

Court Administration

MAY 04 2022

2022

Hfx No. 5 1 4 7 1 2

IN THE SUPREME COURT OF NOVA SCOTIA

Between

ISAI ESTEY

Plaintiff

-and-

**THE ATTORNEY GENERAL OF NOVA SCOTIA
REPRESENTING HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF NOVA SCOTIA**

Defendant

NOTICE OF ACTION

To: THE ATTORNEY GENERAL OF NOVA SCOTIA

Action has been started against you

The Plaintiff takes action against you.

The Plaintiff started the Action by filing this notice with the Court on the date certified by the Prothonotary.

The Plaintiff claims the relief described in the attached Statement of Claim. The claim is based on the grounds stated in the Statement of Claim.

Deadline for defending the action

To defend the action, you or your counsel must file a Notice of Defence with the court no more than the following number of days after the day this notice of action is delivered to you:

- 15 days if delivery is made in Nova Scotia
- 30 days if delivery is made elsewhere in Canada
- 45 days if delivery is made anywhere else.

Judgment against you if you do not defend

The court may grant an order for the relief claimed without further notice, unless you file the Notice of Defence before the deadline.

You may demand notice of steps in the action

If you do not have a defence to the claim or you do not choose to defend it you may, if you wish to have further notice, file a Demand for Notice.

If you file a Demand for Notice, the Plaintiff must notify you before obtaining an order for the relief claimed and, unless the court orders otherwise, you will be entitled to notice of each other step in the action.

Rule 57 - Action for Damages Under \$150,000

Civil Procedure Rule 57 limits pre-trial and trial procedures in a defended action so it will be more economical. The Rule applies if the Plaintiff states the action is within the Rule.

Otherwise, the Rule does not apply except as a possible basis for costs against the Plaintiff.

This action is NOT within Rule 57.

Filing and delivering documents

Any documents you file with the Court must be filed at the office of the Prothonotary at 1815 Upper Water Street, Halifax, Nova Scotia, (902) 424-4900.

When you file a document you must immediately deliver a copy of it to the Plaintiff and to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information

The Plaintiff designates the following address:

McKiggan Hebert
Purdy's Wharf, Tower 1
502 – 1959 Upper Water Street
Halifax, NS B3J 3N2
Tel: 902-423-2050
Fax: 902-423-6707

Documents delivered to this address are considered received by the Plaintiff on delivery.

Further contact information is available from the Prothonotary.

Proposed place of trial

The Plaintiff proposes that if you defend this Action the Trial will be held in Halifax, Nova Scotia.

Signature

Signed on this 4th day of May, 2022.

Brian J. Hebert and John McKiggan Q.C.
McKiggan Hebert Lawyers
502-1959 Upper Water Street
Purdy's Wharf Tower 1
Halifax, NS B3J 3N2
Tel: (902) 423-2050
Fax: (902) 423-6707
Email: bhebert@mckigganhebert.com

James Sayce and Jamie Shilton
Koskie Minsky LLP
20 Queen Street West,
Suite 900
Toronto, Ontario M5H 3R3
Tel: (416) 977-8353
Fax: (416) 977-3316
Email: jsayce@kmlaw.ca

Prothonotary's certificate

I certify that this Notice of Action, including the attached Statement of Claim, was filed with the Court on May 04th, 2022.

Prothonotary

JAMILYN TRAINOR
Deputy Prothonotary

2022

Hfx No.

IN THE SUPREME COURT OF NOVA SCOTIA

Between

ISAI ESTEY

Plaintiff

-and-

**THE ATTORNEY GENERAL OF NOVA SCOTIA
REPRESENTING HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF NOVA SCOTIA**

Defendant

STATEMENT OF CLAIM

OVERVIEW

1. Since 1998, the Province of Nova Scotia has had a statutory obligation to provide social assistance to persons in need who reside in the province. Eligible residents of the province who are not disabled receive the social assistance to which they are entitled as of right effective from the date of their application for benefits. The program through which assistance is administered has no funding limit or cap.
2. Social assistance for persons with a mental or physical disability or both is provided pursuant to a different set of programs (“**Disability Assistance**”) administered by the Nova Scotia Department of Community Service (“**DCS**”) pursuant to the *Social Assistance Act*, R.S.N.S. 1989, c. 432. Unlike funding for the system of social assistance for non-disabled persons, funding for Disability Assistance is subject to an arbitrary cap. In addition, Disability Assistance is treated as discretionary, and most of those who are eligible do not receive the assistance they are entitled to in a timely manner or at all. This has led to eligible applicants being placed on a waitlist for assistance (the “**Waitlist**”), in some cases for many years.
3. While on the Waitlist, eligible applicants have no choice but to remain in their current living arrangements. This may mean living with relatives, living on their own with independent living supports if available, living in a small option home in a different community far away from family and friends, living in large segregated institutional facilities, or being placed in nursing homes and hospitals, including on psychiatric wards, in order to receive assistance to meet their basic and special needs.
4. In short, thousands of eligible applicants with a mental or physical disability or both have been wrongly denied the statutory benefits to which they are entitled and which are necessary to allow them to meet their basic need for shelter, food and clothing as well as their special need for services and supports to permit them to live in their community.

5. As a result, thousands of adults with mental or physical disabilities or both have been forced to either live in small option homes far away from family and friends, in large institutions segregated from society at large, or in nursing homes, hospitals and psychiatric facilities, often on locked wards with those who are mentally ill even though they themselves have no mental illness requiring hospitalization. In many cases, these arrangements continue for years, often decades.

6. Further, many hundreds more adults are required to rely upon family members, many in homes that do not meet their physical, social or emotional needs, and rely on charity for the necessary services and supports they need. Others go without such services and supports altogether.

7. Denying people with a mental or physical disability or both the assistance to which they are entitled in this arbitrary way is cruel and inhumane. It is discriminatory. It strips them of their dignity and interferes with their liberty and the security of their person. It causes psychological, emotional, and at times physical, pain and suffering. It contravenes domestic human rights law, the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), customary international law as incorporated into Canadian common law, and is inconsistent with the United Nations *Convention on the Rights of Persons with Disabilities* to which Canada is a signatory. The manner in which the Province has administered Disability Assistance is negligent and in breach of its fiduciary duties to the class members.

8. The Province has long been aware of the issues associated with Disability Assistance but has failed to act in any meaningful, reasonable, or prudent manner.

