

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Deal v. Cheticamp Association for Community Living*, 2019 NSSC 19

**Date:** 2019-01-15

**Docket:** Syd No. 333793

**Registry:** Sydney

**Between:**

Barbara Louise Deal, by her Litigation Guardian, Barbara H. Deal

*Plaintiff*

v.

Cheticamp Association for Community Living

*Defendant*

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**LIBRARY HEADING**

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- Judge:** The Honourable Justice Frank C. Edwards
- Heard:** November 26 – December 17, 2018, in Sydney, Nova Scotia
- Subject:** Negligence
- Facts:** A developmentally delayed adult by her litigation guardian brought this action against the Defendant. The Plaintiff was a resident of the Defendant's group home for more than three years. During her time as a resident, the Plaintiff developed physical and mental problems which she did not have prior to entering the group home. She claims that she suffered abuse and mistreatment which caused her harm. In particular, she claims that the Defendant breached the appropriate standard of care thereby causing her harm.
- Issues:**
- (1) Was the Defendant negligent in its care of the Plaintiff by the Defendant?
  - (2) Was there evidence of abuse or mistreatment of the Plaintiff by the Defendant?
- Result:** There was no negligence or abuse or mistreatment of the

Plaintiff by the Defendant. The evidence did not reveal the cause of the Plaintiff's physical and mental difficulties. The Defendant did everything that could reasonably be expected of it to provide the best possible care for the Plaintiff. The problem was that the Plaintiff required a higher level of care than the Defendant could provide in its group home.

The Plaintiff's parents refused to accept offers to transfer their daughter to another home operated by the Defendant where the Plaintiff could have gotten the level of care she required. The parents appeared to believe that they could pressure the Defendant to provide the required care in the group home. This the Defendant could not do because DCS (Department of Community Services) controlled the funding of staff levels. The Plaintiff's Developmental Level appears to have been misclassified by DCS. Her placement in a group home was therefore inappropriate

**Cases Noticed:** *Saadati v Moorhead* 2017 SCC 28  
*Fontaine v B.C. (Official Administrator)* [1998] 1 SCR 424  
*Johannson v General Motors of Canada Ltd* 2010 NSCA  
120  
*Snell v Farrell* [1990] 2 RCS 311 (SCC)  
*Clements v Clements* 2 RCS 181

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**Counsel:** Vincent A. Gillis, QC and Melina Celap, for the Plaintiff  
Tony Mozvik, QC, for the Defendant

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By the Court:

## **INTRODUCTION**

[1] This trial lasted for ten days between November 26 and December 17, 2018. The documentary evidence comprised nine volumes. By agreement of counsel, the documents were admitted by consent as proof of the truth of their contents. In my summary of the evidence of individual witnesses, I have interwoven some excerpts from related documentary evidence in order to provide a more complete narrative.

[2] As the reader will see, one of the main participants in the events in dispute was the Nova Scotia Department of Community Services (DCS). DCS was not a party to the action nor were any DCS witnesses called by either the Plaintiff or the Defendant. I therefore had to assess DCS' role on the basis of documentary evidence submitted by consent of counsel as well as references to DCS in the testimony of the parties' witnesses. I am sensitive to the fact that I did not have the benefit of hearing from DCS personnel but I unavoidably had to some extent evaluate their actions. I did so keeping in mind that the DCS employees (in particular, Karen Wager) did not have an opportunity to explain and defend what they did.

## **OVERVIEW**

[3] The Plaintiff, Barbara Louise “Barbie” Deal was a resident of Le Chemoi group home between June, 2007 and October, 2010. Le Chemoi is owned and operated by the Cheticamp Association for Community Living (CACL). Barbie is developmentally delayed and requires twenty-four hour care. Her parents are Barbara and Ken Deal.

[4] Through her litigation guardian, Barbara Deal (Barbara), Barbie has brought this action against CACL. She alleges that she was subject to mistreatment and abuse which amounted to negligence by CACL. After a thorough review of the evidence, I have determined that the allegations of mistreatment and abuse are unfounded. While at times Barbie did not receive the level of care she required, that was not the fault of CACL. I was satisfied that CACL provided the level of care which, in the circumstances of this case, could reasonably be expected of an operator of a group home such as Le Chemoi. I therefore dismissed the Plaintiff’s claim with costs.

## **THE PLAINTIFF’S WITNESSES**

### **1. Barbara Deal**

[5] Barbara Deal (Barbara), age 72, has a degree in math, has worked as an economic analyst and has studied holistic health care. The family home was near

Hamilton, Ontario. Barbara's daughter, Barbara Louise (Barbie), was born on July 16, 1984, the youngest of five siblings. There are eight years between Barbie and her next youngest sibling. Barbie is now thirty-four.

[6] Barbie has intellectual disabilities and cognitive impairment. She has been diagnosed "global delay" which Barbara says is a catchall term. Barbie has a limited ability to express herself in full sentences, she can read words but not sentences. Barbara says Barbie cannot express herself verbally "even like a three year old could." Barbie has excellent long term memory, but her short term memory is not good. Directions may have to be repeated to her three or four times.

[7] Barbie cannot live independently. She can go shopping but has to be accompanied. She cannot cross the street as she would not be aware of traffic. At home she can be left alone for short periods of time. Barbie can be taught life skills "e.g. chopping veggies". Barbie's eyesight is not good – "lazy eye in one, poor in the other ." "She's getting glasses in a couple of weeks."

[8] Barbie went to a school with a special program for the developmentally delayed. She graduated at age 21. On school days Barbie went to a day camp from 1:00 pm to 3:00 pm every day. When she got older she went to overnight camp. After she was thirteen, Barbie went to a two week camp, "she loved it" and

“got glowing reports.” According to Barbara, Barbie showed no reluctance to be separated from her parents.

[9] The family lived in a rural area but Barbie did belong to a local club; she did sports, outings, dances, social events, and went camping. In her day to day at home, Barbie’s main activity was watching videos. She could also do puzzles and electronic games. Barbie could do physical exercise except swimming. The family went out to movies and dinner every Friday.

[10] In the community, Barbie liked to go shopping and enjoyed manicures and pedicures. “She never had a teenage buddy, only family. At dances she would dance by herself.” As Barbie got older, her mother says she became more social and liked to be around people. She had limited ability to be a friend; e.g. she could not talk to someone on the phone.,

[11] In 2006, the Deals purchased a property in Cape Breton, near Cheticamp. Though the family had no prior connection to the area, they liked it very much. In the short term, the property was intended to be a summer cottage, with retirement there being the long term goal. As it turned out, Barbara and Barbie stayed year round while Mr. Deal went back to Ontario during the university year for his work. (He is a university professor).



[12] Barbie enrolled in a day workshop called the Green Door in 2006. Green Door is operated by the Defendant CACL. CACL is a not for profit society created to provide community based living and support to individuals with intellectual and developmental disabilities. CACL operates three residential homes in addition to the Green Door workshop. The operation of all four entities is overseen by a volunteer board of directors. CACL has an executive director, who, at all times relevant to this action, was Jeanne Chiasson (Chiasson).

[13] Barbie got along well during her first year at Green Door. She would go there in the morning and “they’d bring her back in the evenings”. Sometime during 2006, Barbara got a call from Chiasson regarding the possibility of a full time placement for Barbie in Le Chemoi, one of CACL’s group homes. Barbara was pleased and surprised: “I wasn’t going to turn the opportunity down.” Barbara had testified about the near impossibility of such a placement in Ontario. She said the wait times ran into years.

