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THE  
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**Response of the Association for Community Living  
to the  
Minister of Family Services and Housing  
and  
the Executive Director of the MDC  
(known collectively as the "Province")**

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## **A. The Nature of the Section 13 Complaint Against the Minister**

1. The Province<sup>1</sup> alleges that it is difficult to determine the Complainant's precise allegations regarding the manner in which certain Respondents have contravened sections 9(1), 9(2)(e), 9(2)(l), 13(1) and 14(1) of *The Human Rights Code*.<sup>2</sup>
2. This is a puzzling statement given the argument outlined in paragraphs 12, 13, 46, 47, 51, 52, 84 – 90 of the initial complaint. However, in order to be of assistance, paragraphs 3 through 47 of this response offer an elaboration of paragraph 13 of the ACL complaint as it relates to the Minister.

### ***The Section 13 Allegation Against the Minister***

3. Paragraph 13 of the Complaint states:

More fundamentally, the Respondents are discriminating against MDC residents under ss. 13(1) of *The Human Rights Code* on the basis of age and mental disability by denying them the right to live in their community with appropriate support and funding.

4. Section 13 of *The Human Rights Code* provides that

No person shall discriminate with respect to any service, accommodation, facility, good, right, license, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

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<sup>1</sup> The Minister and the Director together are referred to as the Province.

<sup>2</sup> Reply of the Province (the Province), page 3.

## ***The Historical and Social Context***

5. Individuals with intellectual disabilities are a historically disadvantaged group. Based upon stereotype and gross generalization, they have been denied equality of opportunity and the right to fully participate in society to the best of their ability and potential.
6. Historically, intellectual disability has often been treated as a disease requiring quarantine<sup>3</sup> or a medical cure<sup>4</sup> rather than as a product of the complex interaction between an individual and his or her community.<sup>5</sup>

## ***Rejection of the Institutional Care Model***

7. In North America, one of the most egregious examples of this outmoded way of thinking has been the segregation of hundreds of thousands of individuals with intellectual disabilities in large institutions where they were left to wither away - hidden from the public eye.
8. Over time, this institutional care model has come to be viewed as a tired relic of a discredited past. It has been condemned and rejected by the United Nations, by many states, provinces and other jurisdictions, by learned social scientists and by over a quarter of a century of careful empirical research.
9. Most importantly, the model has been rejected by those individuals with intellectual

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<sup>3</sup> “In 1916, thousands of Canadians petitioned the prime minister and other members of the government of Canada and its provinces to establish ‘farm colonies’ for ‘the care and control of the mentally defective in our country.’ They urged that a study be conducted to report on what provisions might be necessary to ‘control this menace’ . . . Mental deficiency was portrayed as the cause of a range of social problems. . . Even intelligent humanitarians, concluded that the cure for the social problems of the day was to label, segregate and sterilize those deemed subnormal.” *Disability, Community and Society*, Roeher Institute, 1996, pp. 4 -5 citing McLaren, *Our Own Master Race: Eugenics in Canada, 1885-1945*.

<sup>4</sup> Disability has often been viewed through the prism of a bio-medical model. The bio-medical model, with a focus on altering the biological condition, places less emphasis on the role that society plays in limiting and enabling people. With the rise of institutional facilities and public benefits, medical science was established as the mechanism for gatekeeping (i.e. assessing those deemed to be legitimately disabled). *Disability, Community and Society*, Roeher Institute, 1996, pp. 14.

<sup>5</sup> In modern times, experts and service providers have tended to look at disability from a more environmental viewpoint as compared to the bio-medical model's exclusive focus on the individual. These observers tend to view disability as a difference rather than an anomaly and as a function of the interrelationship between the individual and society.

disabilities who have escaped institutional care and who have experienced properly supported and carefully designed community living programs.

10. A majority of the Supreme Court of the United States of America has recognized that:

(i) 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;

(ii) Institutional placement of persons who can benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life;

(iii) Unjustified isolation is properly regarded as discrimination based on disability.<sup>6</sup>

11. The evidence is in. Judgement has been rendered. For individuals with intellectual disabilities, the institutional care model is beyond redemption.

### ***Acceptance of the Community Living Model***

12. Today, while Manitobans with intellectual disabilities continue to struggle against discrimination based upon stereotype and generalization, they comprise a central and vibrant part of many Manitoba communities.

13. Over four thousand adults with intellectual disabilities live in the community and successfully participate in community living programs funded by the Province of Manitoba. While no program is perfect, there is almost universal consensus that individuals with intellectual disabilities best realize their full potential in a community living setting.

14. This reality has been acknowledged by the Public Trustee<sup>7</sup>, the Province and the Director<sup>8</sup> within the context of their reply to this complaint.

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<sup>6</sup> *Olmstead v. L.C.* (98-536) 527 581 (1999).

<sup>7</sup> Reply of the Public Trustee (the Trustee), page 3.

<sup>8</sup> The Province, page 6.

## ***In Manitoba – Large Institutions still Remain***

15. Despite the acknowledged superiority of the community living model, some Manitobans with intellectual disabilities have remained warehoused in large institutions for many years.

16. The Pelican Lake Institution which housed about seventy individuals with intellectual disabilities was not closed until the year 2000. Many of those individuals had existed within the confines of Pelican Lake for close to thirty years before being successfully returned to their communities.<sup>9</sup>

17. While Pelican Lake has closed, the Manitoba Developmental Centre (MDC) still remains. Approximately three hundred and seventy residents of the MDC continue to be denied access to community living programming.

## ***Community Living Programing Would be in the Best Interests of the MDC Residents***

18. There is conclusive evidence that the community living model is superior to the institutional model.

19. Based upon over a quarter of century of empirical research, there can be do no doubt that:

- institutional life by its very nature, segregates, denies choice, limits liberty and fails to include people with intellectual disabilities fully in society;
- judged solely on their personal situation and merits, all residents of the MDC could live in the community provided they received adequate support based upon their individual needs;
- it would be in the best interests of all MDC residents to live in the community with adequate supports and careful planning rather than to continue to be segregated within the confines of

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<sup>9</sup> Many of the family members of former Pelican Lake residents initially opposed a return to community life until they were given the opportunity to observe the opportunities that community living offered. Residents of Pelican Lake and their family members were given an opportunity to visit potential homes and to consider whether they were appropriate.

the MDC.

20. The Public Trustee which acts as the substitute decision maker for the vast majority of residents at the MDC, has always endorsed community living for its clients where adequate supports exist.<sup>10</sup>

21. Even the Province acknowledges the need for a strategy to accelerate the movement of residents from MDC into the community.<sup>11</sup>

### ***The Complaint***

22. This complaint is made on behalf of the approximately three hundred and seventy adults housed at the Manitoba Developmental Centre who have been denied access to the community living programming available to over four thousand other Manitobans with intellectual disabilities.

23. ACL says the denial of access to community living programming constitutes discrimination with respect to a program, service, benefit or privilege that is available to a section of the public (i.e. those Manitoban adults with intellectual disabilities receiving community living programming).