THE PARTIES

9. The plaintiff is Isai Estey. The plaintiff is 25 years old and resides in Dartmouth, Nova Scotia.

10. The defendant, The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia (the "Province"), is named in these proceedings pursuant to the provisions of the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360, and the amendments thereto.

11. At all material times, the Defendant was responsible for the design, administration, management and funding of Disability Assistance under the *Social Assistance Act* and for the assessment and approval of applications for assistance under the programs.

12. The plaintiff brings this action pursuant to the *Class Proceedings Act*, S.N.S. 2007, c. 28 (the "*Class Proceedings Act*") on his own behalf and on behalf of all other persons who are or have been on the Waitlist for Disability Assistance for any period of time since April 1, 1998.

13. The proposed members of the class are:

Waitlist Class Members

All persons, who were alive as of May 4, 2022, who were on the Waitlist for any period of time after April 1, 1998, exclusive of any period for which an individual was residing in (a) a Regional Rehabilitation Centre, Adult Residential Centre, or Residential Care Facility; (b) a nursing home without a medical reason for being there; or (c) a hospital without a medical reason for being there (the "Waitlist Class Members");

Institution Class Members

All persons, who were alive as of May 4, 2022, who for any period of time resided at a Regional Rehabilitation Centre, Adult Residential Centre, or Residential Care Facility, while eligible for assistance under the *Social Assistance Act*, R.S.N.S. 1989, c. 432 (the "Institution Class Members");

Nursing Home Class Members

All persons, who were alive as of May 4, 2022, who for any period of time after April 1, 1998 resided in a nursing home, without a medical reason for being there, while eligible for assistance under the *Social Assistance Act*, R.S.N.S. 1989, c. 432 (the "Nursing Home Class Members"); and

Hospital Class Members

All persons, who were alive as of May 4, 2022, who for any period of time after April 1, 1998 resided in the Nova Scotia Hospital or another hospital operated by the Nova Scotia Hospital Authority or any of its predecessors, without a medical reason for the hospitalization, while eligible for assistance under the *Social Assistance Act*, R.S.N.S. 1989, c. 432 (the "Hospital Class Members");

(Collectively the "Class" or the "Class Members").

THE PROVINCE'S LEGISLATED OBLIGATION TO PROVIDE SOCIAL ASSISTANCE

14. In Nova Scotia the provision of social assistance to persons in need is governed by the *Employment Support and Income Assistance Act*, S.N.S. 2000, c. 27 (the "*Employment Support and Income Assistance Act*") and by the *Social Assistance Act*.

15. The *Employment Support and Income Assistance Act* requires the Province to provide assistance to a "person in need". "Person in need" is defined as 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." Assistance is as of right and is not discretionary. A person eligible for assistance under the *Employment Support and Income Assistance Act* receives that assistance without delay.

16. The *Social Assistance Act* and the *Municipal Assistance Regulations*, N.S. Reg. 76/1981 (the "*Regulations*") made thereunder, also require the Province to provide assistance to a "person in need", defined as "a person who requires financial assistance to provide for the person in a home for special care or a community based option". Under the *Social Assistance Act*, persons in need

are entitled to Disability Assistance as of right and on a non-discretionary basis.

DISABILITY ASSISTANCE IN NOVA SCOTIA

17. The Province has undertaken, and is mandated, to provide assistance to all residents of Nova Scotia who are in need. Specifically, the obligation toward persons with a mental or physical disability or both, who are unable to care for themselves is carried out through the Disability Assistance programs established pursuant to the *Social Assistance Act*.

18. The *Regulations* set out the Disability Assistance to be provided by way of money, goods or services to persons in need:

(a) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements;

(b) 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;

(c) 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;

(d) care in homes for special care;

(e) social services, including family counselling, homemakers, home care and home nursing services; and

(f) rehabilitation services.

19. Many, but not all of the services offered as Disability Assistance are provided by the DCS through the Disability Support Program ("DSP").

20. Similarly, assistance by way of money, goods or services provided to non-disabled persons in need under the *Employment Support and Income Assistance Act* includes:

(a) basic needs, including food, clothing, shelter, fuel, utilities and personal requirements;

(b) special needs; and

(c) employment services.

21. Whether mandated under the *Employment Support and Income Assistance Act* or under the *Social Assistance Act* and the *Regulations*, once eligible, an applicant is entitled to receive assistance as of the date of their application or the date of their being found eligible.
22. The Province has failed to provide assistance to those persons in need who applied for and were found eligible for assistance under the *Social Assistance Act* and the *Regulations* as it undertook and was mandated and required by law to do. Instead eligible applicants were put on the Waitlist and denied services, often for years. In part, this was due to the fact that the Province capped the total funding for the Disability Assistance knowing that not all eligible applicants would receive the assistance to which they were entitled. Some have been forced to move away from their community, including into large-scale congregate institutions, in order to receive assistance.
23. In contrast, those eligible for assistance under the *Employment Support and Income Assistance Act* have in fact received the assistance to which they were entitled as of the date of their application or the date they are found to be eligible. There was no limit placed on the total amount of funds available to the program. Further, assistance can be accessed within the applicant's community, and no person eligible for assistance under the *Employment Support and Income Assistance Act* is required to leave their community in order to receive assistance.
24. Treating persons in need under the *Social Assistance Act* differently than persons in need under the *Employment Support and Income Assistance Act* is discriminatory on the basis of mental or physical disability.
25. Further, the Province failed to discharge its responsibilities and exercise its powers in a reasonable and rational manner in the provision of assistance under the *Social Assistance Act* to those individuals who have been assessed as eligible for such assistance.
26. In particular, the Province failed to administer the Waitlist in a reasonable and prudent manner, directly harming the members of the Class.
27. The failures, as detailed below, consisted of:
 - (a) failing to act to reduce unreasonably long waitlist times which serve as an effective denial of approved assistance;
 - (b) creating waitlists of indeterminate length for assistance which is essential to the Class members' basic human needs, safety and security;
 - (c) failing to have a consistent and rational scheme of prioritization for Class members on the Waitlist;
 - (d) arbitrarily limiting or capping funding for Disability Assistance;
 - (e) failing to create a cohesive system to rationally and efficiently allocate assistance to Class members on the Waitlist;

- (f) failing to provide Class members with assistance for which Class members were eligible and approved pursuant to the *Social Assistance Act* and the *Regulations*;
- (g) returning Class members to the Waitlist when assistance was discontinued;
- (h) confining Nursing Home Class Members to nursing homes, when they were not in need of nursing home care, in order to receive assistance; and
- (i) confining Hospital Class Members to the Nova Scotia Hospital or other hospitals, when they were not in need of medical care, in order to receive assistance.