[14] Homes like Le Chemoi are funded on per diem basis per resident by DCS. DCS does a placement assessment in order to determine the level of care required by the potential resident. The final decision on placement, however, is that of CACL. In Barbie’s case, the DCS assessment was done on November 20, 2006 by

caseworker, Karen Wager (Wager). On page 10 of her report, Wager made the following notation:

“Barbie requires 24 hour supervision with mainly a single care provider at this time. Family would benefit from DFSA funding.”

[15] On page 11 under “Recommended program”, Wager wrote:

“Barbie requires ongoing direction for daily management but is able to attend to work/socialization with minimal direction and supervision. It is believed that she has maximized her potential out. I would recommend GHMH.”

Later:

“(The Family) believe Barbie should maximize her independence from them in her own home and Barbie is in agreement.”

[16] Chiasson gave Barbara a tour of Le Chemoi: “I found it acceptable.” Barbara knew that Barbie would initially have to share a room but might eventually get her own. “(Chiasson) did not commit to that.” Barbara noted that there was a separate recreation room in the basement: “Barbie needed it to do music and do stuff without bothering anyone else.” Barbara found that the residents appeared to be happy.

[17] Barbie entered Le Chemoi as a permanent resident in June, 2007. Barbara says that they were told not to visit Barbie for six months – they were allowed to take her out for supper “every now and then” and were limited to one phone call

per week (“I recall none until after six months”). Chiasson denied telling Barbara they could not visit Barbie for six months (discussed later).

[18] After six months, Barbie was allowed to go home on weekends. In fact, the Deals had Barbie for three weeks at Christmas 2007 which they spent in Ontario. Barbara says she did not see a problem though Barbie was “not quite as happy and pleasant as she had been.”

[19] In January-February, 2008, Barbara learned from Le Chemoi staff that Barbie would spontaneously have stools in her underwear. On May 27, 2008 Barbara met (Ex.11 Tab 8) with Wager, Chiasson, Stacey Miller (supervisor) and Georgina Roach (staff person). They discussed the bowel issues and possible remedies. They also discussed Barbie’s behavioural issues. “Barbara says Barbie’s behaviours have arisen from being here”. “...Barbie is not happy here, and that every times she takes her home, she shakes when she has to come back.” “Barbara said that she felt there was a shortage of staff.”

[20] Barbara noted that the bowel problem persisted for 3-4 years after Barbie left Le Chemoi in 2010. (As I will point out later, the bowel problem probably still exists but is now better managed.) Barbara thought the problem was related to what Barbie was eating and therefore sought copies of the menus. She says she did not get them until July 2008. There is a great deal of evidence related to the menus

and Barbie's diet. Suffice to say that from this point on, Barbara had frequent input into what Barbie could and could not eat. CACL staff tried to accommodate Barbara's wishes.

[21] Barbara states that overall Barbie gained weight. The report of Barbie's personal physician (Ex 1 Tab 1) records her weight at 190 lbs on November 8, 2006. The Chemoi Weight Chart (Ex 5 Tab 53) shows her weight in September, 2007 as 168 lbs. By December, 2007 she is 180.8 lbs; September, 2008 – 189.8 lbs; September, 2009 – 194.4 lbs.; August, 2010 – 203 lbs.

[22] Barbara says that in 2008, Barbie's behavior, demeanor, happiness and personality changed dramatically. She became physically aggressive. Barbie also became more obsessive – insisting on taking more and more of her belongings with her everywhere she went. Barbara noted cognitive changes with Barbie acting like she was in a stupor. She did not appear to be engaged with her surroundings. She would not respond to questions asked or to what she had heard.

[23] According to Barbara, Barbie's speech regressed to the point that she would only grunt, that she could not talk anymore. Barbara says that continued for months.

[24] Barbie's aggressive behavior is documented in a series of approximately sixty incident reports relating to both the Green Door and Le Chemoi (See Ex 4 Tab 26; Ex 3 Tab 13). The reports note instances of Barbie striking staff or other residents. Barbara's view is that staff did not handle Barbie's aggression properly. In particular, Barbara took exception to staff treating Barbie like a child rather than in an age appropriate manner. Punishment such as "time out" was inappropriate. Barbara says she also warned staff about saying no to Barbie, or taking away any of her belongings. Barbara felt staff should have been able to redirect Barbie rather than confronting her.

[25] On July 28, 2008, Barbara had a two hour meeting with Wager, Chiasson, Stacey Miller, and nine other staff members (Ex 2 Tab 11 p. 334-339). There was extensive discussion regarding Barbie's bowel issues, her behavior, and discipline options. Some excerpts:

"Barbara said that something has traumatized Barbie and that's the reason she has been having accidents."

**"Karen (Wager) said that Barbie is used to the one on one that this home can't provide."** (Emphasis mine)

"Barbie needs one on one now. Staff to try different things and chart it so that others can see what has worked and has not worked."

"Barbara told Stacey that she didn't want to hear from her. She was told to shut up."  
"Staff said that having one on one for two weeks with Barbie is not enough."

"Barbara suggested staff find a way to keep (Barbie) happy."

“In closing, Wager said that these issues are not unique to the Chemoi. It’s an adjustment that may take a long time but it has to be worked on.”

[26] Following the July 28, 2008 meeting, Barbara sent a lengthy email to Wager which sets out her position. The full email reads:

Hi Karen,

Following the meeting yesterday, several things became crystal clear to me. The limited scope of the ministry’s influence is more than apparent than ever. Although much was said about writing a letter to the board, re-training for the staff and addressing the issues of concern to us, only a few of those items have actually been accomplished. It appears that the ministry has no real influence over the board, the staff or the treatment of the residents. Unless a formal complaint of abuse is made, resulting in action under a different legal directive, nothing can be done save removal of the resident from the facility and that is on a volunteer basis it seems.

Although you clearly stated to the staff present that:

- Bedrooms may not be used for disciplinary purposes
- Menus can be flexible, given knowledge of the dietary needs of the residents
- We have advocated for more staffing at high demand hours
- The residents must be treated with dignity
- The needs of the residents are to come before chores
- Staff must be flexible to accommodate the influx of new and younger residents and more, I doubt that you were heard above the dominant voices complaining about their plight.

This is not just the result of inferior training from the top down and inept management from the administrators. It is a result of deliberate misinformation and misdirection. If I’m not mistaken, the staff have been told that the ministry is responsible for the limitations on the staffing at Chemoi. Hence, the gripe sessions that occur every time you attend a staff meeting; they erroneously believe

that you are to blame for the situation and can fix it. Meetings most often are dominated by the complaints of the staff rather than the issues the meeting has been called to address. The focus always becomes the staff rather than the residents. Clearly, the staff cares more about their own welfare than that of any of the residents they are hired to provide services for. Not only that, their chores are the main focus of the job, not the personal care of the residents. This focus on tasks alone must come from the supervisor. The staff has no time to actually interact with the residents and provide a home-like atmosphere for them; thus, it becomes institutionalized without the individual attention so necessary in creating a comfortable and calm atmosphere. Without any means to discipline the staff, the ministry is ineffectual in making changes to the situation. Other means must be used for this to happen.

Under these circumstances, the mistreatment of the residents is more likely to occur because of the need to keep them out of the way so the staff can do the chores. No time is allocated to the residents for attention or recreation. The demand is for the resident to stay out of the way and not interfere with the completion of the chores. If there is any extra duty to be performed in the service of a resident, that resident becomes a problem in the completion of the chores and must be gotten rid of. It then becomes a battle ground and dilemma for the staff; save their jobs or eliminate the problem. Since all the original residents have been bullied into conforming to the demands of the staff, problems occur when new residents are placed in the home. Expectations are that the resident will conform to the existing pattern without care to the ability of the newcomer to adapt and without any need for the staff or other residents to adapt to the newcomer's personality or habits. Thus the attitude that more work is a burden. It also causes the staff to be defensive of their positions and unable to accept any suggestion that things are not being done well – even when they agree with the statements. Clearly their jobs are in jeopardy if any notion of failure to perform properly is broached. Reprisals come in the form of chastisement and reduction of working hours. It then becomes easy for everyone to criticize the newcomer and anyone connected to that new resident as a troublemaker, thus preventing any attempt at resolving conflicts or restructuring, if needed, eventually eliminating the now identified source of the problem for the staff. It seems that no one is encouraged to be innovative or independent in providing solutions to these problems.