24. In the view of ACL, there is no reasonable and bona fide cause for this discrimination.

### ***Discrimination with respect to a Program or Benefit***

25. The MDC is a large institution which evaluates itself using standards designed for other large long term care facilities.<sup>12</sup> It is a successor to and a product of the institutional care model.

26. All residents of the MDC have intellectual disabilities. On average, they are over fifty years of age and have been housed at the MDC for over thirty years. Most were institutionalized at a

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<sup>10</sup> The Trustee, page 3.

<sup>11</sup> The Province, p. 6.

<sup>12</sup> The Province, p. 9.

time when institutionalization was routine and there were few, if any, community options.

27. The original decisions to institutionalize these individuals were discriminatory and based upon a series of stereotypes and generalizations which denied these individuals the opportunity to fully participate in society and to fully realize their potential.

28. While most residents of the MDC were wrongfully torn from their community based upon decisions made many years ago, they continue to be denied access to community living programming today based upon discriminatory decisions made by the Minister and the Director.

29. The Minister and the Director have failed to expose or to prepare the residents of the MDC to the community living option in order that the residents, in consultation with their substitute decision maker, can make an informed choice of where they wish to live.

30. Just as importantly, the Minister has denied the residents of the MDC access to community living programming.

31. As a consequence, the residents of the MDC continue to be confined in an institution where they do not belong and where they cannot prosper.

32. The Minister's failure has exacerbated the pre-existing disadvantage of the residents of the MDC and perpetuated the unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.

33. The Minister's failure to provide appropriate community living programming for individual MDC residents as compared to those who receive community living programming, constitutes:

differential treatment of the individual MDC residents, based upon their membership in a group of older persons with intellectual disabilities who have been housed over an extended period of time in a large institution;

differential treatment of the individual MDC resident based upon their intellectual disability and based upon their age;

## ***Battling Science with Stereotype and Strawmen***

34. The Province, in defending the MDC, continues to do battle with accepted social science by employing both stereotype and analytical strawmen. It expressly or implicitly argues that certain individuals within the MDC are unable to benefit from community living due to their age, the length of time they have been institutionalized, their medical condition, their behaviour or the development level with which they have been labeled.

35. The Province also claims that the denial of community living programming is simply a matter of respecting the choices of MDC residents, their substitute decision maker or their family.

## ***Discrimination for which No Bona Fide or Reasonable Cause Exists***

36. The language, reasoning and argument offered by the Province in its reply graphically illustrates the stereotypical assumptions which continues to animate its decisions.

37. There is no reasonable basis for the Province to deny access to community living programming to MDC residents. The Province cannot successfully argue the institutional care model is in the best interests of any MDC resident.

38. There is an overwhelming empirical consensus that “people experience major enhancements in dozens of quality of life indicators” when they escape from large institutions and move to the community.

39. The Province cannot successfully argue that certain individuals are unable to live in the community.

40. Over twenty-five years of careful social science research has led to a general consensus that, with careful planning and adequate support, all individuals with intellectual disability can live in their community regardless of their age, the length of time they have been institutionalized, their medical condition, their behaviour or the development level with which they have been

labeled.

41. There is no doubt that for every person living within the confines of the MDC, there is another person with similar support needs thriving within the community. The Ontario Superior Court of Justice has recognized that regardless of the level of community support required, all individuals with intellectual disabilities can return to the community.<sup>13</sup>

42. It also cannot be reasonably argued that the failure to offer community living programming to MDC residents is simply a matter of respecting the choices of MDC residents given that:

**The substitute decision maker for the vast majority of MDC residents has endorsed community living for its clients;**

**The Minister and the Director by failing to provide MDC residents with exposure to the community living option have denied the residents of the MDC the opportunity to make an informed choice, in consultation with their decision maker, of where they wish to live.<sup>14</sup>**

43. More fundamentally, it is contrary to universally accepted human rights principles<sup>15</sup> for the state to engage in the unwarranted segregation of any individual from the rest of society.

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<sup>13</sup> *Gray v Ontario* [2006] O.J. No. 266 found in the Social Science Brief (SSB) at Tab 17. I accept that these residents are severely developmentally delayed and are no doubt very vulnerable individuals. However, it does not follow and the evidence does not establish that their needs cannot be met in community placements. On the contrary, the evidence establishes that individuals with this level of developmental disability have been placed successfully in community settings since the mid-1980's. There have been no new admissions to the three remaining institutions for nearly 20 years.

<sup>14</sup> An informed choice might involve the opportunity to visit and explore various community living options. For example, visits and overnight stays have been used to give residents of large institutions some insight into community living.

<sup>15</sup> The Province does not explain why it has taken a position with regard to the residents of the MDC which is inconsistent with the most recent Convention on the Rights of Persons with disabilities which was adopted by the Plenary of the General Assembly on December 13, 2006, and signed by Canada on or about March 30, 2007. In particular, the Province has not explained why it has taken a position with regard to the residents of the MDC which is inconsistent with Articles 19 (living independently and being included in the community) and 26 (habilitation and rehabilitation) of the Convention.

## **No Evidence of Undue Hardship**

44. The Province has failed to offer any substantive evidence of undue hardship. It has offered no evidence to refute the statement by ACL that, on average, community services are no more expensive than those provided in an institution;

45. The Province has never challenged the suggestion made to it in 2005 by ACL that the Province could purchase, furnish and modify new homes for current MDC residents at a capital cost that is comparable to and perhaps less than the \$40 million redevelopment plan.

46. The Province has never refuted the suggestion made to it in 2005 by ACL that those individuals currently residing at the MDC could be supported in the community at an global annual operating cost that is very comparable to the global annual operating costs of the MDC.

## **B. Both the Province and the Public Trustee Endorse Community Living**

47. Neither the Province or the Public Trustee offer any empirical evidence to challenge the ACL assertion highlighted in paragraphs 42 through 45 of the Complaint that a growing body of social science research reveals that persons who move into the community after decades of institutional life, do significantly better in terms of personal growth and realizing their full potential.<sup>16</sup>

48. While the Province buries a boiler plate denial of paragraphs 42 through 45 on the second last page of Appendix A to its reply, it does concede that it sees “community living as a preferred option.”<sup>17</sup>

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<sup>16</sup> The ACL Complaint, para 42.

<sup>17</sup> The Province, page 6. In fact, 4300 Manitobans are already benefiting from community living programming. The superiority of the community living option is implicitly recognized in the Province's White Paper on Full Citizenship (Full Citizenship: A Manitoba Strategy on Disability”, 2001.) The Province admits that:

- Manitobans with disabilities have the right to the least restrictive environment possible.
- Manitobans with disabilities have a right to places, events, services and functions that are generally available in the community.
- Manitobans with disabilities have the right to participate and be invited to participate in all aspects of the economic, social and cultural life of Manitoba.