THE PLAINTIFF'S EXPERIENCE

28. The plaintiff was born on June 2, 1996. He is currently 25 years of age. He currently resides in Dartmouth, Nova Scotia with his parents. The plaintiff has physical and intellectual disabilities. He has cerebral palsy which has caused spastic paraplegia. He uses a wheelchair for mobility. He cannot swallow and is tube fed. He also has developmental delay and does not communicate verbally. He is able to communicate with his parents and others using a Bliss board, an electronic communication device and with sign language. The plaintiff requires access to support and services 24 hours a day 7 days a week. The services and support for the plaintiff are necessary to fulfill his daily minimum needs for living and security.

29. Until the plaintiff's 18th birthday, on June 2, 2014, the Province provided the plaintiff's parents with some limited funding for supports and services to permit him to live in the family home. The services and supports were provided by the Province as a result of the plaintiff's disabilities.

30. Before the plaintiff turned 18, his family began the process of applying for Disability Assistance pursuant to the process established by DCS.

31. The plaintiff was assessed for his eligibility for Disability Assistance. Once he turned 18, the plaintiff was approved for assistance by DCS. The plaintiff received some Disability Assistance support, but did not receive funding for placement in a small options home in his community, as he had requested. Despite the plaintiff being eligible and approved for assistance, he was placed on the Waitlist. DCS did not, and could not, provide any estimate as to the length of time he would remain on the Waitlist. During his time on the Waitlist the Province has not provided assistance to the plaintiff to allow him to live in a community based small options home.

32. As of the date of the issuance of this claim, the plaintiff remains on the Waitlist and will remain on it for an indeterminate time into the future.

33. As a result of his disabilities, in order for the daily living needs of the plaintiff to be met, the plaintiff's family has been required to provide some of the assistance he has been approved for, which should have been provided as of right pursuant to the *Social Assistance Act* and regulations. The plaintiff's family has been required to undertake significant personal and financial sacrifices

to provide the necessary services and supports to attempt to maintain the basic minimum standards necessary for the safety and security of the plaintiff.

MASS INSTITUTIONALIZATION OF PEOPLE WITH DISABILITIES

34. Unlike many other jurisdictions in Canada, the Province continues to place disproportionate reliance on large-scale congregate care facilities in its scheme of support for people with disabilities.

35. The Province administers three kinds of large-scale congregate care facilities ("Institutions"):

- a. Regional Rehabilitation Centres ("RRCs"): intended for twenty or more adults with disabilities with more complex access needs and/or requiring more intensive supports.
- b. Adult Residential Centres ("ARCs"): intended for typically twenty or more adults with disabilities.
- c. Residential Care Facilities ("RCFs"): intended for typically ten or more adults with disabilities with less-complex access needs.

36. The largest Institution – the Kings RRC – currently has 173 beds.

37. Currently, there are approximately 800-900 people living in RRCs, ARCs, and RCFs.

38. The Institutions are characterized by certain features which inhibit the autonomy and fail to respect the dignity of people with disabilities. In particular:

- a. Residents of Institutions are congregated and compelled to live together;
- b. Residents of Institutions are isolated from their families and broader communities;
- c. Access to facilities is controlled by staff at the Institutions, and many Institutions are locked subject to staff permission to come and go;
- d. Residents of Institutions are often forced to move away from their communities to faraway and unfamiliar locations;
- e. Residents of Institutions have their meals, schedules, and activities determined by institutional authorities, and therefore are substantially deprived of control over their lives and the decisions which affect them; and
- f. The individualized needs of residents of Institutions tend to be subordinate to the institutional and organizational requirements of the Institutions themselves.

39. Unnecessary institutionalization has and continues to cause harm to people with disabilities in Nova Scotia. Such harms include, and are not limited to:

- a. Loss of independence, motivation, sense of self, self-esteem, and self-confidence;
- b. Social withdrawal, depression, and feelings of hopelessness;
- c. Inhibition of the development of important social and life skills;
- d. Inhibition of the development of communication skills;
- e. Relapse or exacerbation of mental health issues;
- f. Inhibition of the formation of relationships;
- g. Provocation of self-destructive behaviours, self-abuse, and self-harm;
- h. Loss of personal autonomy;
- i. Grief and loneliness due to placements far away from family, friends, and community members; and
- j. The unnecessary institutionalization creates a barrier to social inclusion, and perpetuates stigma and stereotypes associated with persons with disabilities and their ability to participate in society and their communities, effectively separating them from their communities and excluding them from an equal opportunity to enjoy a full and productive life.

40. Alongside the antiquated Institutions, the Province also administers and/or funds programs which enable people with disabilities to live in the community through several small community placement options. These include:

- a. Alternative Family Support Program: provides support for persons with disabilities to live in an approved, private family home.
- b. Independent Living Support: funding for hours of support services from a third-party service provider, based on the assessed needs and circumstances of an eligible participant who is semi-independent but requires support to live on their own.
- c. Small Options Home: small community homes where three to four persons with disabilities live with the support of qualified care providers.
- d. Group Homes and Developmental Residences: small residential homes for four to twelve persons with disabilities supported by qualified care providers who provide a range of developmental and rehabilitative programming.

41. These community placement options are smaller in scale and allow for a greater degree of individualized care and programming. Small community placement options better support the autonomy of people with disabilities.

42. All people with disabilities can be accommodated in small community placement options.

43. Despite the preferability of small community placement options, for many people with disabilities on the Waitlist, placement in an Institution is the first and only option for social assistance from the Province. People with disabilities currently living at home without access to adequate supports will often incur vast expenses; face a lack of appropriate caregivers; and lack appropriate mobility, communication, and other care devices. Faced with such circumstances, and presented with the option of a placement in an Institution, many people with disabilities, or their caregivers, are compelled to accept it, notwithstanding that an accommodative community placement could provide better and more individualized care. The Province refuses to provide the social assistance required, and to which the Institution Class Members are entitled, to allow them to live in an accommodative small community placement option.

44. Of the individuals currently residing in an Institution, many remain on the Waitlist seeking an alternative placement in the community.

45. The Province has breached its statutory, common law, equitable, and constitutional duties to provide social assistance to people with disabilities in a manner that does not require them to leave their homes, families, and communities for the Institutions.