Whenever any of the administrative staff are confronted with issues of deficiency, the response is to deflect the responsibility to a higher authority – the ministry, the doctor, the dietician, the occupational therapist. In most cases, this is sufficient to eliminate further need to discuss it. These outside authorities, usually inadvertently, play into the situation in the course of performing their requested duties. All suggestions for changes of any kind are given superficial attention only to disappear down some rabbit hole into oblivion. This maintains the

illusion that everything is fine with the exception of the troublemaking, new resident. Since very few people actually go into the home to witness the conditions under which the residents live, there is no one to witness anything untoward. And the residents, being handicapped, cannot speak for themselves and, if they were to do so, they are easily dismissed by pointing out their inability to accurately represent reality. It appears that at no time is their word given credence or action taken to determine any grain of truth in their stories. What's more, restrictions are put on the residence limiting the ability for such events to occur and giving the staff control of all circumstances which may threaten their jobs.

[27] On August 10, 2008, Chiasson and Miller met with four of the staff. The full minute of that meeting reads:

Staff meeting (Barbie Deal)  
August 10, 2008  
10:00 am

Present: Jeanne Chiasson, Stacey Miller, Lucille Poirier, Marie Malthilde Quillan, Lucille Leblanc, Gerald Roach.

- 1) Jeanne welcomed and thanked all staff for coming.
- 2) Jeanne asked staff how things were going with Barbie's program. Lucille L asked Jeanne why staff has to follow a certain program with Barbie if it can't be done after due to no one on one. Jeanne said that we had to do it now because we had the one on one. When the one on one is gone, staff would do whatever they can
  - ' Staff said that going to the bathroom and having Barbie stay on the toilet for 10 minutes is working well.
  - ' Lucille P said that Barbie does not ask to go for a walk. It's the staff that has to ask her to go.
  - ' When asked how Barbie does at night, the staff said that she often wakes up fully dressed at night.
  - ' During bath time, staff said that Barbie needs hand over hand, and this does not always work either.
  - ' Staff said that Barbie's behaviours and different rules are now impacting the other residents. Some of them are even developing new behaviors too. The residents want to do the same as Barbie. They are always upset with her. She is taking their personal belongings and this upset them very much.



3) Barbie wants to eat whatever the others are eating. She will often try and take food from the others whenever she is not getting the same as them. She has tried to drink nail polish remover too. Staff has moved the nail polish remover to a locked area. Staff feels that it's very unsafe. They are scarred that she will drink something poisonous one day.

‘ Barbie is still running away.

‘ Without one on one, there is not time to take Barbie to the bathroom.

‘ Whenever staff asks Barbie to put her p.j's on (suggested by Barbara) she does not understand. Staff says it works better if you tell her.

‘ On August 5/08, Barbie hit Meghan 2x at the Green Door. The whole ordeal lasted about 25 minutes. Some residents were crying too. Green Door staff moved Barbie to a different chair, spoke firmly to her and told her to sit, not move and to not hit others. Barbie did not move. She sat there and played cards. Was content. This was a different approach and it worked.

‘ Barbara has told staff that Barbie has no short term memory, but at times, staff will ask her questions, and she remembers things.

‘ Staff said that Barbie regressed after Christmas vacation with parents. Staff felt that she could do more before she left on vacation.

‘ Staff does not want to take her on outings; they feel that it's very unsafe.

‘ Lucille L asked Jeanne if when parents put their child here, they are asked to sign a paper that says CACL is in control. Jeanne said NO.

‘ Jeanne extended the one on one for another week.

Meeting ended at 11:05 am.

[28] The foregoing are quoted in their entirety to give the reader a sense of the tension between Barbara's expectations and CACL staff's perceived limitations.

[29] On November 11, 2008, staff noticed Barbie was limping and suspected she must have fallen (See Ex 4 Tab 26 p. 1685). They called Barbara who came to Le Chemoi and then took Barbie to the hospital for an x-ray. Barbara kept Barbie at

home overnight and returned her to Le Chemoi the next day. On November 13, staff took Barbie to the hospital where she was seen by Dr. Aucoin. The doctor diagnosed a secondary strain and felt Barbie should take it easy for a few days. Barbara took photos of Barbie's swollen ankle and knee (See Ex 7 Tab 95).

[30] When Barbara came to Le Chemoi on November 11, she demanded that she be immediately given Barbie's medical card which she would require for the hospital visit. A confrontation with supervisor Stacey Miller (Miller) took place. Miller called the RCMP (though Barbara did not know this until the next day). Miller was very upset and advised the Board chairman Chester Muise (Muise).

[31] Muise then wrote to Barbara on December 11, 2008 telling her that the November 11 incident had caused "enormous stress on the staff and was extremely disruptive on the residents." He noted "your behavior and approach to CACL in the past has been unacceptable." He then advised Barbara that from then on supervisors were empowered "... to ask any visitor/parent/guardian...to leave these premises at any time when they, I emphasize they, decide that the situation demands it."

[32] Muise concluded: "I also hope that you realize that this is the last step before we are forced to consider other legal options." Barbara was not pleased. She sent a copy of Muise's letter to the RCMP with the comment: "...This letter removes

all my rights to advocate for my daughter on CACL property.” (Ex 4 Tab 27 p. 747).

[33] Despite the foregoing, throughout 2009 and 2010 Barbara says there was a lot of progress. This followed the January 2009 review report by DCS (which I reference below in Ken Deal’s evidence). Barbara says 17 of the 31 recommendations were implemented. She continued to interact with staff re Barbie’s bowel issues – she wanted staff to chart Barbie’s bowel movements; she wanted staff to accompany Barbie to the bathroom and wait with her for 10 minutes to ensure she completed her bowel movement. (Staff felt they had no time for this – see Ex 1 Tab 7 p. 177)

[34] Barbara says she tried to school staff in how to interact with Barbie – refrain from taking her devices, not to shout at her; not to say no to her. As noted, Barbara continued to have regular input on the menus and food selection for Barbie. Barbara says she was only trying to get staff to do their jobs better. She acknowledged however that staff could see her interventions as interference.

[35] Then on Sunday, March 7, 2010, Barbie fell. (Compare with staff notes Ex 2 Tab 9 p. 195. The notes show that staff initially did not realize that Barbie had been hurt as badly as later proved to be the case). Barbara says she was not called immediately but only found out when she called the home on an unrelated

matter. (1 hr. 45 min. after the fall). Barbara went to the home and found Barbie sitting on her bed with a swollen ankle. Since it was a Sunday there would be no doctor or x-ray tech at the hospital. Barbara got Barbie to walk to ensure there was no break and decided to wait until the next day before taking her to the hospital. Barbara requested staff to put ice on Barbie's ankle for a few hours. Barbara then went home.

[36] At 5:30 pm, Barbara phoned and staff told her Barbie was doing okay. Extra staff had been called in to help with Barbie. At 9:30, when Barbie could not get off her bed, staff called Barbara. Barbara and her son came to the home and took Barbie to the hospital in a wheelchair. Barbara says there was no doctor. They returned at 11:30 pm. (N.B. Staff note that a nurse called Le Chemoi at 11:05 pm to say Barbie was seen by a doctor who ordered an x-ray for the next day. Ex 2 Tab 9 p. 196). Barbara got Barbie ready for bed and returned home.