49. More bluntly, the Public Trustee states that it “has always endorsed community living for its clients, where the Government of Manitoba has funded the creation of appropriate community places.”<sup>18</sup> (emphasis added)

## **C. The Empirical Evidence Cannot be Denied**

50. The Province's reluctance to offer any empirical evidence in opposition to the assertion that those “who move into the community do significantly better” can best be explained by the absence of any such material to offer.

51. The data is overwhelming that, in comparison to the community living model, the service model represented by institutions such as the MDC is outdated, ineffective and damaging to the individuals it purports to serve.

52. As James Conroy stated in 2002:

Twenty-five years of developmental disabilities research literature on movement from institutional to community settings indicates that, on the average, people experience major enhancements in dozens of quality of life indicators. The research is remarkably consistent in this area. ... Their qualities of life are enhanced, they display less challenging behaviour, their homes are more pleasant, and their families believe that they are far “better off” than they were in developmental centers.<sup>19</sup>

### ***The Research is more than just Academic Argument***

53. The Province attempts to “duck and run” from empirical research by dismissing this evidence as “academic argument” aimed at attributing to MDC “all wrongs done at other institutions.”<sup>20</sup>

54. The Province mis-states the issue.

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<sup>18</sup> The Trustee, page 3.

<sup>19</sup> Conroy, James W. “Deinstitutionalization of People with Mental Retardation and Developmental Disabilities in the United States: Was This Good Social Policy?” Center for Outcome Analysis. SSB, Tab 5.

<sup>20</sup> The Province, page 3.

55. First, these are not mere academic musings which cannot be translated to the living, breathing reality of the Province of Manitoba.

56. The MDC is not some unique institution cloaked in Walden<sup>21</sup> like isolation and innocence. It employs the same tired language and uses the same tired approach as so many institutions which have gone before it. It was created and it has endured within the same institutional milieu as so many other large institutions throughout North America.

57. More importantly, the evidence of the community living experience in other jurisdictions is directly relevant to the likely experience of MDC residents in the event that they are given the opportunity to benefit from properly planned and supported community living.

58. The closing of residential institutions for persons living with mental disabilities is nothing new. It has been going on in Canada and the USA for decades. Because the closure of institutions is such a significant undertaking both in terms of policy and lives affected, policymakers have been keenly interested in the outcomes of this trend. In consequence, the trend of deinstitutionalization has been the subject of thorough and comprehensive scrutiny.

59. For well over a quarter of a century, skilled social scientists and policy makers have been asking the question that the Province dares not ask or answer:

Is community living good social policy rather than just a nice theory?

60. The best predictor of what is likely to happen to those who leave the MDC is the experience of those who have left large institutions and returned to the community.

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<sup>21</sup> Thoreau, Henry David, *Walden or Life in the Woods* (1854).

## ***There is Little Academic Argument Regarding the Benefits of Community Living***

61. It also should be noted that the Province would be wrong to suggest that there is considerable academic debate regarding the question of whether the community living model is superior to institutional care.

62. In fact, there is very little argument among academics about the merits of community living when compared to large institutions such as the MDC. As Conroy notes

the research literature on community versus institutional living has not been "mixed." Through the assessment of all of these quality of life dimensions, my research in 18 states, and the research of other scientists in America, has consistently shown strong benefits associated with community placement. Furthermore, the results have been extremely powerful, in that improvements have been documented in nearly every measurable outcome dimension.<sup>22</sup> (emphasis added)

63. This American data has been reinforced by the data from many other nations.

Research in other nations (Australia, Canada, Denmark, England, France, Ireland, the Netherlands, New Zealand, Norway, Sweden) has revealed remarkably consistent findings associated with institutional closure (Mansell, J., & Ericsson, K. (Eds.), 1996).<sup>23</sup>

64. While the Province may try to hide behind the argument that the MDC is the best of a bad lot, the Province cannot obscure the reality that individuals with intellectual disabilities do best in the community. No amount of remedial window dressing can sanctify the institutional care model.

65. Given the refusal of the Province to substantively address the merits of community living, ACL has provided a brief which summarizes the current state of research and debate. The

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<sup>22</sup> Conroy, James W. "Deinstitutionalization of People with Mental Retardation and Developmental Disabilities in the United States: Was This Good Social Policy?" Center for Outcome Analysis. SSB, Tab 5.

<sup>23</sup> Conroy, James W. "Deinstitutionalization of People with Mental Retardation and Developmental Disabilities in the United States: Was This Good Social Policy?" Center for Outcome Analysis. SSB, Tab 5.

brief is being filed at the same time as this response. As a courtesy, ACL has provided the background material upon which the brief is based to the Commission and to the Respondents.

## **D. Institutional Care Models Are on the Decline**

66. While the Province objects to the MDC being compared to a residential school or orphanage, it does not offer any evidence to refute the suggestion by ACL that institutional care models are on the decline.<sup>24</sup>

67. The Province's inability to offer any evidence on this point is not surprising. When jurisdictions as disparate as Ontario and Serbia<sup>25</sup> have announced their intention to close down all large institutions, the handwriting is clearly on the wall.

68. In the United States alone, the population of individuals with intellectual or developmental disabilities living in public institutions had declined to less than forty two thousand in 2004 from a peak of almost one hundred and ninety five thousand in 1967.<sup>26</sup> Thirty seven states and the District of Columbia have closed at least one institution.<sup>27</sup> Nine US states and the District of Columbia have closed all their public institutions.

69. In defending the institutional model, the Province lies in the uneasy company of the few Southern states which continue to support an “extensive network of public institutions” such as Arkansas, Louisiana, Mississippi, North Carolina and Virginia.<sup>28</sup> The Province's adamant commitment to the MDC is inconsistent with empirically based logic, practical experience and basic human rights.

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<sup>24</sup> See page 1 of Schedule A to the Province's Reply regarding paragraph 6 of the ACL Complaint.

<sup>25</sup> Judith Klein and Dragan Lukic, “Out of the asylum”, Comment is Free (Guardian UK) December 27, 2006. Online: [http://commentisfree.guardian.co.uk/judith\\_klein\\_and\\_dragan\\_lukic/2006/12/out\\_of\\_the\\_asylum\\_judith\\_klein.html](http://commentisfree.guardian.co.uk/judith_klein_and_dragan_lukic/2006/12/out_of_the_asylum_judith_klein.html). SSB, Tab 2.

<sup>26</sup> Proutty, Smith & Lakin (2005), *Residential services for persons with developmental disabilities: Status and trends through 2004*.

<sup>27</sup> Thirteen states have not closed any public institutions although Wisconsin appears to be on the verge of doing so. (Braddock 2002, Hemp, 2005)

<sup>28</sup> Braddock, 2002.

## E. The MDC is not Needed for those with Chronic Medical Conditions

70. At page six of its reply submission, the Province implicitly suggests that the MDC must remain open as part of “a range of residential options to meet a wide spectrum of needs . . .”<sup>29</sup> In particular, it appears to suggest that institutionalization is a practical and economic necessity for those who require 24 hour residential care.<sup>30</sup>

71. However, experience from jurisdictions which no longer offer publicly funded institutional care, including two Canadian provinces as well as nine American states and the District of Columbia,<sup>31</sup> makes it abundantly clear that large institutions such as the MDC are not required to meet the needs of those with intellectual disabilities.

