998 to 2000.

[180] With respect to Ms. Livingstone, given the Board's finding she was elderly and ill, we cannot determine her placement at Harbourside constituted unnecessary institutionalization. What is clear, however, is Ms. Livingstone was differentially treated by virtue of her placement in Yarmouth. Based on the evidence of Deputy Minister Hartwell, to receive income assistance under the *ESIA*, eligible persons are not required to relocate. Ms. Livingstone's move resulted in fewer family

visits, a clear detriment not suffered by non-disabled recipients of social assistance. The Board's finding of *prima facie* discrimination in relation to Ms. Livingstone ought to have encompassed the period she was placed in Yarmouth.

> *7. Should the finding of prima facie discrimination in relation to the individual appellants be returned to the Board for a justification hearing?*

[181] There is no question the Province is entitled to a justification hearing pursuant to s. 6 of the *Act* in relation to this Court's two expanded findings of *prima facie* discrimination.[32] What is more contentious is whether the Province should now be entitled to attempt to justify the Board's original finding of *prima facie* discrimination relating to the individual complainants' unnecessary retention at the Nova Scotia Hospital simply because this Court applied a different analysis but reached the same conclusion.

[182] The Board did not undertake a s. 6 justification hearing in relation to its finding the Province had *prima facie* discriminated against the individual appellants due to their unnecessary placement at the Nova Scotia Hospital. Because the Province waived its right to a justification hearing, the Board proceeded to a remedy hearing.

[183] In response to questioning from the Court during the appeal hearing, the Province asserts if the Board's *prima facie* determination were upheld on the basis of a different analysis, it would request the opportunity to justify that conclusion. It asks in that case, the Court remit the matter back to the Board for a s. 6 hearing.

[184] Although acknowledging the Province's right to justify any expanded finding of *prima facie* discrimination arising from the appeal, the individual appellants say the Province waived that opportunity in relation to their placement at the Nova Scotia Hospital. They say forcing them to respond to a justification hearing at this stage would be unfair, particularly given their circumstances and long history of suffering well-documented disadvantages.

[185] We decline to remit the finding of discrimination based on the individual appellants' placements at the Nova Scotia Hospital to the Board for a justification hearing. In the circumstances of this case, it would be inappropriate to do so, and would constitute an unreasonable burden on the individual appellants. In reaching

---

[32] For clarity, it will be up to the Province to determine whether it will seek to justify the expanded findings of *prima facie* discrimination. These reasons should not be viewed as making such a hearing obligatory.

this conclusion we note, in addition to waiving its right to a justification hearing before the Board, the Province has never as part of its pleadings in this Court requested a justification hearing as a potential remedy.

[186] Further, in its factum, the Province clearly contemplated the possibility of the Board's finding of *prima facie* discrimination being upheld. It knew the individual appellants were asking that the Board's finding in relation to their time at the Nova Scotia Hospital be upheld albeit on the basis of an alternate analysis. The Province did not raise the issue of a justification hearing, nor did it request one in its written submissions.

[187] We are satisfied the possibility of a justification hearing in relation to the individual appellants' placement at the Nova Scotia Hospital was never in the Province's contemplation until it was raised by questions from the panel in the course of the appeal hearing. We are further satisfied the individual appellants could not have anticipated that argument being made given the earlier waiver, the pleadings and written submissions filed by the Province. In the circumstances, we do not accede to the Province's request that the finding of discrimination relating to the individual appellants' retention at the Nova Scotia Hospital be remitted to the Board for a justification hearing.

> *8. Did the Board err in concluding a claim of systemic discrimination was unavailable on the evidence before it? If so, does the record establish a prima facie case of systemic discrimination?*

[188] Before undertaking our analysis, it is useful to consider the relevant legal principles.

[189] Systemic discrimination is not defined in the *Act*, although the concept is well-established in human rights jurisprudence. The phrase "systemic discrimination" was first used by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at pp. 1138–1139:

> A thorough study of "systemic discrimination" in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis." (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge Abella chose not to offer a precise definition of systemic discrimination,

> the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report:
>
> > Discrimination … means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ….
> >
> > It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.
> >
> > This is why it is important to look at the results of a system ….
>
> In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (see the Abella Report, pp. 9-10). To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged. […]

[190] The reasons why human rights jurisprudence has developed to encompass systemic discrimination are described by Gwen Brodsky, Shelagh Day & Frances Kelly, in their 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.

[191] It is not surprising that complaints of systemic discrimination arise in relation to the treatment of persons with disabilities. In 1997, the Supreme Court

of Canada described the experience of disabled persons in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624:

> 56 It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; see generally M. David Lepofsky, "A Report Card on the *Charter's* Guarantee of Equality to Persons with Disabilities after 10 Years -- What Progress? What Prospects?" (1997), 7 *N.J.C.L.* 263. This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms; see Sandra A. Goundry and Yvonne Peters, *Litigating for Disability Equality Rights: The Promises and the Pitfalls* (1994), at pp. 5-6. One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed; see Minister of Human Resources Development, *Persons with Disabilities: A Supplementary Paper (1994)*, at pp. 3-4, and Statistics Canada, *A Portrait of Persons with Disabilities* (1995), at pp. 46-49.

[192] As noted earlier, the definition of discrimination is set out in s. 4 of the *Act* and includes actions that have the effect of imposing burdens, obligations or disadvantages on individuals or classes of individuals. The remedial power of a board of inquiry after making a finding of discrimination is very broad:

> 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.

[193] This jurisdiction includes the ability to make remedial orders with systemic impact; however, as the Supreme Court of Canada noted in *Moore*, a finding of discrimination with respect to an individual complaint does not open the door to the granting of broad systemic relief:

> [62] *Meiorin* and *Grismer* also directed that practices that are neutral on their face but have an unjustifiable adverse impact based on prohibited grounds will be subject to a requirement to "accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them" (*Grismer*, at para. 19).
>
> [63] In that sense, it is certainly true that a remedy for an individual claimant can have a 'systemic' impact. In *Grismer*, for example, the issue was a rule that excluded individuals with a medical condition affecting peripheral vision — homonymous hemianopia — from obtaining a drivers' licence. The Court concluded that this rule had a discriminatory impact on Mr. Grismer and upheld the Tribunal's order that the Superintendent test Mr. Grismeri individually. Although the remedy was individual to Mr. Grismer, it clearly had remedial consequences for others in his circumstances. Similarly, a finding that Jeffrey suffered discrimination and was entitled to a consequential personal remedy, has clear broad remedial repercussions for how other students with severe learning disabilities are educated.
>
> [64] But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether *Jeffrey* was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.
>
> (Emphasis in original)

[194] In this matter, the Board's broad jurisdiction was triggered because the DRC filed a complaint alleging systemic discrimination. It was ultimately dismissed by the Board on the basis that a *prima facie* case of systemic discrimination had not been proven. The DRC alleges the Board used the wrong test for such a claim and thereby committed an error of law. It asks us to apply the proper test to the circumstances and make a finding of *prima facie* discrimination. It submits the matter should then be returned to a different board of inquiry, with the Province being given an opportunity to provide justification under s. 6(f) of the *Act*.

[195] In order to provide context for our assessment of the Board's decision, we will return to the particulars of the DRC complaint and how it was described to the Board. We will then consider the Board's findings with respect to systemic discrimination and assess its legal analysis.