[37] Barbara had two issues with the fall:

- (i) That she should have been called immediately.
- (ii) That Barbie was wearing her slippers and not her sneakers which had been prescribed for stability.

[38] Consequently, Barbara wanted Lucille Poirier, the senior staff person on duty, fired. As will be seen, Lucille Poirier was reprimanded. A series of events then occurred which ultimately led to Barbie's eviction from Le Chemoi.

On March 19, 2010, Barbara met with the Board. According to the Board minutes:

"...Barbara says when she says something, it gets twisted and turned around and nothing is done...the Board does not know what's going on...the log books are distorted."

(After the recent March 17, 2010 fall) Barbie "only got medical attention the next day." (When she fell in November 2008). "...medical care was not provided." (As noted previously, that is incorrect). "Barbara stated that up to now she did not pursue any legal actions but she wants to see some changes at the home." Barbara told the Board "...**they were responsible for the extra staff needed at this facility.**" (Emphasis mine). Barbara told the Board she would not move Barbie to Le Maison Roderique because "her daughter would not fit in at the home because the other two residents' level of care was too low functioning."

[39] The Board met again on March 29, 2010. Barbara was invited to attend but declined to appear without her lawyer (who was not available on that date). The Board passed a motion that Barbie's placement "...be removed from the home with a 30 day notice pending the meeting with DCS on April 7."

[40] Between March 25, 2010 and April 6, 2010, the Board received (or at least were made aware of twelve letters from staff. (Ex 11 Tab 34). The letters made clear that staff found their work very stressful because of Barbara Deal. Barbara's wish to have Lucille Poirier fired made some of the staff fearful they might be next. Though the union, through Lucille's daughter, the union president, inspired

the letters, the sentiments expressed in them were no less genuine. Many of the staff had clearly had it as far as Barbara was concerned.

[41] On April 7, 2010, Board representatives and Executive Director, Jeanne Chiasson, met with DCS representatives. DCS was told in part:

“...so far, we have two staff that have quit, one on stress leave and two that refuse to work. Jeanne stated that we have to deal with the union as well. DCS understood our situation and supported our decision.”

“Patricia (DCS Community Supports Specialist) suggested a peace bond first, if she violates the peace bond, then give her a 30 day notice to remove her daughter from the home.”

(Ex 2 Tab 11 p. 356)

[42] Interestingly the minute for the April 7 meeting contains the following suggestion by Fred Gillis, the DCS District Manager:

“Fred suggested that Barbie should be reassessed. Fred thinks that Barbie was not properly assessed the first time and that she does not belong at the Chemoi Group Home.”

The minute continues:

“If her reassessment does not quality her for a placement at the Chemoi Group Home, DCS has to remove her from that home which would be very much in our favor.” (the minute is recorded by Chiasson).

[43] Karen Wager, by now a DCS Care Coordinator’s Supervisor, was in attendance. She is the person who did Barbie’s initial assessment on November

20, 2006, as well as Barbie's re-assessment on October 20, 2009. The minute does not record any reaction to Fred Gillis' suggestion.

[44] By letter dated April 15, 2010, CACL Counsel gave Barbara Deal notice pursuant to the *Protection of Property Act* that, effective that date, she was "...directed to refrain from entering onto any (of CACL's four properties) without the express written permission of the Association. "The letter noted that it was copied to the RCMP and "...any breach shall give rise to your immediate arrest." A similar letter was prepared for Ken Deal but never served because CACL concluded he had done nothing wrong. From that point on, it was Ken Deal only who visited Barbie at Le Chemoi. Barbara says she was "totally shocked" by the notice. She says that she thought they were making progress.

[45] By letter dated July 19, 2010, CACL Counsel gave Counsel for Barbara and Ken the following notice:

"...We are hereby giving your clients 30 days notice to find alternative arrangements for the care of their daughter." (Ex 3 Tab 19)

[46] Barbie, by her litigation guardian, Barbara, began this action on August 6, 2010. The Deals made an application to this Court for an interim injunction to prevent CACL from removing Barbie from Le Chemoi. That application was denied.

[47] Barbie left Le Chemoi in October, 2010 to resume living with her parents. Barbara says Barbie came home with problems she did not have before, notably

with her bowels, her speech, and loss of hair. Barbie's trance-like state went away first, then her speech improved, she rarely fell, her rash went away. Barbie resisted exercise but her aggressive behavior stopped at once. Barbie was still obsessed about her clothes but her hoarding gradually dissipated. Her speech took three years to come back to the pre Chemoi level.

[48] Barbara says Barbie's gait improved. Now she favors a leg once in a while. Her allergies went away. Barbie is more social now and very confident in herself. Barbara was provided with respite care by the Department of Health. Homecare worker Mary Elizabeth Hinkley testified about her experience with Barbie. (Noted later).

[49] Barbie lived with her parents from October, 2010 until early 2015. At that time she entered the L'Arche group home located in Iron Mines, Cape Breton. I will deal later with the evidence of Jennifer Power who testified regarding Barbie's experience at L'Arche.

[50] Barbara Deal was cross-examined for almost two full days. Some brief highlights:

[51] Barbara acknowledged that she has always been Barbie's caregiver. The only break in that relationship was the time Barbie spent at Le Chemoi and later at L'Arche. She does not agree with Counsel's suggestion that going into the group



home was a big change for Barbie. “Barbie came from a big family and had shared a room in the past.”

[52] She agreed that she never saw anyone at Le Chemoi do anything violent to Barbie. Barbara never saw Barbie pushed, punched, have meals withheld, or be inadequately clothed. She agreed that she has no evidence that any staff at Le Chemoi ridiculed Barbie, for example, by calling her “poopie pants.” She did not deny that the epithet could have come from another resident.

[53] Barbara acknowledged that she had the opportunity to move Barbie into a small options home (Roderique) where she would have gotten a higher level of care. She says she declined because the other residents were men and they were lower functioning than Barbie. The move, in her view, would have been detrimental for Barbie.

[54] Barbara says she sought the injunction to keep Barbie in Le Chemoi because that was Barbie’s home. Barbie had done nothing wrong and did not deserve to be evicted. “We were making progress” and it was Barbie’s fall in March, 2010 that “precipitated all this.”

[55] Barbara dismissed the nutritionist’s report that said CACL was “doing a great job” with the menus and were following the Canada Food Guide. She seemed to have difficulty with the competence of the nutritionist and the currency of the menus she had been asked to review.

[56] She agreed that, at Barbara's request, Barbie's bedtime was changed to 10:00 pm as of April, 2008. Barbara agreed that on May 9, 2008, she demanded that she immediately be provided with incident reports or she would call her lawyer. Barbara apparently did not recognize the privacy concerns of other residents named in the reports. She acknowledged that on March 9, 2010, she gave her opinion to other members of staff that she wanted staff person Lucille Poirier dismissed because "she is not physically or emotionally fit to do the job."

[57] Barbara was cross-examined about the details of the March 7, 2010 fall. She insisted that CACL could have called in extra staff who could have specifically cared for Barbie. She was asked whether she thought her expectations were "a bit much?" Her reply: "No, I don't think so."

[58] Finally Barbara was asked to list specific instances of abuse by CACL. She replied that not following the protocol (by not phoning her immediately when Barbie fell) was abuse; refusing to change menus was abuse; refusing to accommodate Barbie's allergies was abusive. In the latter instance counsel pointed out that some of the alleged allergies were not listed in Barbie's initial assessment. Barbara replied that, "they didn't always write down what I told them about allergies." Barbara said that putting Barbie on a 10:00 pm bedtime was also abuse.