46. Further, the Province's de facto compulsion of Institution Class Members into inappropriate institutional settings, where personal autonomy is curtailed and dignity is not respected, by the withholding of social assistance for an accommodative small community placement option, constitutes an unlawful and unconstitutional deprivation of liberty.

ARBITRARY PLACEMENT IN NURSING HOMES

47. The Province has also maintained a regular practice of refusing Disability Assistance to those people with disabilities who have been placed in nursing homes, many of them young people, when they have no need for nursing home care and are able to live in a small option setting. In effect, the Province's failure to provide Disability Assistance on a timely basis confines these to nursing homes against their wishes and in the absence of any legitimate medical purpose.

48. Many people with disabilities who are on the Waitlist or are otherwise eligible to receive social assistance under the Disability Support Programs currently reside within nursing homes, many of them young people in their early twenties.

49. Due to the Province's failure to provide the Disability Assistance required to allow these individuals a safe and accommodative community placement, many remain in nursing homes many for decades.

50. Individuals confined in nursing homes suffer harms similar to those experienced by institutionalized individuals which are particularized at paragraph 40, above.

ARBITRARY HOSPITALIZATION OF PEOPLE WITH DISABILITIES

51. Alongside its compulsion of people with disabilities into inappropriate Institutions and nursing homes, the Province has also maintained a regular practice of failing to provide appropriate Disability Assistance to those eligible people with disabilities who are hospitalized in the Nova Scotia Hospital or other hospitals for medical treatment but who no longer need medical treatment, in effect confining them to those hospitals against their wishes and in the absence of any legitimate medical purpose.

52. Dozens of people with disabilities who are on the Waitlist or are otherwise eligible for Disability Assistance currently reside within hospitals despite having no need for medical treatment.

53. Due to the Province's failure to provide the social assistance required to allow these individuals a safe and accommodative community placement, they remain in hospitals.

54. The hospital settings in which people with disabilities have been confined include places like Emerald Hall in the Nova Scotia Hospital. Emerald Hall, a locked, acute psychiatric unit, was designed and intended to provide short-term psychiatric treatment. It was not designed for long-term residential placements.

55. For people with disabilities residing in hospitals, many of the detrimental aspects of living in an Institution are present, but are intensified. The rhythms of daily life are established by hospital authorities. Meals arrive on hot carts and bathing routines are scheduled. Opportunities for the exercise of personal autonomy are severely curtailed.

56. Hospital settings like the Nova Scotia Hospital and Emerald Hall are blatantly unfit for long-term living. Educational opportunities are limited, if available at all, and programming is limited, if available at all.

57. Individualized care and services are not available. Because staff rotate on shifts, and because staff turnover is high, personal relationships between staff and residents rarely, if ever, crystallize.

58. Emerald Hall and other such units are locked. Residents are not able to leave unless a staff or family member can take them out. Opportunities for normal social interactions are limited.

59. The people with disabilities confined in such units experience their placements as a form of incarceration.

60. Individuals confined in hospitals suffer harms similar to, but greater in intensity to those experienced by institutionalized individuals which are particularized at paragraph 40, above.

61. In the absence of any legitimate medical purpose for their continuing hospitalization, the Hospital Class Members have been subject to an unlawful and unconstitutional deprivation of liberty by the Province.

KNOWLEDGE OF THE PROVINCE

62. As a series of reports, memoranda, and discussion papers demonstrates, for decades, the Province has been aware of, among other things,

- a. The number of people on the Waitlist;
- b. The lengths of time that people have been spending on the Waitlist before being offered appropriate services;
- c. The continuing growth in the number of people on the Waitlist and the increasing lengths of time spent by people on the Waitlist;
- d. The medical, scientific, and community view of institutionalization as an inappropriate model of care for people with disabilities;
- e. The fact that many members of the Class feel compelled to accept placements in Institutions due to the absence of community options;
- f. The fact that many Institution Class Members have been on the Waitlist seeking alternative placements in community options; and
- g. The fact that the Nursing Home Class Members have remained in nursing homes, without any legitimate need for nursing home services, due to the denial of social assistance for appropriate placement options.
- h. The fact that the Hospital Class Members have remained hospitalized, without any legitimate medical purpose, due to the denial of social assistance for appropriate placement options.

63. In a memorandum to the Province's Treasury Board dated January 12, 2012, the Deputy Minister of Community Services advised that the budget for Disability Assistance was "inadequate to address the minimum needs of people with disabilities in need of supports and services". The Deputy Minister further noted that Disability Assistance (referred to in the memorandum as the Services for Persons with Disabilities or 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".

64. In the memorandum the situation at the time was described 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 [the Capital District Health Authority]. 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. [...]

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 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.

65. In June 2013, guided by the United Nations *Convention on the Rights of Persons with Disabilities*, the Joint Community-Government Advisory Committee on Transforming the Services to Persons with Disabilities (SPD) Program (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” (the “Joint Committee Report”).

66. In the Joint Committee Report the Province acknowledged the continued reliance on Institutions:

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 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.

67. 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”.

68. The Joint Committee set out the principles underlying its recommendations, which included:

- (a) People with disabilities have a right to live and to be included in the community.
- (b) 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.
- (c) 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.

69. The Joint Committee noted that, in addition to better respecting the rights and dignity of people with disabilities, reducing reliance on ARCs, RRCs and RCFs in favour of community-based options was preferable from a financial perspective:

It is also generally recognized that the marginally increased cost of community-based service in the short-term is outweighed by its beneficial outcomes, and that overall a

community-based system of supports and services is more financially sustainable and cost-effective than institutional care.

70. The Province had been aware for decades of the need for de-institutionalization and more small community placement options. In February 1995, DCS released a discussion paper entitled “*Moving Towards Deinstitutionalization*”, in which it noted that de-institutionalization was well under way in Nova Scotia:

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

71. In the 1995 discussion paper DCS set out the principles forming the basis of its policy direction for Disability Assistance in Nova Scotia:

Rights And Responsibilities:

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.

72. In April 1998, DCS released a report entitled “*Report of the Review of Small Options in Nova Scotia*” in which DCS recognized small community placement options which were 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, as the best means of ensuring those eligible for Disability Assistance received the supports they needed in the community.

73. In January 2001, the Province released a report by Michael J. Kendrick, PhD entitled, “*An Independent Evaluation of the Nova Scotia Community Based Options Community Residential Service System*”. The report noted:

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.