72. US estimates suggest that only one percent of the total population of individuals with disabilities live in large institutions with another one percent residing in nursing homes.<sup>32</sup> Clearly, many people with extensive support needs, similar to or more intensive than the needs of those now living in institutions, are living in the community today.<sup>33</sup>

73. Canadian experience and US data demonstrates this is true even for those with chronic or complex medical needs.

74. Perhaps the most compelling Canadian example flows from Newfoundland.<sup>34</sup> As institutions were closed in Newfoundland during the mid-1980s, a common refrain was that “community living was good but not for everyone – not for those with the greatest needs.”

75. In reply to this suggestion, officials in Newfoundland focused their “first efforts on those identified as having the greatest needs”. The Province identified fourteen persons who were labeled as medically fragile. The group included some individuals who were being tube fed.

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<sup>29</sup> The Province, page 6.

<sup>30</sup> The Province, page 8.

<sup>31</sup> Shoultz et al, *Status of Institutional Closure Efforts in 2005*, SSB, Tab 10.

<sup>32</sup> Shoultz et al, *Status of Institutional Closure Efforts in 2005*, SSB, Tab 10.

<sup>33</sup> Shoultz et al, *status of Institutional Closure Efforts in 2005*, Appendix A

<sup>34</sup> Source: Mr. Don Gallant who was a senior official with the Newfoundland government during the closure of Exxon House Institution during the 1980s. Mr. Gallant notes that in hindsight the “development maximization units were an unnecessary step.”

These fourteen individuals were targeted for the first deinstitutionalization efforts.

76. While these individuals were initially located in development maximization units, within a relatively short period of time they were all moved to alternate family settings. Since then, service providers in Newfoundland “have assisted many people with similar needs within the community through a process of individualized planning and supports.”

77. There is no doubt that, with careful planning and implementation, all individuals with complex medical needs can live and thrive in the community. American literature reinforces this reality.

People who have medical conditions requiring sophisticated medical expertise and technology are living in the community in most states. For every person with such needs in institutions, others with the same or more complex needs live in the community (e.g. Hewitt, Larson & Lakin, 2000).<sup>35</sup>

78. This point is further addressed in the social sciences brief.

## **F. There is no Must Stay Group – Either in terms of Ability to Function or in terms of Behavioural Difficulties**

79. To similar effect, the Province appears to implicitly argue in its discussion of Development Levels and Programs Areas<sup>36</sup> that there are certain individuals within the MDC who simply cannot function within the community either due to developmental disability, mental disorder or personality disorder.

80. Before addressing the flaws in the Province's argument, it should be noted that the labelling of individuals using “developmental levels” derived from IQ testing<sup>37</sup> underlines the institutional mindset both of the MDC and of those who work there.

81. The terms employed by the Province are considered to be anachronistic by almost all

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<sup>35</sup> Shoultz et al, *Status of Institutional Closure Efforts in 2005*, Appendix A, p. 3.

<sup>36</sup> The Province, pp. 9 - 12.

<sup>37</sup> The terms used include mild, severe and profound.

specialists currently working in the field of intellectual disabilities.<sup>38</sup> As long ago as 1992, leading professionals were noting that “the old classification level is gone. The new definition focuses on needed supports instead of an IQ-derived level”<sup>39</sup>

82. Today, rather than labelling individuals using outdated terms, the focus is upon an individualized assessment of the needs and capabilities of each person. Instead of relying upon the dated, single dimensional analysis implied by the use of terms such as development level, modern asset based planning looks at a person's emotional, physical, spiritual and mental abilities.<sup>40</sup>

83. The language employed by the Province is representative of an approach long considered obsolete.

### ***Those in Need of Greater Support are Capable of Thriving within the Community***

84. Just as importantly, the empirical evidence suggests that “when people who are labelled severely or profoundly retarded move into family-like community settings, they show even greater gains, proportionally, in adaptive behaviour than persons labelled mildly and moderately retarded.”

No support exists for the proposition that some people are "too low functioning" to succeed in the community. Empirical evidence is directly to the contrary (Conroy & Bradley, 1985; Stull, Conroy, & Lemanowicz, 1990). In fact, the gains made by persons with severe and profound disabilities upon moving to small community homes from large institutions are initially rapid and immediate and continue over time.<sup>41</sup>

85. This point is elaborated upon in the social sciences brief.

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<sup>38</sup> It should be noted that these development levels are reproduced from a Provincial Government memo at paragraph 20 of the ACL complaint. ACL does not endorse or condone the use of these outdated terms.

<sup>39</sup> AAMR, *Mental Retardation, Definition, Classification and System of Supports*. The AAMR notes the word retardation itself is also viewed as stigmatizing.

<sup>40</sup> AAMR, *Mental Retardation, Definition, Classification and System of Supports*, Chapter 9.

<sup>41</sup> Conroy, James W. “Deinstitutionalization of People with Mental Retardation and Developmental Disabilities in the United States: Was This Good Social Policy?” Center for Outcome Analysis. SSB, Tab 5.

## ***Those with Challenging Behaviours can be Successful in the Community***

86. Likewise, the experience of US States such as New Hampshire, demonstrate that even those with serious behavioural challenges can be successfully reintroduced to their community.<sup>42</sup> Of thirty three studies of persons with challenging behaviours who were moved into the community between 1980 and 1999, all but two found improvements or no significant change.<sup>43</sup>

87. A further discussion on this point can be found in the social sciences brief.

## **G. On Average, Community Services are no more Expensive than Institutional Care**

88. The Province never directly responds to the ACL submission that services in the community are no more expensive, on average, than those provided in an institution. The Province never asserts that for the total population of the MDC, community living would be more expensive than institutional care.

89. Instead, without providing the data upon which it relies, the Province chooses to focus solely on the comparative costs of serving what it describes as “vulnerable persons who require 24-hour residential care with the same level of care as provided at the MDC.”<sup>44</sup>

90. ACL will request complete documentation of the alleged research conducted by the Province to test whether it was conducted in an analytically defensible manner. However, it would respectfully point out that by “cherry picking” the most extreme and most expensive example, the Province has avoided the more fundamental question.

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<sup>42</sup> Conroy, James W. “Deinstitutionalization of People with Mental Retardation and Developmental Disabilities in the United States: Was This Good Social Policy?” Center for Outcome Analysis. SSB, Tab 5.

<sup>43</sup> Shoultz et al, *Status of Institutional Closure Efforts in 2005*, SSB, Tab 17 citing (Kim, Larson, & Lakin, 2001) “Both of the studies showing an increase in challenging behaviour were conducted in the 1980s, and in one of them, although challenging behaviour increased in the community it increased more among those remaining in the institution.”

<sup>44</sup> The Province, page 8.