Evolution of the DRC's systemic discrimination complaint

[196] The amended complaint, filed on August 1, 2014, consolidated the allegations of the individual complainants and the DRC. In that document, the DRC described the discriminatory treatment by the Province as follows:

> 136. The Province's treatment of the individual complainants, and the adverse impact of the Province's failure to provide meaningful access to public assistance that will enable them to live in the community, is part of a systemic failure that will adversely affect many persons with disabilities who are in need of public assistance in Nova Scotia at some point in their lifetime. In the case of the individual complainants, these adverse impacts include both the harmful effects on their physical and mental health of being effectively forced to live in a locked psychiatric ward and the adverse consequences of being deprived of the opportunity to live and participate to the extent possible in the community. These are typical of the types of impacts of the Province's failure to provide supports and services to persons with disabilities.
>
> 137. At a systemic level, some individuals with disabilities need supports that non-disabled individuals do not need in order to live in the community and exercise some control over their lives. Thus, for persons in need and in receipt of social assistance, equality/non-discrimination require recognition of differential need; it is discriminatory not to provide for the necessary supports tailored to individual needs as they may change over time.

[197] After noting the discrimination alleged by the individual complainants typified the systemic problems, the DRC provided particulars of their specific allegations:

> 149. Beyond the specific context of Emerald Hall, the DRC is aware that the individual complainants are representative of a much larger group of individuals in Nova Scotia who, based on their poverty and disability, have been deprived of access to government supports and services which would enable them to live in the community and participate as full citizens in our society.
>
> 150. The DRC believes that there are hundreds and hundreds of people with disabilities in Nova Scotia, who are in need of community-based, supportive housing but whose needs the Province has failed to respond to. Many hundreds of these are people who are needlessly institutionalized, many in jails and prisons, many hundreds of others in RRCs and ARCs.
>
> 151. The DRC alleges that the current patchwork of options for community based living for persons with disabilities involves long delays and opaque criteria and waiting lists, based primarily on the needs of institutions not on individuals.

152. The failure to provide timely access to community living supports and services can result in unnecessary detention in institutional settings, and harm to individuals through loss of life choices, exclusion, segregation, mental, psychological and at times physical harm.

153. In accessing community based housing options, persons with disabilities may face a multitude of barriers over the course of their lifetime. Many individuals rely on parental support, but as parents grow older, and individual needs increase, often family support options are no longer tenable because of the undue burden it places on families and the insufficient support that is offered to individuals.

154. Without personal or family financial resources, many persons with disabilities must look to charitable or government funded housing options in order to be included in their communities. Based on their own financial resources many individuals with disabilities are not able to finance the supports and services they require in order to live in the community. Accordingly, they require government services and supports. The DRC is actively involved in promoting the development of policies, programs, services and supports for the meaningful inclusion of persons with disabilities in the community in order to strengthen accessible and inclusive government programs, policies and services.

155. Inadequate supports and services impact individuals with disabilities in a number of ways; physically, mentally and psychologically. Where inadequate supports and services result in unnecessary institutionalization, as occurred to the individual complainants in this case, the harm that can result is especially serious.

156. Individuals placed outside their community of origin may find their contact with family and friends greatly curtailed, and thus their emotional and psychological support and health undermined, due to financial and health constraints that prevent people from travelling.

157. Depending on the nature of the institution, and the condition of the other residents, detention in an institution may result in assault or other threats to personal security. It may result in psychological harm and mental deterioration, as persons are deprived of interactions with the community at large.

158. The unnecessary institutionalization of disabled persons creates a barrier to their social inclusion, and perpetuates stigma and stereotypes associated with disabled persons and their abilities to participate in society and their communities. Effectively, it separates disabled persons from their communities, and excludes them from an equal opportunity to enjoy a full and productive life, contrary to the purposes of the *Human Rights Act*.

[198] The complaint said the systemic discrimination was not limited to those persons with disabilities who are unnecessarily institutionalized while they wait for services:

> 168. Instead of being provided with the necessary and appropriate services, they have been denied meaningful access to supports and services that will allow them to live in the community, and/or have been placed on waitlists while they are unnecessarily institutionalized and/or held in care facilities that do not accommodate their needs.

[199] In its pre-hearing brief filed with the Board, the DRC focused its arguments on the issue of inappropriate institutionalization of persons with disabilities:

> 64. The Respondent is responsible for providing community based options to persons with disabilities who require financial assistance. As the evidence will show, the Respondent has managed, administered, funded and maintained a system where many individuals who are fully capable of living in the community are forced to choose between remaining in an institutional facility, or going to a homeless shelter or park bench.
>
> 65. In the words of Justice Ginsburg, of the US Supreme Court, the institutional placement of persons who can handle and benefit from community based options "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life … Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."
>
> 66. The purpose of the Nova Scotia *Human Rights Act* is to bring an end to discrimination against disadvantaged groups in our society. As the jurisprudence shows, the history of discrimination against persons with disabilities is marked by isolation, segregation, and lack of opportunities for growth and development that comes with being part of mainstream society. This Board of Inquiry will address these important issues in the context of the ongoing unnecessary institutionalization of persons with disabilities in Nova Scotia.

(Reference omitted)

[200] The post-hearing brief of the DRC outlined the issue of the institutionalization of persons with disabilities but went on to say the systemic complaint included persons who were in other accommodation circumstances:

> 604. In particular, since 1986 to the present, the following practices by the Respondent, and adverse effects experienced by the Complainants and persons with disabilities who require supports and services to live in the community, violate section 5 of the *Human Rights Act*:
>
> > 1 The Province's support for the provision of supports and service through residential care options to the Complainants and other persons with disabilities **in congregate care or institutionalized settings** is *prima*

> *facie* discriminatory and a violation of section 5 of the *Human Rights Act*; and
>
> 2 The impact of the Province's practices and policies that have resulted in unreasonable wait times for the persons with disabilities, including the individual complainants who require supports and services to live in the community is *prima facie* discriminatory and a violation of section 5 of the *Human Rights Act*; and
>
> 3 The **delay** in providing appropriate supports and services results in adverse effects not just on individuals who are unnecessarily institutionalized such [as] in <u>forensic hospitals, prisons, acute care psychiatric hospitals, and long term residential facilities such as RRCs, ARCs and RCFs, but also on those who find themselves in inappropriate settings in the community, such as homelessness, homeless shelters, or inadequately supported in their own homes</u>. These delays are *prima facie* discriminatory and a violation of section 5 of the *Human Rights Act*;
>
> 4 The Province's **failure to provide supports and services** to the Complainants and other persons with disabilities **in the community of their choice**; while limiting supports and services to locations that are at an unreasonable distance from their homes and family, friends or other loved ones is *prima facie* discriminatory; and a violation of Section 5 of the *Human Rights Act*; and
>
> 5 The **denial** of supports and services to eligible persons with disabilities based on the Province's classification/assessment tool;
>
> 6 The Province's provision of supports and services to the Complainants and other persons with disabilities on a **discretionary basis**, rather than an 'as of right' or entitlement basis is *prima facie* discriminatory and a violation of Section 5 of the *Human Rights Act*.
>
> (Bolded emphasis in original)
> (Underlined emphasis added)

[201] It is clear from the DRC complaint and its submissions to the Board that the alleged systemic discrimination was not limited to persons in the same circumstances as the individual complainants (i.e. those who were kept in an institutional setting due to the absence of supports that would have allowed them to live in the community).

Findings of the Board of Inquiry in relation to the systemic complaint

[202] The Board dismissed the systemic discrimination complaint. This conclusion was based on its view that evaluation of the allegedly discriminatory provision of social assistance to persons with disabilities required an assessment of

whether each individual had been given "meaningful access" to that service (at p. 99):

> I also refer to paragraph 393 at page 121 of the Complainants' post-hearing brief:
>
> > The Board is being called upon to apply s. 5 of the *Human Rights Act* to hold that for the Province to, *inter alia*, institutionalize persons with disabilities as a means of providing them with residential supports is discriminatory.
>
> I also quote from the end of the Complainants' post-hearing written submission:
>
> > The Province's support for the provision of supports and service through residential care options to the Complainants and other persons with disabilities in congregate care or institutionalized settings is *prima facie* discriminatory and a violation of section 5 of the *Human Rights Act*;
>
> I do not accept that I would be justified in making such a draconian pronouncement under the *Human Rights Act* or in my role as a Board of Inquiry serving under it. The theme of my opinion is, however, that all is governed by 'meaningful access' for the individual.
>
> In my view, meaningful access provides the code and no general analysis of the role of 'institutions' or another analysis based on free-standing rights can apply. I say, in other words, that one cannot construct a freestanding right to any particular service on demand by any disabled person. The argument for a generalized human right to access to a particular service detaches the right from the *Human Rights Act* itself.