74. Despite this, DCS maintained a moratorium on small community placement options from at least 1997 to 2017 and the numbers on the Waitlist continued to grow unchecked. An August 26, 2019 "*DSP Service Request and Placement Data Report*" prepared by DCS put the total number of people on the Waitlist at 1560:

Q1. Indicate the total number of individuals on the DSP Service Request list.

A1. The DSP Service Request includes current DSP participants and eligible applicants to the DSP Program. There are 1560 DSP participants and applicants on the DSP Service Request list.

75. As of March 31, 2021, there were 1915 people on the Waitlist. This figure includes 1155 current recipients of assistance under the *Social Assistance Act*, of whom many are currently residing in an Institution and seeking alternative placements; 536 not receiving any support, and 224 on the future planning registry.

76. The Waitlist continues to grow.

DISCRIMINATION, HUMAN RIGHTS AND THE *CHARTER*

77. The plaintiff repeats the forgoing and says that Province discriminated against him and all members of the Class in the administration and provision of social assistance on the basis of mental or physical disability or both. The Province failed to apply the same service standards for its programs under the *Social Assistance Act* as it did for its programs under the *Employment Support and Income Assistance Act*. In particular:

(a) the Province limited the amount of total program funding available to disabled applicants for Disability Assistance which it did not do to the amount of total program funding available to non-disabled applicants under the *Employment Support and Income Assistance Act*;

(b) eligible applicants for Disability Assistance do not receive assistance effective as of the date of their application unlike applicants under the *Employment Support and Income Assistance Act* who did, instead, applicants for Disability Assistance are placed on the Waitlist and forced to wait months or years for the assistance they are entitled to; and

(c) eligible applicants for Disability Assistance, unlike non-disabled applicants for social assistance, are forced to reside outside their community far away from family and friends, in the Institutions segregated from society at large, or in nursing homes, hospitals and psychiatric facilities, in order to receive assistance for their basic and special needs.

78. These features of Disability Assistance create a distinction based on the receipt of social assistance and disability.

79. These features of Disability Assistance impose burdens on recipients of social assistance and on people with disabilities, and deny them benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

80. As people with disabilities, the Class Members have historically been subject to processes of exclusion, devaluation, and stigmatization by mainstream social and political institutions. The Province's denial of immediate access to social assistance to people with disabilities; its compulsion of people with disabilities into antiquated and harmful Institutions; and its arbitrary confinement of people with disabilities in nursing homes and hospitals serve to both perpetuate and exacerbate the systemic disadvantages imposed on people with disabilities by society at large.

81. Discrimination against the plaintiff and members of the Class in the provision of social assistance on the basis of mental or physical disability is prohibited by the *Human Rights Act*, R.S.N.S. 1989, c. 214 (the "*Human Rights Act*") and by customary international human rights law as incorporated into the common law of Nova Scotia.

82. The Province's discrimination against the Class Members is also contrary to the right not to be subjected to discrimination as guaranteed by s. 15(1) of the *Charter*.

83. To the extent that it may be prescribed by law, the Province's discrimination against the Class Members cannot be justified in a free and democratic society.

RIGHT TO LIFE, LIBERTY AND SECURITY OF THE PERSON

84. The plaintiff repeats the forgoing and says that the Province deprived the plaintiff and other members of the Class of their rights to liberty and security of the person and their right not to be deprived thereof except in accordance with the principles of fundamental justice as guaranteed by s. 7 of the *Charter*.

85. Through its administration of the DCS and the Waitlist, the Province has deprived the Waitlist Class Members of their security of the person by:

- (a) failing to provide in a timely manner, or at all, assistance that would allow the Waitlist Class Members to meet their basic needs for food, clothing and shelter; and by
- (b) failing to provide in a timely manner, or at all, assistance to the Waitlist Class Members to allow them to meet their special needs for care, supervision and supports required to allow them to live a healthy life in their community.

86. Through its administration of the DCS and the Waitlist, the Province has deprived the Institution Class Members of their security of the person and their liberty by:

- (a) failing to provide in a timely manner assistance that would allow the Institution Class Members to meet their basic needs for food, clothing and shelter;
- (b) failing to provide in a timely manner, or at all, assistance to the Institution Class Members to allow them to meet their special needs for care, supervision and supports required to allow them to live a healthy life in their community;
- (c) requiring persons on the Waitlist to make an impossible choice between accepting an inappropriate Institutional placement and forgoing social assistance from the Province; and
- (d) placing Institution Class Members in large-scale congregate Institutions which:
 - i. impose significant curtailments on the liberties and personal autonomy of residents;
 - ii. effectively segregate people with disabilities from their families, their communities, and the rest of society at large;
 - iii. operate according to a model of care which has been known to be inappropriate and harmful for decades; and

- iv. fail to respect the dignity of people with disabilities.

87. Through its administration of the DCS and the Waitlist, the Province has deprived the Nursing Home Class Members of their security of the person and their liberty by:

- (a) failing to provide in a timely manner assistance that would allow the Nursing Home Class Members to meet their basic needs for food, clothing and shelter;
- (b) failing to provide in a timely manner, or at all, assistance to the Nursing Home Class Members to allow them to meet their special needs for care, supervision and supports required to allow them to live a healthy life in their community;
- (c) placing Nursing Home Class Members in nursing homes against the wishes of those Nursing Home Class Members and without their consent;
- (d) failing to provide appropriate accommodative placement options for Nursing Home Class Members,
- (e) continuing to confine Nursing Home Class Members in nursing homes;
- (f) continuing to confine Nursing Home Class Members in nursing homes in the absence of any legitimate medical purpose; and
- (g) placing Nursing Class Members in inappropriate nursing home settings which:
 - i. impose significant curtailments on the liberties and personal autonomy of residents;
 - ii. prevent Nursing Home Class Members from leaving without a staff or family member to take them out;
 - iii. lack educational opportunities, programming, and amenities for long-term residents;
 - iv. effectively segregate people with disabilities from their families, their communities, and the rest of society at large; and
 - v. fail to respect the dignity of people with disabilities.