91. As any credible researcher would observe, the economic implications of community living versus the institutional model must be viewed at the global level. In the words of Drs. Shoulz, Walker, Taylor and Larson:

it is crucial that costs be viewed in the aggregate – that is, for a large group of people instead of on an individual basis. Making decisions about whether or not someone should live in the community based on the cost of serving that person is like saying that he or she may not be worth the expense. When costs are aggregated, the average per-person cost is the standard. Expenses will be higher for some individual than others.<sup>45</sup>

92. The Province's failure to directly refute the assertion that community services are, on average, no more expensive than those provided in an institution is not surprising given that most research would appear to suggest that, if anything, costs tend to be significantly “higher in institutions for comparable intensities of service.”<sup>46</sup> (emphasis added)

## **H. The Commitment to the MDC Undermines Efforts to Return Residents to the Community**

93. The Province cites a growing budget for community living as support for its assertion that “the Province has not diverted financial resources away from community living.”<sup>47</sup>

94. But with respect, the Province misses the point. There can be no doubt that “the costs of running dual systems of services (institutional and community based) takes resources away from community services.”<sup>48</sup> As the Roeher Institute concludes:

the development of community-based resources is hindered by the institutional option. The funds flowing to institutions prevent many families from receiving the supports that they require to provide care at home. The costs of maintaining institutions, even as they are downsizing, draw resources out of the community that could be used to

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<sup>45</sup> Shoulz et al, *Status of Institutional Closure Efforts in 2005*, SSB, Tab 17, page 4.

<sup>46</sup> See for example, Stancliffe and Lakin (2005) and Prouty, Smith and Lin (2003) as surveyed in Shoulz et al, *Status of Institutional Closure Efforts in 2005*, SSB, Tab 17, p. 4. Although most U.S. Studies have shown that the community living model is less expensive than the institutional model, these may not have controlled for certain factors that influence costs (i.e. wages and benefits which tend to be higher in state operated institutions. (Poliser, Lain & Prouty, (2002)

<sup>47</sup> The Province, page 8.

<sup>48</sup> Shoulz et al, *Status of Institutional Closure Efforts in 2005*, SSB, Tab 17, page 4.

support individuals in their own communities.<sup>49</sup>

95. Put another way, ACL has previously provided evidence to the Province that, once the short-term conversion period is over,<sup>50</sup> assuming all 370 residents of the MDC have very complex needs<sup>51</sup> and are at the high end of the cost continuum, those individuals could be supported in the community at an annual operating cost that is very comparable to than the annual operating costs of the MDC.

96. Likewise, MDC has previously provided evidence to the Province that, it would be possible to purchase, furnish and modify new homes for current MDC residents at a capital cost that is comparable to the \$40 million redevelopment plan.<sup>52</sup>

97. In short, the Province has not suggested the resources necessary to return MDC residents to the community do not exist.

## **I. The Province Has Not Met its Onus of Establishing Undue Hardship**

98. Given this economic reality, it is perhaps not surprising that the Province never directly offers any evidence suggesting it would pose an undue hardship to return all MDC residents to their communities. Instead, the Province frames the issue of keeping the MDC open as a matter of choice:

The Province and the Director are very much committed to continue to work with service providers to assist current MDC residents to transition to community settings. However, this is in the context that the MDC is to remain open so current MDC residents have the choice to continue to remain at MDC or to transition to a community settings. Therefore, the physical infrastructure of MDC is

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<sup>49</sup> *Disability, Community and Society*, Roeher Institute, 1996, pp. 31-32.

<sup>50</sup> In the short-term conversion period, costs would clearly be increased as past experience proves that it is impossible to precisely match institutional cost decreases with community cost increases while “de-institutionalization” conversion is taking place.

<sup>51</sup> It is extremely unlikely that the 140 individuals engaged in work programs could be properly described as having complex needs.

<sup>52</sup> See Appendix A, Manitoba Developmental Centre Redevelopment – A Community Sponsored Alternative Proposal. (assuming an average of 3.5 former MDC residents per home)

being redeveloped.<sup>53</sup> (emphasis added)

99. In paragraph 91 of its complaint, ACL explicitly argued that returning all MDC residents to the community would not pose an undue hardship. While the Province issued a boilerplate denial of this assertion in Appendix A to its reply, there has been no argument or evidence advanced by the Province suggesting it would suffer an undue hardship.

100. The Province bears an express statutory onus to demonstrate an undue hardship exists. That evidence has not been provided. Its absence is telling. The Province's onus has not been met.

101. The Province's failure to advance any evidence of undue hardship coupled with its express attempt to justify the continued existence of the MDC as a vehicle for preserving residents' choice can be viewed as an implicit admission that no undue hardship exists.

102. The Province has implicitly admitted that the resources exist to return the residents of the MDC to their community. The real issue is not money.<sup>54</sup>

## **J. The Skewed Question of Choice**

103. The Province admits that thirty one residents of the MDC are overtly seeking discharge from its institution. Shockingly, it also concedes that it is not aware of the position in terms of discharge of an additional one hundred and forty MDC residents. However, the Province claims that there are one hundred and ninety MDC residents who wish to remain within the institution either at the direction of the resident, the SDM or family members.<sup>55</sup>

104. While the Province concedes that community living is “the preferred option”, it argues the MDC must remain open to preserve a choice for MDC residents.

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<sup>53</sup> The Province, page 6.

<sup>54</sup> US literature suggests that a major impetus behind ongoing resistance to community living is “resistance from local communities and public employee unions” (Lakin and Prouty, 1995/96). While the Province has not offered this rationale in the context of the human rights complaint, it should be noted that any such argument is analytically indefensible.

<sup>55</sup> The Province, page 17. It is not clear whether the family members referred to actually serve as substitute decision makers.

105. ACL will request complete documentation regarding the methodology of the alleged survey of resident, SDMs and family member choice to test whether it was conducted in an analytically defensible manner.<sup>56</sup>

106. More fundamentally however, the Province's efforts to to hide behind the justification of choice are undermined:

- by the skewed question;
- by the experience of those who have been given the opportunity to make an informed decision;
- by social science evidence;
- by the position of the Public Trustee.

### ***The skewed question***

107. The Province implies the residents of MDC, to the extent their wishes were consulted, are making an informed choice in deciding whether they wish to reside in the institution.

108. However, the Province offers no comment on the fairness of asking an individual if they wish to leave the institution in circumstances where that individual has only experienced institutional life.

109. To use a dietary example, the Province's justification in terms of choice is akin to asking an individual who has only tasted vanilla ice cream whether they prefer chocolate to vanilla. The question is unfair.

110. The skewed nature of the question being asked is best highlighted by the comment of a former staff member of the Valley View Centre in Moose Jaw:

Having had some involvement with the foster care system, the thing that always shocked and amazed me is no matter how badly they were

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<sup>56</sup> Leaving aside the issue of whether the individual in question has had the opportunity to experience and compare community living, other questions include the type of question asked, the type of person asking the question and the nature of the relationship between the interviewer and the MDC resident.

treated, there were children who just wanted to go home to what they knew. Even when they knew they weren't safe there, they just wanted to go home. I don't know if that is what people think when they say they want to live at Valley View (when the person says it, and it is not the declaration of someone else) and I wouldn't presume that they all think that way. The point should be considered though. How can a person make an informed choice if they don't know what the other choices are? Isn't the devil you know always safer than the devil you don't know?<sup>57</sup>

111. An informed choice can only be made when one is comparing two alternatives for which one has comparable knowledge. For long term residents of the MDC, an informed choice is not possible in the absence of a true opportunity to experience community living through mechanisms such as community living visits and overnights stays.