[203] In evaluating the individual complaints, the Board had no difficulty concluding unnecessary institutionalization in a psychiatric hospital was discriminatory (at p. 75):

> The Province's placing them in a unit designed and operated for and occupied by people in an acute stage of a mental illness, and then withholding or limiting their access to other Community Services' facilities, distinguished them from other disabled people. Being on a waitlist while residing in an acute care unit of a psychiatric hospital is to be distinguished from being on a waitlist while residing at home or another facility. Ms. MacLean, Mr. Delaney and Ms. Livingstone were, among all people on waitlists for residential supports, distinguished by having, through their placement at Emerald Hall, disadvantages imposed upon them not imposed on others on Community Services waitlists. Ms. MacLean, Mr. Delaney and Ms. Livingstone were, among all people on waitlists for residential supports, distinguished by having, through their placement at Emerald Hall, opportunities, benefits and advantages open to others on Community Services waitlists, limited or withheld from them.
>
> […]

> Their very placement and retention in the acute care unit of a mental hospital speaks for itself in distinguishing them from disabled people placed in other Community Services or Health and Wellness facilities or awaiting placement while living elsewhere.

[204] In relation to the individual complainants, the Board considered whether they would suffer an adverse impact if they were placed in a residential facility other than a small options home. The Board concluded that they would be (at p. 93):

> 'Meaningful access' does not stand alone. It must be linked to analysis under the definition of discrimination in the *Act* or the factors in paragraph 33 of *Moore*. Disability is a constant and so is their disability as a factor in their placement. The questionable factor in discrimination analysis is whether the three were still placed at a disadvantage. In other words, would they still have 'experienced an adverse impact with respect to the service' to be placed at Quest, or CTP, or King's, or another facility for all those same years? In my view, the answer is still yes. The evidence is clear that Ms. MacLean and Mr. Delaney could have been placed in a small options home. The evidence is clear that living in a small options home is better than living in a larger facility. They are, in my view, at a disadvantage as long as they are not living in a small options home properly prepared for them.
>
> (Reference omitted)

[205] The DRC argued that all persons on the wait-list suffered a disadvantage resulting in discrimination. The Board rejected this argument and concluded the wait-list was not *prima facie* discriminatory (at pp. 97–98):

> The Complainants' submission boils down to the argument that waitlists are *prima facie* discriminatory. I disagree. Some services can be rolled out as a matter of routine to people in general. Others will be more complex and will require a work up. Each disabled person will have to be assessed individually and a placement worked out with them for a placement that best suits their needs. I accept that finding an appropriate place for a disabled person may take time.
>
> In any event, and more importantly, the relationship between waitlists and discrimination is, in my view, to be determined individually on the basis of meaningful access as prescribed by *Moore*. The rule is meaningful access and meaningful access can only be determined in the individual case.

[206] The Board repeated this conclusion when considering the systemic complaint (at p. 102):

> I am not satisfied that all disabled people who do not have immediate access to services, that is to say are on waitlists, or people who are not on waitlists but are residents of ‘institutions’, are suffering adverse [e]ffects. No general statement, in my view, can be made. Adverse [e]ffects on each individual will have to be assessed before meaningful access can be determined.

[207] The evidence at the hearing indicated a range of residential options, which were potentially available for persons with disabilities, from small options homes in the community to larger facilities. The Board concluded it was not the imposition of an adverse impact to deny an individual their particular choice of residential arrangement in a specific community (at p. 103):

> The Coalition's argument leads me to another concern related to whether there are adverse effects or not; that is what I called during the hearing "the granular" nature of discrimination under the Coalition's argument. It seems to me that if one constitutes a freestanding right to services, a right vested in the disabled person to services tailored to their needs and desires and delivered promptly upon application and approval, then any denial of a particular service becomes discriminatory. One lives in a group home in the community with seven other people, but one wants to live in a small options home with three other people. One lives in a small options home, but wants to live alone in a supported apartment. One lives in a small options home in Windsor, but wants to live in a small options home in Smith Settlement. Discrimination may become fine indeed. Discrimination becomes a dispute about the quality of the service. In my view, it is not an imposition of an adverse effect, a denial of meaningful access and discriminatory, for the Province to say it will grant the one service, but not the other or, subject always to meaningful access, a particular quality or location of service.

[208] Having considered its reasons, we are satisfied the Board erred in conflating the individual and systemic discrimination complaints. The individual complainants sought remedies personal to them for the discrimination suffered. The systemic complaint of the DRC requested broad remedies intended to alleviate practices and policies that were said to disadvantage a large number of persons with disabilities. It did not seek compensation or a similar personal remedy for any individual member of the group.

[209] For a systemic complaint to succeed, it is not necessary to establish everyone with the protected characteristic was adversely affected in a direct sense. The Supreme Court of Canada made this point in *Janzen v. Platy Enterprises Ltd.*, [1989] S.C.J. No. 41:

> 62 The fallacy in the position advanced by the Court of Appeal is the belief that sex discrimination only exists where gender is the sole ingredient in the discriminatory action and where, therefore, all members of the affected gender are mistreated identically. While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically. In nearly every instance of discrimination the discriminatory action is composed of various ingredients with the result that some members of the pertinent group are not adversely affected, at least in a direct sense, by the discriminatory action. To deny a finding of discrimination in the circumstances of this appeal is to deny the existence of discrimination in any situation where discriminatory practices are less than perfectly inclusive. It is to argue, for example, that an employer who will only hire a woman if she has twice the qualifications required of a man is not guilty of sex discrimination if, despite this policy, the employer nevertheless manages to hire some women.

[210] As previously noted, the Board dismissed the systemic discrimination complaint because of the view that all potential members of the group needed to prove they suffered a disadvantage or burden. The practical result of such an approach is that no meaningful systemic remedies could ever be awarded. The DRC would be required to present evidence concerning the individual circumstances of a large number of persons with disabilities who were disadvantaged as a result of the Province's policies concerning social assistance. Such evidence might be required if compensation or other individual remedies were sought but is not needed to impose systemic measures to alleviate discriminatory practices. The expense and time involved in the approach adopted by the Board would be massive and represent a practical impediment to pursuing system wide remedies.

[211] Having concluded the Board erred in its test for systemic discrimination, the DRC urges us to apply the correct test and make a finding of *prima facie* systemic discrimination.

[212] We must not forget the caution offered by the Supreme Court of Canada in *Moore* with respect to the scope of systemic remedies that are available in cases of individual discrimination:

> [64] But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether *Jeffrey* was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.
>
> (Emphasis in original)

[213] In order for a board of inquiry to engage in a broad-based analysis concerning the systemic impact of allegedly discriminatory policies, the complaint must be framed in that fashion. Such an inquiry cannot be undertaken in response to an individual complaint of discrimination.

[214] The DRC complaint does allege the delivery of social assistance to persons with disabilities was done in a way that was systemically discriminatory. However, the scope of the systemic discrimination complaint advanced by the DRC is not completely clear. In some of its submissions, it alleges the discriminatory policies and practices are those that deny persons with disabilities the right to live in the residential setting of their choice (usually argued to be small options homes) in their preferred community. The evidence does not establish a *prima facie* case of discrimination in such broad terms.