## **2. Dr. Ken Deal**

[59] Dr. Ken Deal (age 74) is Barbie's father. Dr. Deal (Ken) is professor of marketing at McMaster University. He teaches and does academic research. He also does some consulting work.

[60] Ken describes his daughter as one of the most wonderful people in the world. He says she has the ability to make people happy. He has always "encouraged her to be as much as she can be." Barbie attended Glenwood school from age 7-8 until she graduated at age 21. He described her attendance at an equestrian centre and various camps including a two week live-in camp. He says that shopping with Barbie was "our special activity." Ken says that Barbie liked week-end camping trips and sports. For a few years she participated in a special Olympic program.

[61] Ken noted their move to Cheticamp in 2006, Barbie's one year at the Green Door workshop, followed by her admission to Le Chemoi. He says he regrets their decision to put Barbie in Le Chemoi, that he "had no idea it could be so bad; it almost destroyed our healthy, happy daughter." He continued; "(Barbie) 23-24 years happy – all of a sudden she's not; 'something happened'."

[62] He says that he and Barbara did not see Barbie too much for the first six months. But then he observed that Barbie:

1. Was no longer happy.
2. Was losing her hair.
3. Her tongue was swelling – developing strange mouth actions.

4. Lost her ability to speak – started grunting a word every once in a while.
5. Gained weight.

[63] Clearly (though not on the foregoing list), an overriding concern was Barbie's bowel problems. Ken requested and got a meeting with Muise, the Chairman of the Board of Directors. The meeting took place on July 1, 2008, that is, just over a year after Barbie entered Le Chemoi. Besides Ken and Muise, Jeanne Chiasson, Brian Roach and Stacey Miller also attended. There are two records of the meeting; one kept by Jeanne Chiasson, the other prepared the next day by Ken.

[64] The meeting began with Ken requesting that the meeting be recorded. Muise refused unless his lawyer was present. Ken asked Muise whether Muise expected to say anything that might be litigious. Muise said he did not. Ken agreed to no recording.

[65] In Chiasson's minute, "Ken says Barbie's rights have been violated." In his minutes, Ken refers to himself in the third person as "Dr. Deal." There is discussion about Barbie's privacy and dignity being violated by word of her bowel problem getting out in the community. Ken notes that Barbie has used the expression "piss pants" in her sleep and this must have come from Le Chemoi.

Chiasson notes there is no proof CACL violated confidentiality and that some of the higher functioning residents could have mentioned the problem while outside.

[66] Ken's Minute:

“Dr. Deal presented the meeting with examples of the emotional harm that Barbie has expressed due to the length of time that her bowel problem has remained unresolved by CACL staff.”

Later:

“Dr. Deal said that Barbie had been kept at home during the past week in order to isolate the cause of her bowel problem. It seems though laxatives, dried legumes, especially peanuts, or nuts are the most likely causes...”

[67] The meeting continued regarding the provision of CACL menus, communication with DCS, the need for private bedrooms and recreational space.

[68] In Chiasson's minute:

“Chester told Ken that it appeared to him that they (the Deals) wanted to dictate to CACL on how to run things.”

[69] In Ken's record:

“Mr. Muise stated that the Board has the right to admit anyone they wish and to terminate services to any resident they wish. Dr. Deal asked Mr. Muise if Mr. Muise was threatening expulsion of Barbie and Mr. Muise said he was simply mentioning the right of the Board...”

[70] In Chiasson's minute:

“Chester said that we all got off on the wrong foot and should start off better.”

[71] Ken's minute:

“All parties present agreed to move forward in a spirit of trust, cooperation and sincere desires to improve Barbie’s health and well-being at Chemoi and continue to evolve Chemoi into the best possible for all residents.”

[72] Ken then proceeded to bring his concerns to DCS, the Department of Health, the Ombudsman’s Office and the Premier’s Office

[73] By letter dated September 5, 2008, DCS advised that it had completed its investigation of the Deal’s allegation of abuse of a resident at Le Chemoi. It concluded:

“Please be advised that this allegation has been addressed to the satisfaction of the Minister of Community Services.” (Ex 7 Tab 72 p. 1546) (Emphasis mine – I have no idea what this means.)

[74] On September 12, 2008, Ken wrote to DCS. On September 19, after being informed that DCS would conduct a review, Ken wrote DCS again. His main concern was that “...the investigative team should be comprised of people who are not employed by DCS.” (Ex 7 Tab 72 p. 1548). He received a reply the same day which stated:

“...Our professional staff will be conducting the review utilizing the methodology used for all our reviews and audits.”

[75] The review was conducted on November 3, 4, 5, 6, 2008 by two DCS employees; the Complex Care Coordinator, Central Region, and the Program

Coordinator of Alternative Family Living and Independent Living Support Programs.

[76] On November 3, 2008, Ken gave an interview to CBC which was responding to reports that residents were not getting enough to eat.

“Ken Deal became alarmed after daughter Barbie, 24, began losing weight and hair. ‘When we bring her home its like she hasn’t eaten in days, ‘ he told CBC news.”

(The weight chart notes that in September, 2008, Barbie weighed 189.8 lbs -

Ex 5 Tab 53)

[77] The DCS Review Report was released in January 2009. It made thirty-one recommendations. The review team found no evidence of neglect or abuse of residents served by CACL – the residents appeared to be in good physical condition.

[78] The Report also noted there was no evidence of resident malnourishment. The Report found that the common space available was limited but this would be alleviated by the installation of a sprinkler system which would make the lower level of the home available to residents. It noted that funding for the system had been approved.

[79] Ken did not agree with the Report; on January 30, 2009 he told CBC news:

“I think some of the people who are family members and guardians will feel there is adequate evidence to have found these allegations were true.”

[80] On March 9, 2009, Ken and Barbara met with Karen Wager of DCS. Also present were Stacey Miller (CACL), Jean Paquette (DCS) and Jeanne Chiasson (CACL). (Ex 11 Tab 19). Wager reviewed Barbie’s reclassification to Developmental 1 level of care. (Ken says he does not believe Barbie was ever reclassified: as noted below, he may be correct). Barbara asked for documentation that led to the reclassification. It appears she got an oral explanation of the process but no documentation. Because Barbie was in a group home, extra staff would be provided (though the evidence is ambiguous about the duration of such extra staffing).

“Karen spoke about how when Barbie was placed, it seemed that she was at a group home level, but then at one point, she was at a different level...”

[81] Ken and Barbara were advised that there may soon be an opening at La Maison Roderique where there were only 3-4 residents. The Deals did not want Barbie moved to Roderique. They clearly wanted Barbie to stay in Le Chemoi. The Deals’ main concern seemed to be that Barbie be given her own room in Le Chemoi.

[82] On October 20, 2009, Wager did a reassessment of Barbie’s developmental status. She concluded:



“I am unable to determine which classification level is appropriate for (Barbie).”

[83] With respect to the proposed move to Roderique (where Barbie could have gotten one on one care) Karen noted:

“Barbara’s mother expressed significant concern that a move at this time would be very detrimental. She expressed that **Barbie’s previous behaviors have just resolved and would likely recur with a move. She believes that Chemoi is able to meet her daughter’s needs and wishes to advocate her daughter remain at Chemoi.**” (Emphasis mine)

[84] Likewise, Ken testified that he thought progress was being made. Then came Barbie’s fall in March, 2010 and everything changed. “Only for that we would not be here,” says Ken.