88. Through its administration of the DCS and the Waitlist, the Province has deprived the Hospital Class Members of their security of the person and their liberty by:

- (h) failing to provide in a timely manner assistance that would allow the Hospital Class Members to meet their basic needs for food, clothing and shelter;

- (i) failing to provide in a timely manner, or at all, assistance to the Hospital Class Members to allow them to meet their special needs for care, supervision and supports required to allow them to live a healthy life in their community;
- (j) failing to provide appropriate accommodative placement options for Hospital Class Members,
- (k) continuing to confine Hospital Class Members in hospitals, against the wishes of the Hospital Class Members and without their consent;
- (l) continuing to confine Hospital Class Members in hospitals in the absence of any legitimate medical purpose; and
- (m) confining Hospital Class Members in inappropriate hospital settings which:
 - i. impose significant curtailments on the liberties and personal autonomy of residents;
 - ii. are locked, preventing Hospital Class Members from leaving without a staff or family member to take them out;
 - iii. lack educational opportunities, programming, and amenities for long-term residents;
 - iv. effectively segregate people with disabilities from their families, their communities, and the rest of society at large; and
 - v. fail to respect the dignity of people with disabilities.

89. The Province's deprivation of the Class Members' security of the person and liberty interests is contrary to the principles of fundamental justice. Specifically, these deprivations are contrary to the requirements of procedural fairness and are arbitrary.

90. The Province's decisions respecting the Waitlist are of great importance to the Class Members, all of whom are persons with disabilities in need of financial assistance. The Province owes the Class Members a significant measure of procedural fairness. However, the Class Members are not advised of the program decisions being made that resulted in the violation of their section 7 *Charter* rights. Nor are they given an opportunity to be heard or to present evidence before those decisions are made. No reasons are given for placement and program decisions. As a result of these failures, processes through which these decisions have been made fall short of the requirements of procedural fairness.

91. In addition, there is no rational connection between the placement of the Institution Class Members in the Institutions and the *Social Assistance Act*. It has long been known, and it has been repeatedly recognized by the Province, that large-scale congregate care facilities like the

Institutions cause harm to people with disabilities and fail to support their personal autonomy, life skills development, rehabilitation, education, and human dignity. The continued placement of the Institution Class Members in the Institutions thereby undermines the therapeutic, accommodative, and rehabilitative goals of services for people with disabilities offered under the *Social Assistance Act*.

92. Further, there is no rational connection between the placement of the Nursing Home Class Members in nursing homes and goals of the *Social Assistance Act*. The Nursing Home Class Members are placed in nursing homes without their consent and despite having no need for nursing home care. Nursing Home Class Members' confinement is unconnected to any legitimate medical purpose. Moreover, the continued confinement of the Nursing Home Class Members undermines the therapeutic, accommodative, and rehabilitative goals of services for people with disabilities offered under the *Social Assistance Act*.

93. Further, there is no rational connection between the placement of the Hospital Class Members in the Nova Scotia Hospital and other hospitals and goals of the *Social Assistance Act*. The Hospital Class Members are hospitalized without their consent and despite having no need for medical treatment. Hospital Class Members' confinement is unconnected to any legitimate medical purpose. Moreover, the continued confinement of the Hospital Class Members undermines the therapeutic, accommodative, and rehabilitative goals of services for people with disabilities offered under the *Social Assistance Act*.

94. To the extent that they may be prescribed by law, none of the Province's violations of the Class Members' s. 7 rights can be justified in a free and democratic society.

FREEDOM FROM ARBITRARY DETENTION

95. The plaintiff repeats the foregoing and says that the Province violated the rights of the Institution Class Members, Nursing Home Class Members, and Hospital Class Members not to be subject to arbitrary detention as guaranteed by s. 9 of the *Charter*.

96. The Province forces Institutional Class Members to either accept inappropriate Institutional placements or forgo social assistance from the Province. For the Institutional Class Members, all of whom are all persons in need requiring financial assistance, the latter is not a real option which can be freely chosen without significantly detrimental financial, familial, social, and other consequences. Institution Class Members have thereby been compelled to accept placements in Institutions where their liberties and personal autonomy are significantly curtailed.

97. The Province confines Nursing Home Class Members in nursing homes without Nursing Home Class Members' consent and in the absence of any legitimate medical purpose. Nursing Home Class Members have been involuntarily placed in nursing home due to the Province's failure to provide social assistance required for alternative accommodative placement options to which the Nursing Home Class Members could live. The Nursing Home Class Members experience significant constraints on their liberties and personal autonomy.

98. The Province confines Hospital Class Members in the Nova Scotia Hospital and other hospitals without Hospital Class Members' consent and in the absence of any legitimate medical purpose. Many Hospital Class Members have been involuntarily transferred to hospital settings by the Province, while others remain confined due to the Province's failure to provide social assistance required for alternative accommodative placement options to which the Hospital Class Members could be safely discharged. The Hospital Class Members experience significant constraints on their liberties and personal autonomy due to the conditions of the Nova Scotia Hospital and other hospitals.

99. To the extent that it may be prescribed by law, the Province's arbitrary detention of the Institution Class Members, Nursing Home Class Members, and Hospital Class Members cannot be justified in a free and democratic society.

CHARTER DAMAGES

100. The plaintiff says that he and the other members of the Class are entitled to damages pursuant to Section 24(1) of the *Charter*. An award of *Charter* damages is appropriate so as to:

- a. compensate Class Members for their suffering and loss of dignity;
- b. vindicate Class Members' fundamental rights; and,
- c. deter the defendant from engaging in rights violations of a similar nature.

101. The defendant has failed to reform the system of Disability Assistance despite years of authoritative statements on the harm caused to people with disabilities and recommendations as to what needs to change. There are no countervailing considerations rendering damages in this case inappropriate or unjust.

FALSE IMPRISONMENT

102. The plaintiff repeats the forgoing and says that the Province committed the tort of false imprisonment. In particular the Province held Hospital Class Members in conditions of total confinement in hospital wards. Hospital Class Members have been confined against their will and without their consent after the medical condition for which they were admitted to hospital had resolved and they no longer required hospital care. There is and was no lawful justification for the confinement of the Hospital Class Members.

103. The Province is vicariously liable for acts of unlawful confinement committed by its officers and/or agents pursuant to s. 5(1) of the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360.

THE PROVINCE'S FIDUCIARY DUTY

104. The Class consists of individuals who have a mental or physical disability or both and who have been assessed and approved for assistance provided via Disability Assistance. Class Members rely on Disability Assistance to meet their basic needs including, without limit, their

need for food, clothing and shelter. The Province undertook to provide the assistance pursuant to the *Social Assistance Act* and the *Regulations*. The Class Members are persons to whom the Province owes fiduciary duties including, without limit, the duty to ensure the assistance for which Class Members have been approved is not arbitrarily or unreasonably denied, discontinued, delayed or otherwise withheld.