[215] The evidentiary burden required in order to establish a *prima facie* case of systemic discrimination is not high and once it has been met, the burden shifts to the respondent to justify the potentially discriminatory conduct. The Supreme Court of Canada in *Moore* described this two-step process (cited earlier, repeated here for ease) as follows:

> [33] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[216] The Province provides assistance and support for persons who are eligible to receive it in order to live at a minimum level of dignity and self-worth. As

explained earlier, these resources are provided under the auspices of the *SAA* and *ESIA*. As the Deputy Minister indicated in her testimony, these legislative schemes are interrelated and inseparable. The Board reviewed the Deputy Minister's evidence on this subject and concluded (at p. 85):

> These two Acts of the legislature provide a continuum of services to the disabled in need from the basic income support, through assistance with special needs to full-time expensive residential care and support. I am satisfied, too, from her evidence that this is the way Deputy Minister Hartwell herself views the legislation she administers. I can see, for the purposes of their application to the disabled, no substantial difference between the two Acts, except in terms of the scale of the services they offer. The scale of the opportunities, benefits and advantages, or the fact that as one escalates one may encounter waitlists, does not, in my view, make any significant difference for the disabled.

[217] Prior to 2001, all assistance provided to impoverished Nova Scotians fell under the *SAA*. In that year, the *ESIA* came into force and some programs, particularly related to income and employment, were delivered under that legislation. Section 2 sets out the purpose of the *ESIA*:

> 2 The purpose of this Act is to provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency.

[218] In addition, the recitals to the *ESIA* include:

> WHEREAS independence and self-sufficiency, including economic security through opportunities for employment, are fundamental to an acceptable quality of life in Nova Scotia;
>
> […]
>
> AND WHEREAS the Government of Nova Scotia recognizes that the provision of assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance are the concern of all Nova Scotians;

[219] Although there is no express purpose clause nor recitals in the *SAA*, similar principles should be applied in assessing the programs delivering support and services under that legislation. As stated by the Deputy Minister, and found by the Board, persons with disabilities are potentially entitled to assistance under both statutes depending upon their circumstances. However, non-disabled persons are excluded from the assistance offered under the *SAA* because the definition of a

"person in need" is limited to those who require assistance in a home for special care or community based option.

[220] Despite the integrated and interrelated nature of the assistance regimes, support under the *SAA* is not provided in the same manner as under the *ESIA*. For the latter, anyone who is eligible receives the assistance without delay. According to the Deputy Minister, there is no budgetary cap and support is provided to everyone who is eligible whether they are persons with disabilities or not. With the assistance under the *SAA*, the situation is very different and limits on funding and resources restrict the availability of support.

[221] The impact of the manner in which the *SAA* assistance is provided is that persons do not always receive assistance once they are determined to be eligible. This has significant and potentially severe implications for those persons with disabilities who are eligible for assistance. It can lead to unreasonable and unnecessary institutionalization, as it did for the individual complainants. As the evidence before the Board indicates, there are long wait-lists of persons who are eligible but not receiving assistance in the form of support and services under the *SAA*. According to a memorandum prepared by the Deputy Minister in January 2012, there were 273 persons entitled to support and assistance who were receiving no services whatsoever. The memorandum described the work required to improve and expand the continuum of services as being urgent. At the time of the hearing, the situation had not improved, with the number of eligible persons receiving no services climbing to over 400.

[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* creates a disadvantage that is unique to them and not applicable to assistance given to non-disabled persons under the *ESIA*. 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*.

> *9. Did the Board's remedy decision disclose an error in principle in the assessment of damages? If so, what is the appropriate quantum of damages to be awarded?*

[224] The individual complainants and the Province both appeal from the damages awarded by the Board. The broader issue stated above has several discrete components. From the individual complainants' appeal and the Province's cross-appeal, the following sub-issues arise:

(a) Did the Board err in its determination of the general damage awards to Beth MacLean and Joseph Delaney?

(b) If the Board erred in its determination of the general damage awards for Ms. MacLean and Mr. Delaney, what is the appropriate amount of general damages to be awarded to them?

(c) Did the Board err in failing to award any damages to the estate of Sheila Livingstone?

(d) Did the Board err in awarding damages to Ms. Livingstone's sister and niece?

[225] It is well-settled that appellate courts should not alter damage awards made by a trier of fact unless: there is no evidence on which a trier of fact could have reached the conclusion it did; the trier proceeded on an incorrect principle; or, the amount reached was wholly erroneous (John Sopinka, John Gelowitz & W. David Rankin, *Sopinka and Gelowitz on the Conduct of an Appeal*, 4th ed. (Toronto: LexisNexis, 2018) at pp. 116–17; *Feser v. Candelora*, 2021 NSCA 49 at para. 3).

> *(a) Did the Board err in its determination of the general damage awards to Beth MacLean and Joseph Delaney*

[226] Both the individual complainants and the Province say the Board erred in the manner in which it assessed damages for the individual complainants; however, they take diametrically opposed views of the impact of the error. The Province says the error resulted in exorbitant awards to the individual complainants that are not in keeping with principles governing general damages in human rights cases.

The individual complainants say the awards are too low for Ms. MacLean and Mr. Delaney and an amount should have been awarded to Ms. Livingstone's estate for the violation of her human rights. We will address compensation for Ms. Livingstone separately in the next issue.

[227] The Board's authority to provide remedies for discriminatory conduct is found in the *Act*:

> 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 [...]

[228] The authority granted is broad and should be interpreted accordingly (*Cashin v. Canadian Broadcasting Corp.*, 1990 CanLII 650 (CHRT) at para. 12 (Can. Trib.)).

[229] The case law consistently indicates that assessment of damages for discriminatory conduct is much more of an art than a science (see for example *Association of Management, Administrative and Professional Crown Employees of Ontario (GAM) v. Ontario (Health)*, 2019 CanLII 118346 (ON GSB)). However, there are some established key principles.

Purpose of awards and factors to consider

[230] Russel W. Zinn explains the purpose of discrimination awards in *The Law of Human Rights in Canada* (looseleaf) at **§16:10**:

> **The purpose of awarding damages in discrimination cases has been said to prevent further discrimination rather than to punish the wrongdoer. However, tribunals will also seek to put the complainant into the position he would otherwise have been but for the discriminatory conduct.**
>
> In *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, Chief Justice Dickson, for the majority, stated:
>
> > The purposes of the [*Canadian Human Rights 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.

> In *Cashin v. Canadian Broadcasting Corp.*, **the Tribunal stated that the remedial powers of adjudicators should be interpreted broadly. The remedy for discrimination should make the victim whole by putting the complainant into the position he or she would have been but for the discrimination**. The tort test of reasonable foreseeability does not apply in human rights law.
>
> (Emphasis added)

[231] The Board in *Y.Z. v. Halifax Regional Municipality*, (2019 NS HRC Decision on Remedy) ("*Y.Z.*") concisely sets out the following general principles relating to damage awards for discrimination:

> 1. Boards of Inquiry may award damages for the harm and injury to a Complainant's dignity and self-respect and to recognize the humiliation suffered as a result of discrimination or harassment.
>
> 2. Some of the considerations in assessing general damages in the human rights context are addressed at paragraph 67 of *Marchand v. 3010497 Nova Scotia Ltd.* (2006), 56 CHRR D/178 (NSBOI):
>
> > In considering an appropriate range of general damages I am guided by a number of factors, which are, I believe relevant. [...] The relevant factors include the following:
> >
> > a) The redress for the harm suffered by the discriminatory conduct, which in this case I consider to be economic, sociological (impacting an entire family) and emotional;
> >
> > b) the need to ensure that a message is delivered to the [Respondents] and others that human rights must be respected; and
> >
> > c) the need to ensure that the award does not appear to be so small as to constitute a minor cost of doing business, such as to encourage risk taking.
>
> 3. Further relevant considerations are set out in *MacTavish v. Prince Edward Island*, 2009 PESC 18:
>
> > 49 The court must take a common sense, fair and equitable approach to any award of general damages. It must take into account the principles outlined above. General damages in human rights cases are not intended to punish the wrongdoer. They reflect a recognition by society that one has been harmed by the actions of another. The harm we speak of with dignity and self-respect of the victim. **We must attempt to restore, but not reward.** We must be realistic and consider whether any award bears a reasonable relationship to other awards for similar discrimination.
>
> (Emphasis added)