[85] In cross-examination Ken was questioned about his CBC interviews and how he thought they might be helpful. He stated that his daughter’s health was his paramount concern.

[86] He was also questioned about his contention that the interests of staff “were clearly put before the interest of residents.” (Ex 5 Tab 50). Ken had noted in an email dated May 27, 2008 to Muise that he had had difficulty accessing copies of menus and incident reports. He and Barbara had requested this information in an attempt to deal with Barbie’s bowel and behavioral issues.

### **3. Mary Elizabeth Hinkley**

[87] Mary Elizabeth Hinkley testified for the Plaintiff. She said she has been employed as a homecare worker with the Department of Health for more than twenty years. She impresses as a very likeable person with a sunny outgoing disposition. It is easy to assume that she is very good at what she does.

[88] Ms. Hinkley provided respite care for the Deals at their house on two occasions, in January, 2012 and again during March and April, 2013. She described how well she got along with Barbie and how excited Barbie would be when Ms. Hinkley arrived. Ms. Hinkley would bathe Barbie and attend to her personal care. She says that Barbie was never aggressive with her. At first Barbie's words were not clear but "got more clear." She said that Barbie "hollered at lot" but "that got better." Ms. Hinkley and Barbie would do puzzles together and sometimes dance.

#### **4. Jennifer Power**

[89] Jennifer ("Jen") Power is the Regional Director of L'Arche for the Atlantic Provinces. Jen (as she prefers to be called) has been with L'Arche since 1994 and was Executive Director of L'Arche Cape Breton for sixteen years. Jen has an honors degree in psychology. She briefly referenced the philosophy of L'Arche which is that people with intellectual disabilities have gifts to share with the rest of

the world and that they have rights. Jen lives in Orangedale, Cape Breton and regularly visits the group home in nearby Iron Mines where Barbie has resided since the spring of 2015. She says the DCS regards their residence as a group home for special care. That home would be funded on the same basis as Le Chemoi, that is, at a per diem rate per resident.

[90] Jen knows Barbie well. She and Barbie have travelled together. Barbie has been a guest in Jen's home. Jen says "Barbie is a fabulous woman – she brought energy and enthusiasm (to L'Arche); people found joy and delight in Barbie...She's a pleasure...Barbie needs support to be safe...Barbie is not safety conscious – she needs someone with her."

[91] Jen says Barbie does not require one on one care; "we're not funded for that." On a scale of 1-10 (10 requiring the most care), Jen says Barbie would be a 3-4. She says that Barbie needs to know where the things that are important to her are all the time (e.g. her Ipad, necklace, bracelet, glasses, hair elastics). If not disruptive, she keeps her possessions on (e.g. on a trip, she slept with her sunglasses on). Jen has not witnessed Barbie demonstrate aggressive behavior.

[92] Barbie's speech has improved in the four years she has been at L'Arche – she now uses more sentences. Sometimes her words are related to what is happening and sometimes not.

[93] In cross-examination, Jen noted that L'Arche does not use the term "resident."

- Residents are "core members" – persons with disabilities
- **There are five people in the home and staff is comprised of 4-6 full time equivalent positions.**
- **Staff do not live there permanently but they do live there.**
- "Other homes encourage a professional distance between staff and residents – we see ourselves as having a particular philosophy around care, we consider ourselves a relationship based model. In L'Arche, we encourage people to develop relationships (friendships) and go beyond the traditional staff/client relationship."
- Barbie has gotten to know the organization better; knows more people, she is used to the routine and in general, she has progressed the way we might expect someone to progress with good support. She has become more independent and able to go to work on her own.
- **Bowel movements:** Barbie does not wear adult briefs. She is on a schedule to go to the bathroom regularly – "we have built-in times of the day for her to go to the bathroom, **she'd always prefer not to**, but someone goes with her to make sure she sits long enough to let things happen." (Emphasis mine)
- we wear "shirt covers – **not bibs.** **"We call them shirt covers."** (Emphasis mine)

## 5. Lise Aucoin

[94] Lise Aucoin worked at Le Chemoi from 1986 to 2005. She noted that originally Le Chemoi, the other two group homes, and the workshop (Green Door),

each had their own board of directors. All four were amalgamated under one board in 2001. In Ms. Aucoin's view, that is when things got worse.

[95] Prior to amalgamation, Ms. Aucoin says that the home was run "like a normal home." Afterward, rules came about and punishments increased. Residents could be punished for very simple things. They could be sent to their rooms or grounded.

[96] Ms. Aucoin spent most of her career as a caregiver. She was a supervisor for a period of time but went back to being a caregiver. She was replaced as supervisor by Stacey Miller, a person whom Ms. Aucoin had trained when Ms. Miller was originally hired. She blames Ms. Miller for instituting rules which made the atmosphere in the home unpleasant and perhaps unsafe. Ms. Aucoin noted in one instance when a resident was "doubled" in pain but there was a rule that staff had to call the supervisor and not 911. It took over an hour to get the resident to the hospital where they kept him for three days.

[97] Other rules included a prohibition against staff to calling residents' family members – that could only be done by the supervisor. Staff were prohibited from telling residents who was working the next day. Ms. Aucoin says the rules prevented staff from giving residents the reassurance they required. The house "was a prison after Stacey started." Aucoin says that she was reprimanded for

“undermining the authority of the supervisor.” She claims that Miller told her one of the residents repulsed her and that she took a shower after every shift.

[98] Ms. Aucoin says she spoke to the Executive Director, Jeanne Chiasson, about her concern but nothing was done. Ms. Aucoin says the residents “were like my kids but after a while (because of the rules) I lost their trust.” Ms. Aucoin quit in 2005.

[99] Ms. Aucoin was interviewed by the DCS investigative team in November 2008. She says she relayed the above concerns to them.

## **B. THE DEFENDANT’S WITNESSES**

### **1. Jeanne Chiasson (Chiasson)**

[100] Chiasson was the executive director of CACL from 2000 to 2015 when she retired. She was responsible for one workshop, two group homes, and one small option home. The homes were licensed by DCS. DCS did an annual inspection to ensure that its policies were being followed.

[101] In 2006, Chiasson told Barbara that there was an opening at Le Chemoi. Placement is done by DCS which does an assessment to determine whether the potential placement qualified. DCS determines the resident’s classification;

Developmental 1, 2, or 3 – respectively requiring most supervision, some supervision, and the least amount of care. CACL received a per diem rate per resident from DCS. In Barbie’s case, \$195.00 per day. CACL could request extra funding but DCS had the final say. CACL had a budget it was required to follow and justify to DCS.

[102] Chiasson denied that she never told Barbara that they could not visit Barbie, or take her home for the first six months. Chiasson says that “would never happen.” She did acknowledge that adjustment could take six months depending on the resident.”

[103] Chiasson says Barbie could speak a few words but could not carry on a conversation. As for speech clarity: “certain words you’d know what she said...Sometimes Barbie would respond to a question but she’d never ask a question.”

[104] With respect to employee education Chiasson noted that Grade XII was required. DCS provided training in non-violent crisis intervention, medication awareness, CPR, and some personal care training. Chiasson says some employees are hired and trained on the job.

[105] Chiasson was referred to p. 10 of the November 2006, DCS assessment which notes that (Barbie) “requires significant amounts of support.” According to Chiasson, Barbie seemed very happy in her first year. Her mother said she did not need extra staff.

[106] Chiasson noted that in May 2008, DCS authorized 98 hours for extra staff for Barbie. This was the second time extra hours had been authorized. She noted that it was difficult to get DCS to approve extra staffing.