105. The members of the Class had a reasonable expectation that the Province would act in their best interests with respect to the administration of approved assistance provided as Disability Assistance by virtue of the following:

- (a) the Province's creation and direction of a system of assessment and approval for Disability Assistance;
- (b) the dependence of members of the Class on the Province and their complete inability to provide for their basic and special needs without assistance from the Province;
- (c) the Province's prior provision of assistance to members of the Class;
- (d) the vulnerability of the members of the Class to the discretionary decisions made by the Province; and
- (e) the Province's assumption of responsibility for assessing eligibility and providing assistance to members of the Class.

106. At all material times, the members of the Class have been reliant on the Province for the administration of the Waitlist and the provision of Disability Assistance to meet their most basic needs. By virtue of the relationship between the members of the Class and the Province, being one of trust, reliance and dependence on the part of the members of the Class, the Province owed a fiduciary duty to ensure that the members of the Class were treated in a manner which did not arbitrarily or unreasonably jeopardize their safety and wellbeing.

107. As result of its sole jurisdiction over the administration, management and supervision of Disability Assistance and the Waitlist, the Province owed a fiduciary duty to the members of the Class which includes, but is not limited to, the duty to exercise its unilateral discretion properly and effectively and in the best interests of the members of the Class while administering the programs and the Waitlist.

108. The Province has administered, managed or supervised Disability Assistance and the Waitlist in a manner which denied the members of the Class the assistance for which they had been approved and which were essential to meet their basic and special needs and which was degrading and harmful to members of the Class. The Province knew of, or was wilfully blind to, the negative impacts caused by its administration of the programs and the Waitlist.

109. Members of the Class were entitled to rely and did rely upon the Province, to their detriment, to fulfill its fiduciary duty to them. The Province breached its fiduciary duty to the Class. In particular the Province:

- (a) failed to act to reduce unreasonably long waitlist times which served as an effective denial of approved assistance;
- (b) created a waitlist of indeterminate length for Disability Assistance which was essential to basic human needs, safety and security of the members of the Class;
- (c) failed to have a consistent and rational scheme of prioritization for eligible applicants on the Waitlist;
- (d) failed to create a cohesive system to rationally and efficiently allocate resources to those on the Waitlists;
- (e) failed to provide members of the Class with the assistance to which they were eligible and for which they had been approved pursuant to the *Social Assistance Act* and the *Regulations*;
- (f) returned Class Members to the Waitlist when their access to small and community-based placements was terminated, including due to hospitalization;
- (g) failed to properly exercise discretion in determining an appropriate length of time for members of the Class to be on the Waitlist once approved for assistance;
- (h) failed to respond adequately, or at all, to complaints or recommendations which were made concerning the administration of Disability Assistance and the Waitlist;
- (i) put its own interests, and those of its employees, agents and other persons under its supervision, ahead of the interests of members of the Class;
- (j) compelled Institution Class Members into accepting inappropriate Institutional placements;
- (k) compelled Nursing Home Class Members into accepting inappropriate nursing home placements;
- (l) confined Hospital Class Members in the Nova Scotia Hospital and other hospitals without the Hospital Class members' consent and in the absence of any

legitimate medical purpose;

(m) failed to provide adequate financial resources to provide Disability Assistance; and

(n) failed to safeguard the psychological, physical and emotional needs of the members of the Class.

110. The members of the Class suffered damages as a result of the above-noted breaches, the particulars of which are set out later below.

NEGLIGENCE

111. The Province was solely responsible for the creation, administration, supervision and management of Disability Assistance and the Waitlist during the class period. In particular the Province undertook and was solely responsible for:

- (a) the assessment of applications and provision of Disability Assistance;
- (b) establishing the criteria by which an individual was assessed and approved for Disability Assistance;
- (c) establishing the standards governing the provision of Disability Assistance to eligible applicants once approved, including the timing of the provision of assistance;
- (d) establishing the criteria by which eligible individuals are prioritized for Disability Assistance; and
- (e) providing the necessary directions or resources to ensure the reasonable and effective provision of assistance to approved applicants and the reasonable management of the Waitlist.

112. The Province and the members of the Class were in a relationship of proximity which gave rise to a duty on the part of the Province to take care not to cause foreseeable harm to the members of the Class.

113. As a result of the acts and omissions of the Province as more fully described below, the members of the Class did in fact suffer harms which were foreseeable.

114. The plaintiff repeats the forgoing and says that the Province breached its duty of care to the Class and was negligent in its administration, management and supervision of Disability Assistance and the Waitlist. In particular the Province:

- (a) failed to act to reduce unreasonably long waitlist times which served as an effective denial of approved assistance;
- (b) created a waitlist of indeterminate length for Disability Assistance which was essential to the basic human needs, safety and security of the members of the Class;
- (c) failed to have a consistent and rational scheme of prioritization for eligible applicants on the Waitlist;
- (d) failed to create a cohesive system to rationally and efficiently allocate resources to those on the Waitlists;
- (e) failed to provide members of the Class with the assistance to which they were eligible and for which they had been approved pursuant to the *Social Assistance Act* and the *Regulations*;
- (f) returned Class Members to the Waitlist when their access to small and community-based placements was terminated, including due to hospitalization;
- (g) failed to properly exercise discretion in determining an appropriate length of time for members of the Class to be on the Waitlist once approved for assistance;
- (h) failed to respond adequately, or at all, to complaints or recommendations which were made concerning the administration of Disability Assistance and the Waitlist; and
- (i) failed to safeguard the psychological, physical and emotional needs of the members of the Class.

115. The Province is vicariously liable for negligent acts committed by its officers and/or agents pursuant to s. 5(1) of the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360.

116. The Province's failures in the administration of Disability Assistance are located at the operational level, and can be judged according to general standards of competence. The Province's failures do not reflect the exercise of policy judgment. In particular, the Province has continued to rely on the Institutions despite its knowledge that transitioning to community-based care would be more financially sustainable.

117. In the alternative, if the Province exercised policy judgment in designing the features of Disability Assistance which are challenged in this proceeding, such judgment was irrational, in bad faith, or grossly negligent given the Province's knowledge of the problems in Disability Assistance and the harms being inflicted upon people with disabilities.

118. As a result of the Province's negligence, the members of the Class suffered injury, loss and damages which are more fully set out below. The plaintiff's claim, and the claim of each member of the Class, is limited to the amount of the plaintiff's or other Class member's damages that would be apportioned to the Province in accordance with the relative degree of fault that is attributable to the Province's negligence.