[232] With respect to general damages, the Alberta Court of Appeal in *Walsh v. Mobil Oil Canada*, 2013 ABCA 238 adopted the reasoning in *Arunachalam v. Best Buy Canada Ltd*, 2010 HRTO 1880 ("*Arunachalam*"), which set out the following two-factor approach to assessing damages:

> [60] The Ontario Human Rights Commission recently outlined the criteria for awards of general damages: see *Arunachalam v Best Buy Canada Ltd*, 2010 HRTO 1880 (Ont Human Rights Trib). **The first aspect is to characterize the injury based on the nature of the discriminatory conduct, depending for example, on how serious or prolonged the conduct was. The second is to recognize the complainant's particular experience in response to the discrimination.** To the extent that a complainant has experienced particular emotional difficulties as a result, this will likely increase the amount of the award.
>
> (Emphasis added)

[233] The Ontario Human Rights Tribunal explained in *Arunachalam*:

> [46] Monetary compensation for injury to dignity, feelings and self-respect recognizes that the injury to a person who experiences discrimination is more than just quantifiable financial losses, such as lost wages. **The harm, for example, of being discriminatorily denied a service, an employment opportunity, or housing is not just the lost service, job or home but the harm of being treated with less dignity, as less worthy of concern and respect because of personal characteristics, and the consequent psychological effects.** [...]
>
> > […] Often the harm to intangible interests [affected] by a breach of rights will merge with psychological harm. But a resilient claimant whose intangible interests are harmed should not be precluded from recovering damages simply because she cannot prove a substantial psychological injury.
>
> [47] The principle that intangible losses are compensated with monetary awards is not unique to statutory human rights law. [...]
>
> [48] While principles from other areas of law may be useful analogies, the Tribunal's approach to the exercise of its remedial discretion must be centered in the values of and statutory language in the *Code*. *Code* damages are meant to compensate, not punish, and *Code* violations, unlike some other areas of law, arise in a variety of very different social and legal contexts.
>
> [49] Damages for *Code* violations, as in other areas of law, must be fair to both the applicant and respondent(s), given the violations of the *Code* found: see *Ward, supra*, at para. 53. Damages under the *Code* must not be so low as to trivialize the social importance of the *Code* by effectively creating a license fee to discriminate (see *Lane, supra* at para. 152). At the same time, *Code* damages for intangible losses should not be "unduly high": see *Ward, supra* at para. 54, referring to the

> approach of courts in other jurisdictions to damages for violations of constitutional rights. [...]
>
> [50] In a system in which many decisions on the merits are made each year, there is a particular importance that damage awards for intangible losses be consistent and principled. [...]

(Emphasis added)

[234] The Tribunal went on to apply the above-described approach to assessing damages in the discrimination context:

> [52] I turn now to the relevant factors in determining the damages in a particular case. The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 at para. 16.
>
> [53] The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> [54] The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 at paras. 34-38.

[235] *Sanford v. Koop*, 2005 HRTO 53 ("*Koop*"), recently cited in *Arunachalam*, identifies the following criteria as relevant to assessing the impact on the individual and their particular experiences in response to the offending conduct (at para. 35):

- Humiliation experienced by the complainant;
- Hurt feelings experienced by the complainant;

- A complainant's loss of self-respect;
- A complainant's loss of dignity;
- A complainant's loss of self-esteem;
- A complainant's loss of confidence;
- The experience of victimization;
- Vulnerability of the complainant; and
- The seriousness, frequency and duration of the offensive treatment.

[236] Where the complainant is particularly vulnerable, the award may be significantly higher (see for example *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107; *Y.Z.* at para. 36).

[237] With these principles in mind we will now turn to the Board's decision and assess whether it erred in law in determining the quantum of damages.

[238] The Board awarded $100,000 in general damages each to Ms. MacLean and Mr. Delaney. Its decision on how it arrived at this amount is relatively short (at pp. 14–15):

> 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 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.

[239] In reaching this conclusion, the Board noted the potential benefit to Ms. MacLean and Mr. Delaney of a large damage award was limited because of their disabilities (at p. 11):

> […] 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.

[240] Finally the Board concluded that a larger award would not likely have a deterrent effect against the Province (at p. 16):

> 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.

[241] In our view, the Board made a number of legal errors in its determination of the damage awards. We will address them in turn.

Arbitrary compensation awards

[242] The Board awarded Mr. Delaney general damages of $100,000 for his discriminatory institutionalization. The Board awarded the same amount to Ms. MacLean even though her discriminatory institutionalization, on the Board's reasoning, was for approximately twice the length of time as Mr. Delaney.

[243] The Board made no effort to provide reasoning for its failure to grant awards that are commensurate with the duration of discriminatory institutionalization, harm suffered or the vulnerability of the complainants (*Walsh*; *Arunachalam*; and *Koop*). With respect, the Board failed to explain the basis or methodology for the figure at which it arrived. There is simply no reason either via precedent or application of guidelines established by the case law to understand the Board's thought process. The Board itself described the quantum of damages as "arbitrary".

[244] In *Arunachalam*, the Tribunal set out the following guidance (adopted by the Ontario Court of Appeal in *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520):

> [51] Cases with equivalent facts should lead to an equivalent range of compensation, recognizing, of course, that each set of circumstances is unique. Uniform principles must be applied to determine which types of cases are more or

> less serious. Of course there will always be an element of subjective evaluation in translating circumstances to dollars, **but the Tribunal has a responsibility to the community and parties appearing before it to ensure that the range of damages based on given facts is predictable and principled**.

(Emphasis added)

[245] In our view, the Board erred in principle in failing to provide any rational basis for the damage awards for Ms. MacLean and Mr. Delaney. It simply chose an arbitrary amount without regard to their individual circumstances.

Reduction of damages due to appellants' disabilities was inappropriate

[246] Although the Board denied doing so, it erred by limiting the awards to Ms. MacLean and Mr. Delaney because it viewed their disabilities as preventing them from benefiting from large damage awards. Though not decided in the context of a human rights code complaint, *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 ("*Syndicat national*") is instructive on this point.

[247] *Syndicat national* dealt with a class action filed on behalf of a group of patients whose care had been neglected while members of the hospital staff were on an illegal strike. The trial judge awarded compensation to the patients and the Court of Appeal affirmed its decision.

[248] Before the Supreme Court of Canada, the appellant union argued:

> 54. [...] [T]he patients of the Hospital could not receive compensation in the amount awarded since they were unable, because of their mental condition, to take any satisfaction therefrom. [...].

[249] The Supreme Court determined:

> 68. [...] [T]he right to compensation for moral prejudice is not conditional on the victim's ability to profit or benefit from monetary compensation: [citations omitted]. Preference should, therefore, be given to the objective characterization of moral prejudice in Quebec; this is also much more consistent with the fundamental principles of civil liability.
>
> 69. In fact, in Quebec civil law, the primary function of the rules of civil liability is to compensate for prejudice. This objective requires that there be compensation for the loss suffered or the opportunity for profit lost because of the

> wrongful conduct, regardless of whether the victim is capable of enjoying the substitute pleasures. […]

[250] This case is distinguishable in that it deals with a class action award for moral prejudice under the *Civil Code of Québec*, rather than a discrimination claim. However, the general principle assists—the Supreme Court of Canada confirmed damage awards to a person (or persons) with a mental disability should not be reduced on the basis that the recipient cannot appreciate or enjoy the award in the way a person without a disability might.

[251] The result of the Board's approach is that discrimination against people with mental disabilities would be compensated on a lower scale, effectively, because their quality of life is lower.