[107] Chiasson said the philosophy of CACL was to treat the residents like family, have meals with them like they were in their own home. She acknowledged that the residents wore bibs for the protection of their clothes. Barbara was the only one who complained about the bibs.

[108] Chiasson noted that “time out kind of worked” and that this method of discipline was approved by DCS. She said that Barbie eventually got her own room (sometime after March 2009) and that it was the best room in the residence. With regard to Barbie, Chiasson stated: “I wanted it to work but it was very hard; we did our best but it was never enough.”

[109] Chiasson was asked about various contacts with the Deals. I have referred to many of these in other parts of this decision so I will not repeat them here.



[110] With respect to the March 2009 suggestions that Barbie move to Le Maison Roderique, Chiasson says they would have converted the office into a room for her there. Contrary to Barbara's evidence, Chiasson says Roderique housed two males and one female. The female attended the Green Door workshop as did Barbie. Chiasson says Barbie would have gotten better supervision if she had moved. Chiasson also indicated that Barbara declined a second offer to move Barbie to Roderique on March 19, 2010.

[111] As noted, Barbara felt that the reason Barbie fell in March 2010 was because she was wearing slippers instead of her prescription sneakers. Chiasson said that Barbie was forever taking her sneakers off; she did not want to keep them on. It was not possible for staff to constantly monitor Barbie's footwear.

[112] In cross-examination, Chiasson said there was no such thing as punishing residents; "we didn't use that word." She said there could be a "time out" for 5-10 minutes at most. Chiasson said it was the resident's home, "they're adults." The residents were not all treated the same because "they have different needs and preferences." Chiasson was aware of Barbie's bowel problem and she tried to find a solution. She said she was going to the home 3-4 times per day when there was a problem. (Chiasson's office was not at Le Chemoi).

[113] Chiasson could not recall any decline in Barbie's ability to speak. She was not aware of any swelling of Barbie's tongue. Chiasson was not in the home every day; she relied upon what she was told by the supervisors and staff.

[114] As for the change in Barbie's behavior, Chiasson said that many things could cause change (e.g. vitamin deficiency). She says Barbie's aggression seemed to be triggered whenever someone said no to her. "We tried distracting her." She noted that Barbie seemed to be put off by Megan's loud voice and that caused the incidents with Megan (another resident). Chiasson did not think the 8:30 pm bedtime was a problem; "when it was, it was changed."

[115] On the administration side, Chiasson noted her frustration with Muise, the Chairman of the Board. "He was a retired colonel; you can't run a home like the army." (The DCS January 2009 Report highlighted that Muise was too involved in the day to day operations of the CACL facilities. Muise quit after the release of the Report). The situation was further complicated by the fact that supervisor Stacey Miller was bypassing Chiasson and dealing directly with Muise. Chiasson says, "It was hard to manage with Chester."

[116] Chiasson was referred to a meeting she had with staff on August 15, 2009 (Ex 3 Tab 22 p. 501). It was at this meeting that the so-called "Stacey's rules" were brought to Chiasson's attention for the first time. (By that time Miller had

gone on stress leave and never returned to Le Chemoi). Chiasson says “I couldn’t believe what I was hearing.” She agreed that she was very disturbed by what she heard. Chiasson immediately countermanded most of the rules. She agreed that the rules benefited staff and not the residents. Some examples:

- staff not permitted to tell residents what is for meals if they ask.
- not permitted to give hugs (except on specified occasions).
- residents not permitted in rec room when supervisor present (her office adjacent to rec room)
- we can only give condiments when they are marked on the menu.
- not permitted to tell residents which staff is coming on duty (Lise Aucoin says this rule was in effect before she quit in 2005).
- not permitted to get medical attention for a resident without first advising the supervisor.

[117] After the meeting, staff advised Chiasson of one instance where a resident was denied medical assistance by the supervisor. Chiasson queried why she had not been told before. “...their answer was that they had been given strict orders from Stacey Miller, the supervisor, that they were not to contact the Executive Director.” (Ex 3 Tab 22 p. 505)

[118] Chiasson recorded:

“...I have informed staff to contact me immediately if they feel the residents are not properly treated and to get medical attention for the residents if they feel it is necessary...”

[119] She also recorded:

...”all staff have stated that it is a much better place to work (Supervisors are on sick leave – I assume that means Stacey Miller), that the residents are happier, and the staff’s morale has improved tremendously as they feel they have some support and they can finally do more with the residents from activities and to give them more choices that best suit their needs. The delivery of service has greatly improved and we want this service to continue (also p. 505).

## **2. Jeanne Poirier (Poirier)**

[120] Poirier was the union president at CACL from 2010 to 2014. Her mother is Lucille Poirier, the staff person whom Barbara wanted dismissed after Barbie’s March 7, 2010 fall. Poirier says she was getting a lot of phone calls at home from Chemoi staff complaining of harassment by the Deals. Poirier asked them to put their complaints in writing. The resulting letters dated between March 25 and April 6, 2010 are found in Ex 11 Tab 34. Poirier denied that anything she did was because of her mother’s difficulty. The letter writers were simply coming to her as their union president.

## **3. Stacey Miller (Miller)**

[121] Miller is 42 years old. She began working for CACL in 1995 as a caregiver. Miller became a supervisor at Le Chemoi in 2002. She remained in that position until the summer of 2009 when she went on stress leave “because of the situation with the Deals.” Miller now works seasonally as the manager of a family owned motel.

[122] Counsel referred her to Barbara's evidence that she found Miller asleep in her office when Barbara made an unannounced visit on April 7, 2008. Miller denied being asleep but she does recall having a hat on and taking it off (presumably to account for her messed hair). As to having the office door locked Miller said she routinely did that when using the washroom. The bed in her office was for the use of staff in case they got storm stayed. Miller's note of this meeting (Ex 11 Tab 3) says that:

Barbara told her that "she should be on call to answer (Barbara's) questions when she has some. I told her that I was not aware that I had to be on call and that it was not in my job description to do so. She said that I should go above and beyond my duties as part of my job. She said that she would change my job description. Also that my hours of work would be changed so that I could stay with Barbie in the basement." (Barbara denies she said that).

[123] Miller explained Lise Aucoin's evidence that she refused to transport a resident in her car. Miller said she did not have insurance for such purposes. (Jeanne Chiasson said CACL did reimburse employees for such insurance).

[124] With respect to Barbie's hair loss, Miller made a note on June 3, 2008 (Ex 11 Tab 8), that she had phoned Barbie's hairdresser, Clair LeBlanc:

"...I asked Claire if Barbie had lost some hair. **Claire said that her hair was thinner.** She said this could be caused due to a change in her life, or her hormones. Claire said **staff would not find hairs around the house due to this.**" (Emphasis mine)

[125] In Ex 7 Tab 72 p. 1505, the following note, received by Barbara on April 28, 2008, (shown to Miller in cross-examination) is signed by Claire LeBlanc:

“In the past six months or so, I have noticed that Barbie’s hair has not been the same. **She’s been losing lots of it and its not getting any thicker. It’s very thin compared to what it use to be.**” (Emphasis mine)

[126] Miller said her relationship with Barbara was never good; “I didn’t follow her orders.” Miller denied that she made rules and that staff was scared of her. Much of Miller’s testimony is punctuated with answers like “I don’t remember.” She blames her medical condition for her lack of memory.

#### **ANALYSIS:**

[127] Barbie did not receive an appropriate level of care during her time at Le Chemoi. Barbie thrives when she has the level of care which she requires. She was a healthy, happy individual before she entered Le Chemoi and she is now that way again.