DAMAGES SUFFERED BY THE CLASS

119. The plaintiff's claim, and the claim of each Class Member, is limited to the amount of the plaintiff's or other Class Member's damages that would be apportioned to the defendant in accordance with the relative degree of fault that is attributable to the defendant's misconduct. The plaintiff's claim is against the defendant for those damages that are attributable to its proportionate degree of fault, and he does not seek, on his own behalf or on behalf of the Class, any damages that are found to be attributable to the fault or negligence of any other person, or for which the defendant could claim contribution or indemnity. For greater certainty, without limiting the foregoing, and notwithstanding paragraph 116, the plaintiff does not seek, on his own behalf or on behalf of the Class, any damages for which the defendant is vicariously liable as a result of harms perpetrated on Class Members who have resided in Institutions or nursing homes that are operated by persons other than the Province, whether or not acting within the authority granted to them by the defendant, for which the defendant could claim contribution or indemnity.

120. The Province knew, or ought to have known, that as a consequence of its administration, management or supervision of the Disability Assistance and the Waitlist in breach of its fiduciary duty, in a negligent manner or in a manner that infringed the human rights and *Charter* rights of members of the Class, the Class would suffer physical, mental, emotional, psychological and economic harm.

121. As a result of the Province's breach of its fiduciary duty, its negligence, its violation of the human rights and *Charter* rights of the members of the Class, the members of the Class suffered and continue to suffer injury, loss and damages which include:

- (a) pain and suffering;
- (b) loss of general enjoyment of life;
- (c) depression, anxiety, emotional distress and mental anguish;
- (d) development of mental, psychological or psychiatric disorders;
- (e) affront to their dignity and worth as a person;
- (f) impairment of their physical integrity;
- (g) loss of freedom;
- (h) denial of the basic necessities of life; and
- (i) economic losses.

PUNITIVE DAMAGES

122. The high-handed and callous conduct of the Province warrants condemnation. The Province established, operated and managed the Disability Assistance, as set out above, with wanton and callous disregard for the health, safety and well-being of the members of the Class and deprived them of the ability to meet their basic and special needs. Members of the Class were particularly vulnerable as they were reliant upon the Province. The plaintiff claims aggravated and punitive damages.

HABEAS CORPUS

123. The plaintiff seeks a writ of *habeas corpus* and an order pursuant subsection 24(1) of the *Charter* compelling the defendant to release the Hospital Class Members who are still confined in a hospital without being in need of medical treatment.

RELIEF SOUGHT

124. The plaintiff repeats the forgoing and claims, on his own behalf and on behalf of the Class, as follows:

- (a) an order certifying this action as a class proceeding and appointing the plaintiff as representative plaintiff for the Class;
- (b) a declaration that, by virtue of the facts and events described herein, the defendant Province violated the right of the plaintiff and the Class to equality before the law and equal protection and equal benefit of the law without discrimination based on mental or physical disability as guaranteed by section 15 of the *Charter*;
- (c) a declaration that, by virtue of the facts and events described herein, the defendant Province violated the right of the plaintiff and the Class to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice as guaranteed by section 7 of the *Charter*;
- (d) a declaration that, by virtue of the facts and events described herein, the defendant Province violated the right of the Institution Class Members, Nursing Home Class Members, and Hospital Class Members not to be subjected to arbitrary detention as guaranteed by section 9 of the *Charter*;
- (e) a declaration that, by virtue of the facts and events described herein, the defendant Province discriminated against the plaintiff and the Class in the provision of services on the basis of mental or physical disability as prohibited by the Nova Scotia *Human Rights Act* and that such discrimination was not permitted or justified on any basis under the *Human Rights Act*;
- (f) a declaration that, by virtue of the facts and events described herein, the defendant Province discriminated against the plaintiff and the Class in the provision of services on the basis of a mental or physical disability which is prohibited by customary international law, as incorporated into the laws of Canada, including those

principles embodied in the United Nations *Convention on the Rights of Persons with Disabilities* and that such discrimination was not reasonable or justifiable;

(g) a declaration that, by virtue of the facts and events described herein, the defendant subjected the Hospital Class Members to false imprisonment, contrary to the laws of Canada and Nova Scotia and contrary to customary international law, as incorporated into the laws of Nova Scotia;

(h) a declaration that, by virtue of the facts and events described herein, the defendant Province breached its fiduciary duties to the plaintiff and Class;

(i) a declaration that, by virtue of the facts and events described herein, the defendant Province breached its common law duty of care to the plaintiff and Class and was negligent;

(j) a declaration that, by virtue of the facts and events described herein, the defendant Province is liable to the plaintiff and the Class for the damages caused by its *Charter* violations, its discrimination in the provision of services, its breach of fiduciary duty and its negligence;

(k) a declaration that, by virtue of the facts and events described herein, the defendant is liable to the Hospital Class Members for the damages caused by the false imprisonment of the Hospital Class Members;

(l) damages or such other remedy as this Honourable Court may consider just and appropriate pursuant to subsection 24(1) of the *Charter*;

(m) damages for discrimination, false imprisonment, and negligence in such amount as this Honourable Court may find appropriate;

(n) equitable compensation for breach of fiduciary duty in such amount as this Honourable Court may find appropriate;

(o) punitive damages in such amount as this Honourable Court may find appropriate;

(p) prejudgment interest pursuant to the *Judicature Act*, R.S.N.S. 1989, c. 240, as amended;

(q) costs of the action on a substantial indemnity basis or solicitor and own client basis;

(r) the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to section 27(1) of the *Class Proceedings Act*; and

(s) such further and other relief as to this Honourable Court may deem just and appropriate in all the circumstances.


125. The trial of the action will take place at Halifax.

Dated at Halifax, Nova Scotia this 4th day of May, 2022.



Brian J. Hebert and John McKiggan Q.C.

McKiggan Hebert Lawyers
502-1959 Upper Water Street
Purdy's Wharf Tower 1
Halifax, NS B3J 3N2
Tel: (902) 423-2050
Fax: (902) 423-6707
Email: bhebert@mckigganhebert.com

fn 

James Sayce and Jamie Shilton

Koskie Minsky LLP
20 Queen Street West,
Suite 900
Toronto, Ontario M5H 3R3
Tel: (416) 977-8353
Fax: (416) 977-3316
Email: jsayce@kmlaw.ca

Counsel for the Plaintiff