[252] There would also be less incentive for individuals or organizations to avoid discrimination if violations of human rights of victims with disabilities would garner reduced awards. Conversely, people who do not live with disabilities, on the reasoning of the Board, would be awarded greater compensation because they would have the capacity to benefit from it. Such an outcome or approach should not be condoned. The Board erred in considering Ms. MacLean's and Mr. Delaney's disabilities as relevant factors in limiting their awards.

> *Deterrence awards are not effective and should not seek to effect system change*

[253] The Board found that a large damage award would not likely have a deterrent effect vis-à-vis the Province. This is opposite to the approach taken in *Y.Z.* where the Board noted the size and resources of HRM weighed in favour of a larger damage award (at para. 37).

[254] In *Vancouver (City) v. Ward*, 2010 SCC 27 ("*Ward*") the Supreme Court of Canada cited the critical role that deterrence plays in arriving at damage awards against governments to compensate for rights violations. Deterrence is a real, necessary and significant factor:

> [29] […] Deterrence, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. […] Similarly, deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.

[255] Similarly, in the context of human rights awards, this Court in *Nova Scotia (Human Rights Commission) v. Multibond Inc.*, 2003 NSCA 122 held:

> [21] […] The *Act* has a mixed purpose; a public interest to deter and eliminate discrimination on the bases enumerated in s. 5 of the *Act* and a private interest to remedy specific violations of the *Act*. […]

[256] In *Walsh*, the Alberta Court of Appeal also commented on the importance of an award acting as a deterrent against future discriminatory conduct:

> [31] Human rights legislation must be accorded a broad and purposive interpretation having regard to its fundamental purpose: to recognize and affirm that all persons are equal in dignity and rights and to protect against and compensate for discrimination. **In addition to compensating victims of discrimination, the remedial authority under human rights legislation serves another important societal goal: to prevent future discrimination by acting as both a deterrent and an educational tool**: *Robichaud v. Brennan*, [1987] 2 S.C.R. 84 (S.C.C.).
>
> [32] Damage awards that do not provide for appropriate compensation can minimize the serious nature of the discrimination, undermine the mandate and principles that are the foundation of human rights legislation, and further marginalize a complainant. **Inadequate awards can have the unintended but very real effect of perpetuating aspects of discriminatory conduct**.
>
> [33] Human rights tribunals recognize that both pecuniary and non-pecuniary, or general, damages can and should be awarded in appropriate cases. [...]
>
> (Emphasis added)

[257] We are of the view that the Board erred in failing to take into account the deterrent impact of any damage award that it might make.

[258] Based on the above, we would allow this ground of appeal and set aside the Board's general damage awards to Ms. MacLean and Mr. Delaney.

(b) If the Board erred in its determination of the general damage awards for Ms. MacLean and Mr. Delaney, what is the appropriate amount of general damages to be awarded to them?

[259] Having determined the Board erred in principle in its determination of the general damages to be awarded to Ms. MacLean and Mr. Delaney, we must now decide the appropriate amount of general damages to be awarded to them. As noted earlier, the Province takes the position that the damages are inordinately high

and indeed higher than any damage award made in Nova Scotia by $20,000 referring to the Board's decision in *Y.Z.* It suggests $50,000 for each of Ms. MacLean and Mr. Delaney would be appropriate. However, like the Board's awards in this case, the Province fails to give any principled reasoning for arriving at that figure.

[260] The individual appellants argue they should be awarded $250,000 to $500,000 per year for every year in which they were wrongfully institutionalized. They say the situation here is analogous to wrongful conviction cases and should result in damages for Ms. MacLean between $4 million and $8 million. For Mr. Delaney it would be between $2.5 million and $5 million. As will become apparent, we also reject that approach.

[261] To assess the appropriate quantum of damages, we return to the two-part test set out in *Arunachalam* as follows:

- Characterize the injury based on the nature of the discriminatory conduct including how serious or prolonged the conduct was; and
- Recognize the complainant's particular experience in response to the discrimination.

[262] The factors to be considered in this approach include the following impacts on the complainants:

- Humiliation;
- Loss of self-respect;
- Loss of dignity;
- Loss of self-esteem;
- Loss of confidence;
- The experience of victimization;
- Vulnerability of the complainant; and
- The seriousness, frequency and duration of the offensive conduct (see for example *Koop*).

[263] In *Ward*, although dealing with a *Charter* breach, the Supreme Court of Canada provided guidance for approaching cases where the loss is non-pecuniary. In particular, it made reference to what has become known as a trilogy of cases which set the general damage limit for the most catastrophic of injuries at, what is in today's dollars, approximately $400,000:

> [50] In other cases, like this one, the claimant's losses will be non-pecuniary. Non-pecuniary damages are harder to measure. Yet they are not by that reason to be rejected. Again, tort law provides assistance. Pain and suffering are compensable. Absent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case. **In extreme cases of catastrophic injury, a higher but still conventionally determined award is given on the basis that it serves the function purpose of providing substitute comforts and pleasures**: *Andrews v. Grand & Toy*.

(Emphasis added)

[264] We will now turn to the circumstances of the individual complainants. We have set out their backgrounds earlier. Some will be repeated for ease of reference.

Ms. MacLean

[265] Beth MacLean was 50 years of age at the time of her death. She lived with a mild to moderate intellectual disability. She left the care of her parents at age 12 because of her behavioural challenges.

[266] In 1986 at the age of 14, she was placed in Kings where she lived for the next 14 years. In 2000, due to her acting out and an incident of property damage, Ms. MacLean was discharged from Kings and transferred to the Nova Scotia Hospital where she remained for 16 years.

[267] In her complaint, Ms. MacLean described the effect of the violations on her rights as follows:

> 42. This affected me in may ways. I have, effectively, been forced to remain in a locked unit in a psychiatric hospital even though I neither wanted nor needed to stay in the hospital. I have been unable to properly develop or to receive an education. I have been deprived of the chance to work and do other things in the community. I have been exposed to the problems of living in a psychiatric ward including noise and the risks of violence.

[268] She also described the impact of her living arrangements at Emerald Hall:

> 43. The fact that I remain at Emerald Hall presents two problems for me:
>
> a. I cannot develop as a person to the fullest extent possible – including learning to live and thrive as a member of a community.
>
> b. In addition, my continued detention in Emerald Hall causes my mental and physical health and wellbeing to suffer.

[269] Ms. MacLean was housed in Maritime Hall at the Nova Scotia Hospital from October 24, 2000 to July 31, 2007. In November 2002, Ms. MacLean was assessed as being ready to leave the hospital. From July 31, 2007 to June 22, 2016, she was housed in Emerald Hall at the Nova Scotia Hospital.

[270] The Board described the conditions at the Nova Scotia Hospital and, in particular, Emerald Hall (at p. 37):

> Emerald Hall is an acute psychiatric unit forming part of a psychiatric hospital in Dartmouth, the Nova Scotia Hospital. The purpose of Emerald Hall is to provide short term psychiatric treatment to people who are very ill and then, when their illnesses have stabilized, see that they are, depending on their needs and existing supports, discharged to their families, the community, or some care facility.
>
> Emerald Hall is locked. Staff turnover is high and staff rotate on shifts making the building of personal relationships with residents difficult. Residents have to conform to the hospital clock. Meals arrive on hot carts. Even bathing is scheduled. 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. 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 lose even the ability to carry out personal care and soon need staff for even ordinary tasks. 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.**

(Emphasis added)

[271] The Board had strong words for the use of Emerald Hall as a place to hold people who were not mentally ill (at p. 78):

> The Province knew that it should not hold people in Emerald Hall who were not mentally ill. The Province's own staffs repeatedly told the Province it should not. The Province's outside consultants repeatedly told the Province it should not. The involvement of counsel and indeed this proceeding, now four and a half years old, moved it not. I refer to Dr. Griffiths' specific report of April, 2006. The Province knew then that it should move people who were disabled, but not acutely ill mentally, out of Emerald Hall. The Province, year in and year out, was simply obdurate.