112. Further discussion of this point can be found in the social science brief which accompanies this response.

### ***Choice at Pelican Lake***

113. The best measure of choice is the experience of those who have been forced to endure the institutional care model then given the opportunity to taste community living. The most recent example of an informed choice can be seen in the experience of those individuals housed at Pelican Lake who were returned to the community after a carefully designed planning exercise which first allowed them and their family members to explore and understand the community living option.

114. It is noteworthy that when the seventy residents of Pelican Lake were given the opportunity to make an informed choice almost all chose to successfully rejoin the community.

### ***When an Informed Choice is Possible Residents and their Families Tend to Choose the Community***

115. American data suggests that:

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<sup>57</sup> Lorri Solomon, "I Hope" (*Dialect*, Fall/Winter 2006) [Hope] at 6-7.

Studies of deinstitutionalization show that parent and family attitudes about deinstitutionalization are often initially negative but once a person has moved, these opinions shift in favour of the community setting.<sup>58</sup>

116. For example, one American study, specifically dealing with the question of family satisfaction following the closure of the Hissom Memorial Center, reported that 38.7 percent family opposition to deinstitutionalization was transformed into 90 percent support after seven years experience of community-based care.<sup>59</sup> Similarly, the conclusion of a study from California was that a “large majority of families were pleased with community supports, wanted them to continue, and would not think of returning their relatives to Developmental Centers.”<sup>60</sup>

117. When a true choice is offered, the social science evidence demonstrates that even those who initially opposed deinstitutionalization are likely to choose the community option once they have been given the opportunity to make an informed choice.

118. The experience of Helen W. and her sisters (T) and (M) supports the conclusions of the US researchers. Helen's sisters T and M had lived at Pelican Lake since the early 1990s. Helen originally resisted the move to close Pelican Lake and to return individuals back to their communities. In Helen's words:

Initially, I fought against my sisters moving. I just didn't know what was possible and what could happen. Once I saw the options being developed for my sisters, I saw they were going to have an excellent life in the community.

I see that my sisters are more involved with their community. T is in a retirement program. M sings in a local choir. We get together for lunch at least once a week. I used to see my sister 4 times a year. I also call them every day.<sup>61</sup>

119. Helen's observations are supported by the experience of family members in Ontario who

<sup>58</sup> Larson and Lakin, 1991, cited in Shoultz et al, *Status of Institutional Closure Efforts in 2005*, SSB, Tab 17, page 3. See also Conroy, *Deinstitutionalization of People with Mental Retardation and Developmental Disabilities in the United States: Was This Good Social Policy?*, SSB, Tab 5, p. 43.

<sup>59</sup> Conroy, *Seven Years Later: A Satisfaction Survey of the Families of the Former Residents of Hissom Memorial Center*. James Conroy, Center for Outcome Analysis, 1999.

<sup>60</sup> Conroy, *Deinstitutionalization of People with Mental Retardation and Developmental Disabilities in the United States: Was This Good Social Policy?*, SSB, Tab 5, p. 3.

<sup>61</sup> Interview Helen W. March 2007. Helen is prepared to be interviewed for the purposes of the Human Rights Complaint.

were initially concerned about the closure of institutions there. As one parent wrote in a letter to the Windsor Star:

**Re: Disabled man’s family fights plan to close regional centre.** I understand where you are coming from and my heart goes out to you. I was there as a mother of two developmentally challenged children – Christine, 53 and Wayne, 52. They have been with Southwestern Regional Centre (SRC) for 41 years. I was a nervous wreck, I thought they were going to lose all the benefits of the centre – not to mention the highest level of care and compassion from the wonderful staff at SRC.

I have to tell you I worried for nothing.<sup>62</sup>

120. A brother of a woman who had been institutionalized for 41 years expressed a similar sentiment in a letter to ACL Ontario.<sup>63</sup>

When we first heard that the government of the day had decided to close down the facilities for people with developmental disabilities, we were angered and scared. . . .

In our opinion, for those people who are still opposed to the closing of HRC and facilities like it, we would strongly suggest that they rethink their position. . .

. . . we now know that there is a better solution for challenged individuals and that we should all fight on their behalf for the best care possible. In our minds, and possibly in the government’s opinion, this is no longer with the larger facilities.

### ***The Substitute Decision Maker for the Vast Majority of MDC Residents Endorses Community Living***

121. It is also clear the substitute decision maker for the vast majority of MDC residents has already spoken in favour of community living.

122. Neither the Province or the Public Trustee deny the assertion by ACL in paragraph 65 of its complaint that “the Public Trustee is substitute decision maker for the vast majority of MDC residents.” The position of the Public Trustee on the merits of community living is also clear:

The Public Trustee has always endorsed community living for its clients, where the

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<sup>62</sup> Letter to the Editor of the Windsor Star, Jan. 25, 2006. See Appendix B.

<sup>63</sup> See Appendix C.

Government of Manitoba has funded the creation of appropriate community places “<sup>64</sup>  
(emphasis added)

123. Assuming the Public Trustee has ascertained and considered to the degree possible both the wishes of the vulnerable persons in its care and their best interests, its choice is quite clear. Provided there are appropriate community places, community living is in the best interests of the persons for who it acts.

### ***Society has no Responsibility to Subsidize Segregation***

124. ACL has no doubt that if MDC residents were offered a true choice, they would opt for community living. However, at the more basic level, the question can be framed this way:

- recognizing a majority of the US Supreme Court has found that unjustified isolation is properly regarded as discrimination based on disability.<sup>65</sup>
- recognizing the MDC is the product of a profoundly discriminatory way of thinking;
- recognizing current MDC residents were torn from their community in a discriminatory manner;
- recognizing the MDC continues to segregate its residents from the community and to deny them the everyday choices those living in the community take for granted;
- recognizing the unquestioned benefits of community living

Do we as a society have an obligation to financially support an institution which perpetuates and exacerbates a discriminatory tradition?

125. As one community organization has observed:

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<sup>64</sup> The Trustee, page 3.

<sup>65</sup> *Olmstead v. L.C.* (98-536) 527 581 (1999).

Society has no responsibility to subsidize segregation.<sup>66</sup>

Society's values change as civil rights, contemporary technology, and new medical and health approaches are incorporated into mainstream society. Outdated technologies and treatment approaches are then replaced by more advanced practice. Institutions are no longer the contemporary approach for the way individuals with disabilities seek to live and receive treatment and supports.<sup>67</sup>

126. Given its role in creating and populating an institution founded upon the unhallowed ground of segregation, the Province's late found adherence to the doctrine of choice raises profound issues of credibility.