[272] The Board went on to find that the treatment of Ms. MacLean resulted in frustration to her and was "soul-destroying". It described the Province's response to her needs as indifferent and over time contemptible (at p. 17):

> I refer to other remonstrances to the Province later in this opinion. Suffice it to say for now, however, that I cannot imagine how frustrating and even soul-destroying it must have been for Ms. MacLean to live in hope and to have those hopes dashed day by day. I cannot imagine how frustrating it must have been for the good and faithful servants of the Province, all dedicated to Ms. MacLean's welfare, to have their opinions and advice ignored in 2002 and for the next 13 or 14 years. The Province met their pleas with an indifference that really, after time, becomes contempt.

[273] The nature of the discriminatory conduct was serious and prolonged—Ms. MacLean was institutionalized at the Nova Scotia Hospital for approximately 14 years when it was not necessary. It is apparent on the evidence accepted by the Board that the Province's conduct towards Ms. MacLean had a significant and lasting impact on her. She was eligible to be discharged from the Nova Scotia Hospital in 2002 but languished there for the next 13 or 14 years. She was capable of living a productive life in the community but was denied that opportunity. Her mental and physical well-being deteriorated while she was institutionalized. Ms. MacLean was denied any opportunity for something resembling a normal life.

[274] The Province's "soul-destroying" conduct must be met with a substantial damage award to compensate her and to have a deterrent effect to prevent others being treated in a similar manner.

[275] We consider an appropriate award of general damages in relation to Ms. MacLean's unnecessary retention at the Nova Scotia Hospital is $300,000.

[276] Ms. MacLean passed away after the Panel decided the appeal but before the reasons were released. We will request supplementary submissions regarding the

impact, if any, on the payment of the damage award to Ms. MacLean's estate. We retain jurisdiction to deal with that issue following submissions from the parties.

Mr. Delaney

[277] Mr. Delaney is 49 years of age. He lives with a severe intellectual disability and cyclical mood disorder. His complaint was originally brought on his behalf by his mother Susan Lattie. Upon her death, Mr. Delaney's sister, Tammy Delaney, continued in her mother's place. He lives with challenges related to epilepsy and chronic constipation.

[278] From 1996 until January 2010, Mr. Delaney lived in a small options home. During this time he worked at a job at the Burnside Industrial Park, travelling to and from by bus.

[279] In January 2010, he was hospitalized at Emerald Hall to regulate his medication. By July 2010, he did not require hospitalization and could return to a placement in the community. He remained at Emerald Hall until February 2015 when he was transferred to Quest and was returned to Emerald Hall in January 2017, where he remained at the time of the hearing awaiting a community placement.

[280] In the complaint, Ms. Lattie described the effects of the alleged violations on her son:

> 115. This affected Joey in many ways, including that: he was effectively forced to remain in a locked unit in a psychiatric hospital even though he neither wanted nor needed to stay there; he has been unable to develop as fully as possible, to live and work and do things in the community that almost everyone else does; he has been exposed to the problems of living in a psychiatric ward including excessive noise and risk of violence.
>
> 116. When he lived in a small options home, Joey was able to work at Dartmouth Adult Services Centre 5 days a week and he enjoyed interacting with the people there on a day-to-day basis and at staff celebrations.
>
> 117. Joey connected well with the staff at his community home, and enjoyed going on car rides and shopping trips, working on puzzles, singing, and dancing around the home. Joey is denied these opportunities while he resides at Emerald Hall, and also suffers from adverse impacts by continuing to live there.
>
> 118. Emerald Hall is a locked unit designed for people with dual diagnosis in acute crisis situations. In this disruptive, institutional, and isolated setting, the

> skills that Joey gained while living in community placements that allowed him to interact socially and function more independently are deteriorating.
>
> 119. Joey is currently developing skills and behaving in ways that help him cope in the institutional setting of Emerald Hall. This institutionalized behaviour may be functional in an institutional setting, but it is detrimental and counterproductive to Joey learning to live in a community setting.

[281] The Board described the effects of the institutionalization on Mr. Delaney in more general terms. This is not surprising considering Mr. Delaney was not capable of giving evidence on his own behalf.

[282] In discussing the adverse effects suffered by Ms. MacLean, Mr. Delaney and Ms. Livingstone, the Board explained the impact of Emerald Hall on its residents (at pp. 77–78):

> There is no evidence that residence in Emerald Hall has anything but an adverse impact. No one suggests that Emerald Hall is conducive to the expansion of the human spirit. Indeed, the evidence consistently speaks of the deleterious effects of life in such a setting. One loses life skills. One becomes more dependent upon others for basic needs. One loses self-confidence and self-esteem. One becomes apathetic and withdrawn to the point where some do not want to live in the community. One loses contact with friends and relatives. One loses track of time. One's physical condition deteriorates. One loses opportunities to be outside, to engage in employment, to engage in recreation, to go to the movies, to go to Tim's and everything else that we take for granted to occupy and entertain ourselves. […]
>
> The evidence shows that placement in Emerald Hall denied the three of almost every opportunity for something resembling a normal kind of life. […]

[283] Like Ms. MacLean, the Province's treatment of Mr. Delaney was indifferent and dismissive. Although it is more difficult to articulate the impact on him because of his inability to verbalize, the fact that he was able to function in the community for 14 years and maintain a job can lead to no other conclusion than his institutionalization resulted in a loss of his dignity and confidence. The Province's offensive treatment of Mr. Delaney was serious and of long duration (seven years at the time of the hearing). Although it was not as long as Ms. MacLean's, it was certainly protracted.

[284] It is also clear on the evidence that Mr. Delaney was very vulnerable, even more so than Ms. MacLean.

[285] In our view, the appropriate amount of general damages to compensate Mr. Delaney for his unnecessary retention at the Nova Scotia Hospital and to have a deterrent effect on the Province is $200,000.

(c) Did the Board err in failing to award any damages to the estate of Sheila Livingstone?

[286] The appellant, Olga Cain, on behalf of Sheila Livingstone, claimed compensation in the range of $275,000 to $500,000 per year for the period from 2004 to 2014. The Board rejected this claim and instead ordered the Province to pay the sum of $60,000 in trust with respect to the claim of Ms. Livingstone. A total of $40,000 in the trust was to be paid to Pink Larkin for legal fees and disbursements, while $10,000 would be paid to each of Olga Cain and Jackie McCabe-Sieliakus. The Board awarded no damages to Ms. Livingstone's estate.

[287] Ms. Cain appeals on the basis the Board erred in relying on the fact that Ms. Livingstone had died before the hearing and failed to award a full and proper compensation award for the discrimination suffered by her. In their factum, the individual appellants submit the Board's failure to grant compensation for the violation of Ms. Livingstone's rights constitutes a breach of the *Act* and the principle that a right cannot exist without a remedy:

> 172. Similarly, Ms. Livingstone's sister, Olga Cain, pursued the human rights complaint after her sister's death in October 2016. She sought a compensation remedy that would reflect the egregious violation of her sister's human rights from the date of her sister's medical discharge from Emerald Hall in April 2005 until her death in October 2016. The Board made no award for the violation of Ms. Livingstone's rights while compensating Ms. Cain and her daughter, Ms. McCabe-Sieliakus—something that was not even sought at the hearing. It is submitted that the Board's failure to grant a compensation award for the violation of Ms. Livingstone's rights was a clear violation of the provisions of the Human Rights Act (including its remedial provisions) and, more fundamentally, the sacred principle that 'there is no right without a remedy'. The respondent Province should not stand to benefit from the fact that the matter took so long to get to a hearing that Ms. Livingstone died in the meantime.

[288] In our view, the Board did not err in failing to award damages to Ms. Livingstone's estate.

[289] Section 2 of the *Survival of Actions Act*, R.S.N.S. 1989, c. 453 allows actions to survive the death of a person for the benefit of their estate:

> 2(1) Except as provided in subsection (2) [(a) adultery; (b) inducing a spouse to leave or remain apart from his or her spouse], where a person dies, all causes of action subsisting against or vested in him survive against or, as the case may be, for the benefit of his estate.