## **K. A “Community” Founded Upon Stereotype and Borne of Compulsion**

127. The Minister and the Director describe the MDC as a community of people who have lived together for decades. What they fail to acknowledge is that this is a community founded upon stereotype and borne of compulsion.<sup>68</sup>

128. It would do a gross disservice to the word choice to suggest that long term residents of the MDC chose to live in this institution. Instead, they were compelled to live at the MDC based upon stereotypes and by means of a process far beyond the pale of what would be considered acceptable today.<sup>69</sup>

129. That the residents of the MDC have formed relationships while they live in this institution speaks to their infinite capacity – not their deficits – and offers further reasons to be confident that they will thrive in community – the real community existing beyond the MDC.

130. The fact that there is a very real and very different community lying outside the walls of the MDC is reinforced by the Orwellian language used by the Province to describe the world in

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<sup>66</sup> Maryland Developmental Disabilities Association, *Shattering Myths about Choice* (2004), SSB, Tab 11.

<sup>67</sup> Maryland Developmental Disabilities Association, *Shattering Myths about Choice* (2004), SSB, Tab 11.

<sup>68</sup> The Province, pages 8 and 13.

<sup>69</sup> New admissions to the MDC require a court order.

which the residents of the MDC exist. MDC residents are housed within the “MDC grounds” and serviced under a ‘resident centred model of service delivery’ using “interdisciplinary teamwork”. Their residential areas are “organized into four major program areas”. Decision making is said to be “decentralized.”

131. These words denote an institution not a home.

## **L. Strangers in a Strange Land**

132. MDC residents are described as “active participants in the larger community of Portage”.<sup>70</sup>

However, ACL believes that at best, most residents can be described as “occasional visitors” to the true community that lies outside the MDC.

133. While there may be a handful of MDC residents who are active visitors to the community of Portage, in the respectful view of ACL, this is not community living. There are too many institutional barriers which identify the residents of the MDC as outsiders and which divide them from true community living.

134. Consider for example, a few of the logistical complexities associated with a simple picnic in the park as set out in the aptly named Procedure F-5 of the MDC.

1. Weather permitting, excursions outside the Centre, may be planned (i.e. Park visits, picnics, hiking, zoo trips etc.)

2. Before planning the outing, approval must be sought from the nurse in charge of the area then the charge nurse must seek approval from the unit supervisor.

5. If a picnic is planned, a catering requisition (D-31) must be filled in and sent to Dietary Department four (4) days prior to outing. (See Procedure H-3).<sup>71</sup>

135. This is hardly an approach that invites spontaneity.

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<sup>70</sup> The Province, p. 8. See also pages 20 – 22.

<sup>71</sup> Manitoba Development Centre Nursing Procedures, Organization of and Supervision of Residents on Excursions Outside the Manitoba Developmental Centre. Exhibit 5 in The Inquest into the Fatality of Dennis Robinson cited in paragraph 12 of *Report on Inquest and Recommendations of the Honourable Judge Brian M. Corrin, March 21, 2001*, Appendix E to the Response.

136. Consider as well what would happen if one of the individuals on this picnic in the park wished to eat a donut while being driven back from the park. Eating donuts in a moving vehicle is forbidden for all residents of the MDC regardless of their personal circumstances. As Mr. Justice Corrin noted in the Dennis Robinson Inquest, eating a donut in a moving vehicle would be

a contravention of memos from MDC Transportation and Material Management Supervisor of April 7, 2000 and May 23, 2000 Vehicle Security and Cleanliness.<sup>72</sup>

137. The memos on Vehicle Security and Cleanliness capture the essential flaw of the institutional model. ACL has no doubt there are many residents of the MDC who can safely eat a donut while traveling in a moving vehicle. However, to protect those who cannot safely eat a donut in a vehicle and to minimize the institutional cleaning bill, the freedom to eat a donut in a moving vehicle must be denied to all regardless of their personal circumstances.

138. A community is a place where a person lives not where one takes excursions.<sup>73</sup> It is a place where an individual is dealt with based upon who they are not who they are presumed to be. It is a place where there is room to take a picnic in the park without filling out requisition form D-31 and complying with procedure H-3.

139. The MDC is a pale shadow of a community. It is a place where the search for the lowest common bureaucratic denominator diminishes rather than enhances the unique nature of each individual.

## **M. Just a Long Term Care Facility**

140. Notably, when it comes to judging its own performance, MDC is unable to identify appropriate community living comparators.<sup>74</sup> By its own admission, this so-called

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<sup>72</sup> Paragraph 23 of *Report on Inquest and Recommendations of the Honourable Judge Brian M. Corrin, March 21, 2007*, Appendix E to the Response. At another location within the Inquest Report it is suggested that the May 23 memo was issued in 2003.

<sup>73</sup> For an example of what persons with intellectual disabilities had to say about what makes an inclusive community please see "It's SENSE That Makes An Inclusive Community!" in the Official Newsletter of the 2007 Manitoba Marathon.

<sup>74</sup> The "CCHSA" is a medical model. To the knowledge of ACL, MDC has never attempted a community outcomes

“community” evaluates itself based upon a set of standards developed by the Canadian Council on Health Services Accreditation (CCHSA) for long term care facilities.<sup>75</sup>

141. Even a simple review of the staffing model reflects the obvious institutional nature of the MDC - psychiatric nurses, licensed nurses, registered nurses, pharmacists, chaplains - The list goes on.

142. As one specialist in the field of community living notes.

I have been in the homes (in the community) of thousands of persons with intellectual disabilities in this country and elsewhere and nowhere did I find nurses, pharmacists and chaplains.<sup>76</sup>

## **N. Distinguishing Between Policy, Platitude and Reality**

143. The Province states “the overall objective of MDC is to provide residents with a safe environment to live in, free from intrusive and restrictive interventions.”<sup>77</sup> The Province goes on to argue that “the minister and director have provided ample evidence to establish that residents of MDC are in receipt of adequate support services.”<sup>78</sup>

144. In support of its claim that the MDC environment is safe and its services are adequate, the Province provides a thirteen page<sup>79</sup> laundry list of the MDC guidelines;<sup>80</sup> Bill of Rights;<sup>81</sup> policies;<sup>82</sup> processes;<sup>83</sup> and services.<sup>84</sup>

145. It is important to understand that there is often a wide gap between guideline and reality. A lengthy list of policies, processes and services does not establish that the MDC environment is safe or that its services are adequate. The lists are not evidence of what the MDC does. They are merely an indication of what the Province says it does. Policies which are not followed are

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evaluation.

<sup>75</sup> The Province, page 9.

<sup>76</sup> Don Gallant, March 2007.

<sup>77</sup> The Province, page 25.

<sup>78</sup> The Province, page 13.

<sup>79</sup> The Province, pages 13 – 25.

<sup>80</sup> The Province, page 12.

<sup>81</sup> The Province, page 13.

<sup>82</sup> The Province, pp. 14 -15.