[290] However, s. 4 of the *Survival of Actions Act* limits recovery to actual pecuniary loss to the estate:

> 4 Where a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the estate are recoverable, and in no case are damages recoverable for
>
> (a) punitive and exemplary matters;
>
> (b) loss of expectation of life;
>
> (c) pain and suffering.

[291] In the context of damages for personal injury or death, this Court clarified in *MacLean v. MacDonald*, 2002 NSCA 30 that general damages are not recoverable by the estate of an individual.

[292] Ms. Cain, on behalf of Ms. Livingstone, claimed general damages for the Province's failure to provide her sister with the supports necessary to live in the community from 2004 to 2014.

[293] Ms. Livingstone alleged as a result of the Province's discriminatory conduct, she "languished" at the Nova Scotia Hospital to her disadvantage and "missed out on the benefits and advantages of participating in community life" (individual appellants' factum at para. 141).

[294] Ms. Cain does not allege the Province's failure to provide her sister with the supports necessary to live in the community had a quantifiable impact. Instead, the damages claimed are for the pain and suffering Ms. Livingstone endured as a consequence of long-term institutionalization.

[295] As a result of Ms. Livingstone's death before the adjudication of her complaint, the *Survival of Actions Act* governs her claim. Section 4 of that legislation specifically excludes damages for pain and suffering from recovery. As such, Ms. Livingstone's estate is not entitled to recover damages for the Province's discriminatory treatment of her.

[296] We would dismiss this ground of appeal.

(d) Did the Board err in awarding damages to Ms. Livingstone's sister and niece?

[297] In its remedy decision, the Board awarded $10,000 each to Ms. Livingstone's sister and niece. The Board's justification for doing so can be seen in two paragraphs of its decision (at pp. 10–12):

> 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 *Intestate Succession Act* [R.S.N.S. 1989, c. 236], 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 [who] have died. I conclude that such payments would constitute a significant and unwarranted windfall to them and bring the whole process into disrepute.
>
> […]
>
> 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. [28], 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.

[298] The Board considered compensation was warranted to recognize many years of care and concern that Ms. Livingstone's sister and niece had for her, their work to see her out of Emerald Hall and their service to the disabled generally throughout the pursuit of this matter.

[299] In their factum, the individual appellants make clear they did not seek this compensation at the hearing:

> 172. […] The Board made no award for the violation of Ms. Livingstone's rights while compensating Ms. Cain and her daughter, Ms. McCabe-Sieliakus—something that was not even sought at the hearing. […]

[300] The Province appeals arguing the award was inappropriate and the Board's reasons do not justify an award of damages to non-parties in these circumstances. We agree. Ms. Cain and Ms. McCabe-Sieliakus did not seek damages at the hearing, Ms. Livingstone's counsel did not argue for them and the Board's reasons fail to justify making the awards of damages.

[301] Section 38 of the *Act* provides discretion to a Board to rectify any injury to a person or party or to compensate them for the injury. The Board did not find that Ms. Livingstone's sister and niece actually suffered any compensable injury. Following the Board's rationale to its logical conclusion, it would entitle Ms. MacLean's parents, Mr. Delaney's sister and potentially anyone who has assisted a complainant over the years in the furtherance of their complaint to compensation.

[302] It is not necessary for us to decide in what circumstances a board of inquiry may make an award to a non-complainant other than to say in this case, where it was not sought by the parties, it was inappropriate for the Board to make an award.

[303] We would allow the Province's appeal on this issue.

10. Did the Board err in awarding costs to the individual complainants?

[304] All counsel at the hearing advised the Board that it did not have the jurisdiction to award costs. It did so in any event. In this unusual circumstance, both the individual appellants and the Province raise it as a ground of appeal. Both argue the Board erred in awarding costs.

[305] Even though it acknowledged the submissions of counsel at the hearing, the Board went ahead and ordered costs of $120,000 or $40,000 per individual complainant against the Province (at p. 14):

> 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. 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 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.

(Reference omitted)

[306] For ease of reference, we will again set out s. 34(8) of the *Act*, which provides:

> 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.

(Emphasis added)

[307] On its face, the legislation permits an award of costs only where regulations so authorize. As the Board acknowledged in its decision, no such regulations have been made.

[308] Whether the Board has implied authority to order legal costs to the individual complainants was decided in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2005 NSCA 70 ("*Johnson*"). The HRM appealed a decision of a board of inquiry that awarded costs to the complainant following a finding of discrimination. This Court held that a board's authority to compensate under s. 34(8) of the *Act* does not include the capacity to award legal costs:

> [20] Having carefully considered this interesting issue, I am of the view that the Board's authority to "compensate" in s. 34(8) does not include the capacity to award legal costs. A compensation award is separate and distinct from an award for costs. The former relates to the victim's injury, the latter relates to the process.

> Accordingly, the Board had no power to award Mr. Johnson legal costs and this part of the order must be set aside. I have reached this conclusion for the following reasons.
>
> [21] Historically, costs have been exclusively a creature of statute with no common law authority to award them. In fact, this court, albeit over 75 years ago, confirmed that the power to award costs could only be by "express statutory authority." In *Re Charles Brown* (1928), 60 N.S.R. 76 (C.A.), at p. 78, Chisholm, J. for a unanimous five judge panel noted:
>
> > By this enactment, the learned judge below has within his district the same power as a judge of the Supreme Court; and the next question arises whether a judge of the Supreme Court has authority to award costs on an application under chapter 231. The Act is silent as to costs. The recovery of costs *eo nomine* was unknown to the common law; the courts have no inherent power to award costs, which can only be granted in any case or proceeding by virtue of express statutory authority.

[309] Although s. 34(8) of the *Act* was amended in 2007 to allow costs to be awarded where authorized by and to the extent permitted by the regulations, there is no provision in the regulations providing authority to award costs. As a result this Court's decision in *Johnson* governs.

[310] The Board did not have the jurisdiction to award costs to the individual complainants. We would allow this ground of appeal and set aside the costs award.

Disposition

[311] To summarize, we find as follows:

1. The DRC's appeal of the *prima facie* decision is allowed. The Board erred in its analysis of the systemic discrimination claim. Applying the law to the Board's findings and the record, we are satisfied that the DRC has established a *prima facie* case of systemic discrimination;

2. The Province is entitled to attempt to justify the above finding, and the matter shall be remitted to a differently constituted Board to undertake a hearing pursuant to s. 6 of the *Act*;

3. The Province's appeal of the *prima facie* decision, specifically the Board's determination that the individual appellants had been

discriminated against by virtue of their unnecessary retention at the Nova Scotia Hospital, is dismissed;

4. The individual appellants' appeal of the *prima facie* decision is allowed in part. Applying a proper analysis, the finding of *prima facie* discrimination should have included the period of 1998 to 2000 for Ms. MacLean, and further covered the period of time Ms. Livingstone was placed in Yarmouth following her transfer from Emerald Hall;

5. With respect to the expanded *prima facie* findings in relation to the individual appellants set out in 4 above, the Province shall, if it wishes, be entitled to a justification hearing before a differently constituted Board. The Province is not entitled to justify the period of time when the individual complainants were found to be discriminated against by virtue of their unnecessary retention at the Nova Scotia Hospital;

6. Ms. MacLean's and Mr. Delaney's appeal from damages is allowed. Ms. MacLean's award is increased to $300,000[33] and Mr. Delaney's award is increased to $200,000;

7. The Province's appeal from the damages award to Ms. Cain and Ms. McCabe-Sieliakus is allowed and the damages awarded to them is set aside;

8. Ms. Cain's appeal of the failure to award damages to Ms. Livingstone is dismissed.

9. The Board's award of costs is set aside.

Wood C.J.N.S.

Farrar J.A.

Bourgeois J.A.

[33] Subject to the further determination of the Court.