<sup>83</sup> The Province, pp. 16 -17.

<sup>84</sup> The Province, pp. 18-24.

merely platitudes.

146. The wide gap between platitude and reality at the MDC has been highlighted by the recently released judicial inquest into the death of Mr. Dennis Robinson, a MDC resident. The Inquest Report:

- refutes the suggestion by the Province that MDC policies, practices, guidelines and processes ensure a safe environment;
- demonstrates there is a wide gap between reality and the policies of the MDC.

### ***The Robinson Inquest***

147. The Robinson Inquest identified serious concerns with the adequacy of MDC staff training methodology<sup>85</sup>:

At the conclusion of the Inquiry, the Crown raised concerns about both the adequacy and efficacy of MDC's staff training methodology. Given the context of the incident this certainly seems warranted. As previously described herein, there were numerous and sometimes seemingly inexplicable breaches of pertinent MDC procedures designed to promote resident safety. These breaches involved four staff members, two of whom were very senior employees of the institution.<sup>86</sup>

148. The inquest identified a culture where it was commonplace for staff not to follow safety procedures and where whistle blowing directed at unsafe procedures was frowned upon.

A senior psychiatric nurse admitted that he hadn't followed the MDC Nursing Procedures Manual regarding excursions on many occasions. Somewhat ironically the Inquiry was advised by management that staff are encouraged to report unsafe conditions during ongoing professional training sessions. Another witness, a senior nurse, advised that staff don't like to rock the boat in this regard and that whistle blowing is generally frowned upon.

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<sup>85</sup> It also noted there was "clear evidence that MDC often employs PNAs with no particular vocational training or related background", *Report on Inquest and Recommendations of the Honourable Judge Brian M. Corrin, March 21, 2007*, Appendix E, para 53.

<sup>86</sup> *Report on Inquest and Recommendations of the Honourable Judge Brian M. Corrin, March 21, 2007*, Appendix E, para 52.

<sup>87</sup> *Report on Inquest and Recommendations of the Honourable Judge Brian M. Corrin, March 21, 2007*, Appendix E, para 35.

The institution also relies on an advertised open door whistle blowing policy to detect both deliberate and unintentional breaches of safety policies; the assumption being that this approach is conducive to the detection of irresponsible employees. Evidence received at the Inquiry belayed this conclusion. The Inquiry heard that MDC employee culture enhanced suppression of such non-compliance, that it was commonplace for staff both not to follow policies and fail to report in such regard.<sup>88</sup>

149. The findings of the Robinson Inquest raise fundamental concerns about the safety of the environment at the MDC. Just as importantly, they highlight the gap between rhetoric and reality at the institution.

150. ACL will request a thorough examination of the claims of the Province regarding the adequacy of its support services. Attached at Appendix D to this document is a proposal to randomly sample the residents of the MDC in order to test the claims of the Province. Attached as Appendix E is a copy of the Robinson Inquest.

## **O. Is Safe and Adequate Enough?**

151. ACL is confident that a review of the Robinson Inquest Report coupled with the results of the proposed random sample of MDC residents will undermine the Province's claims of a safe environment and adequate services. But the Province's position raises a more fundamental issue.

152. Even assuming a safe environment and adequate services are established, is that enough? The answer to that question was persuasively provided by the brother of a woman recently released from an Ontario Institution after 41 years.

having seen the lifestyle that Cheryl was restricted to in a large facility, we can't imagine how one wouldn't opt for change.

HRC kept Cheryl healthy, reasonably content and safe, but that's where it ended. Due to government cuts in staffing and funding, opportunities to develop residents' abilities and to cater to their individual needs was limited at best and sometimes even non-existent. We

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<sup>88</sup> *Report on Inquest and Recommendations of the Honourable Judge Brian M. Corrin, March 21, 2007, Appendix E, para 58.*

believe they did the best they could with the limitations they had to deal with, but we now know that there is a better solution for challenged individuals and that we should all fight on their behalf for the best care possible. In our minds, and possibly in the government's opinion, this is no longer with the larger facilities.<sup>89</sup>

153. To similar effect, in his seminal essay on "Revisiting Choice", Don Smull highlights a central flaw in the institutional model:

One of the traps of the current system of planning is that we determine how people can be safe before we look at what they require to be happy. We forget that there is no such thing as a risk free life, that risk is relative and has a context. What we need is to begin with an understanding of what is required for the "pursuit of happiness" and then seek to reduce or avoid risk within that context.<sup>90</sup>

154. It is a sad testament to institutional life that the most the MDC can aspire to is a safe environment with adequate services.

## **P. An Implicit Admission of Failure**

155. The Province discusses the pace of discharges from the MDC at pages 4, 6 and 16 of its reply but on no occasion during its submissions does it deny the allegation found at paragraph 25 of the ACL complaint that between 1999 and 2005, individuals were more likely to leave the institution by dying rather than by community discharge.<sup>91</sup>

156. Nowhere does the Province explain why the number of residents at the MDC dropped by less than one hundred and eighty (including deaths) between 1993/94 and December 2006 as compared to a decline of more than three times as many residents between 1981/82 and 1993/94.

157. Despite its platitudes and stilted institutional language, the Province implicitly admits that the MDC is not a community. Indeed, it expressly acknowledges the need to "to accelerate the movement of residents from MDC into the community."<sup>92</sup> Notwithstanding this concession, it

<sup>89</sup> Letter to ACL Ontario from the ACL Ontario Web-Site.

<sup>90</sup> Michael W. Smull, "Revisiting Choice."

<sup>91</sup> At paragraph twenty five, ACL stated that "between 1999 and 2005, residents from MDC were more likely to leave the institution due to death than as a consequence of a return to their community."

<sup>92</sup> The Province, page 6.

appears that the Province is only aiming to return 20 MDC residents to the community in 2007/08.<sup>93</sup>

## **Q. Conclusion**

158. Many years ago, when values and knowledge were perhaps fundamentally different, far too many Manitobans with intellectual disabilities were torn from their communities and placed in the care of large institutions like the MDC and Pelican Lake.

159. Today, with the benefit of hindsight, our community can look back and acknowledge past errors. We know now that the decision to remove individuals from their communities was based upon stereotype and stigma. We know now that there is a far superior option which can be offered at a comparable cost.

160. Yet community living programming is still being denied to the residents of the MDC.

161. The issue is not money. The question of undue hardship is hardly touched upon by the Province in its reply to ACL.

162. Instead, a careful analysis of the Province's arguments reveals that the real barrier to the residents of the MDC can be found in the mindset and attitude of the Province.

Notwithstanding overwhelming social science to the contrary, the Province continues to hint at the same stale shibboleths that have been used to defend the institutional care model for far too many years.

163. Community living programming is clearly in the best interests of all Manitobans with intellectual disabilities. The denial of this programming to the residents of the MDC constitutes discrimination within the meaning of *The Human Rights Code*.

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<sup>93</sup> Based upon a conversation in April 2007 between the Minister and the Executive Director of ACL.