[128] I am satisfied that Barbie required one on one care or something equivalent to it. That is what she had for the first twenty-two years of her life. During that period, Barbie was in the care of her family. In particular, Barbie had the benefit of a devoted stay-at-home mom who knew all of Barbie’s physical and psychological needs and how to deal with them. Barbie also enjoyed a close

relationship with her dad and her siblings. With the exception of her days at school, day camp, and some overnight camps, Barbie was home with her family for the majority of her time.

[129] It must have been a tremendous adjustment for Barbie to suddenly find herself living with eight strangers and cared for by two strangers. And the two strangers changed with every shift when two more strangers took over. Barbie also now had to share a room with another stranger. I am satisfied that Barbie must have found the dramatic change in her life to be overwhelming.

[130] Barbara is a determined advocate for her daughter. But I believe that Barbara has her blind spots. This is clearly demonstrated by her attitude toward Barbie's adjustment from family life to living in a non family setting or institutional setting. Barbara is dismissive. After all, she says, Barbie came from a big family and she had shared a room before.

[131] In addition, Barbara believed that Barbie could function more independently than in fact was the case. This is exemplified by her initial attitude that Barbie did not require additional care at Le Chemoi. (That changed as time went on). The point is that some of Barbie's physical and behavioral changes could have been caused and/or contributed to by her struggle to deal with her totally new and very

different living situation. It is impossible to be any more definitive on the basis of the evidence before me.

[132] The problems began, at the latest, within 6-8 months of Barbie's admission to Le Chemoi in June, 2007. Chiasson is incorrect when she says Barbie got along well during her first year. The bowel issues started before January-February, 2008 when Barbara became aware of them.

[133] There is one staff note dated June 9, 2007 (Ex 2 Tab 11 p. 295) noting that "stool samples to the lab this morning." That may or may not be related to the bowel problem. The same note also refers to "thinning hair." Surprisingly, there are no other staff notes or documentation for the June to November, 2007 period. There is a note dated December 4, 2007 (See Ex 10) which states "Barbie needed to be sponged due to BM." The only other documentary reference relating to the start of Barbie's medical difficulties is in an email dated July 8, 2008 from Muise to Chiasson. In the context of discussing Barbie's allergies (not clear whether bowel problem included), Muise states: "...I would however add that we should have started that sooner as **my understanding is that Barbie's medical issue began last fall?**" (Emphasis mine)

[134] In any event, Barbie left Le Chemoi in October 2010 and lived with her parents until the spring of 2015. There was immediate but not total improvement



when she returned to her parents' home. Her bowel problems persisted but her aggressive behavior and trance-like state went away at once. Barbie's speech improved and her hoarding dissipated. In 2015 Barbie moved to L'Arche where she continues to live.

[135] Barbie is thriving at L'Arche. There are five people, "core members", living in the home. Staff is comprised of 4-6 full-time positions. Some staff actually live in the home for extended periods of time. Barbie is now one of five instead of one of nine with four to six caregivers instead of just two. I am not clear whether all the four to six actually live in the home for weeks at a time but some of them do. I am satisfied, that I can safely conclude that the staff resident ratio is much better at L'Arche than that at a traditional group home like Le Chemoi. I do not have enough evidence to explain why L'Arche can provide a higher level of care with the same funding as Le Chemoi. What I can say is that Le Chemoi did the best it could with the funding available to it. Barbie is now benefitting from a level of care that Le Chemoi could never provide.

[136] Consider Barbie's bowel problem. The evidence is irrefutable that two staff persons at Le Chemoi did not have the time to monitor Barbie when they had eight others to attend to. In contrast, Jen's evidence is "we have built-in times of the day for her to go to the bathroom...someone goes with her to make sure she sits long

enough to let things happen.” No matter how dedicated their staff, Le Chemoi staff simply could not devote that kind of time and attention to Barbie’s toiletry. Le Chemoi staff had no option but to require Barbie to wear diapers.

[137] Jen’s evidence was also that Barbie “always prefers not to (go to the toilet).” In other words, without the level of care L’Arche has the human resources to provide, Barbie would likely still be having bowel movements in her clothes. The problem persists. Furthermore, it would appear that the persistence of the problem has nothing to do with what Le Chemoi staff did or did not do. Nor that the problem is in any way associated with Barbie’s diet at Le Chemoi. It has been eight years since Barbie left Le Chemoi. Presumably Barbie now is eating the proper food. The inescapable conclusion is that the bowel issue continues. It is better managed because Barbie now lives where the appropriate level of care is possible.

[138] If Le Chemoi was not able to provide Barbie with the appropriate level of care, the question is: why was she there? The decision to admit and keep Barbie at Le Chemoi was that of CACL. But CACL relied upon the DCS assessment which was done on November 20, 2006. (See Ex 1 Tab I). I have already quoted portions of this document. It does not specifically say that Barbie is classified as Developmental I or II. I am satisfied the message conveyed to CACL was that

Barbie was Developmental Level 2. Page 11 contains the following under Recommended Program:

“Barbie requires ongoing direction but is able to attend to work/socialization with minimal direction and supervision... I would recommend GHMH.” (there is no evidence re what GHMH means)

[139] It soon became apparent that Barbie required much more than “minimal direction and supervision.” By July 28, 2008, Wager, the author of the initial assessment is recorded as saying: “...Barbie is used to one on one that this home can’t provide.” (Ex 2 Tab 11 p. 335). By October 20, 2009, Wager was doing a reassessment but concluded: “ I am unable to determine which classification level is appropriate for (Barbie).” (Ex I Tab I p. 36)

[140] Wager did not testify. It is therefore difficult for me to assess her actions. Her inability to reclassify Barbie seems to have been influenced by two factors: (1) “Staff feel...(Barbie) has finally resettled in and is happy” (p. 36) and (2) Barbara “expressed significant concern that a move at this time would be very detrimental...” (p. 36)

[141] In fact, the Deals had two opportunities (October 2009 and March 2010) to move Barbie to Le Maison Roderique where she would have gotten a higher level of care. They declined the proposed move both times.

[142] On one level, it is perplexing that the Deals insisted upon Barbie staying in Le Chemoi, while at the same time alleging that Barbie was not getting proper care. Barbara and Ken likely believed they had no option. If they took Barbie back to live with them, they would sooner or later have to find another placement. They were very conscious of their advancing age and felt they would soon be unable to care for Barbie. They knew that going back to Ontario with its lengthy wait times was not an option. And they felt that things were improving at Le Chemoi. I am satisfied that the Deal's believed that they could eventually pressure CACL to provide the required level of care for Barbie in the group home.

[143] While I understand their predicament, I am satisfied that Barbie's placement at Le Chemoi was never going to work. Barbara felt that the solution was for CACL to hire extra staff; she insisted that that was CACL's obligation to Barbie. Barbara refused to recognize the reality that CACL could not provide the required extra staff for Barbie without DCS funding. It is clear that DCS funding for extra staff at Le Chemoi (other than on an intermittent basis) was not going to happen unless Barbie was reclassified and moved to Le Maison Roderique. Barbie should have been classified (or at least, reclassified) at Developmental Level I.

[144] In the meantime, Barbie's continued stay at Le Chemoi was overtaken by events. As discussed, Barbie's March, 2010 fall was the catalyst which made her

stay at Le Chemoi untenable. Staff were justifiably afraid that whatever they did for Barbie would never be enough. A fair reading of the record reveals that, with very limited exceptions, staff made every reasonable effort to accommodate Barbara's directions. I can find no specific instance in the evidence which satisfies me that Barbie did not get the care that CACL could be reasonably expected to provide.

[145] Barbara's reaction to the March 7, 2010 fall was the proverbial straw. Staff did not immediately recognize the seriousness of the fall. And neither did Barbara. Barbara came to the home in mid-afternoon when she learned of the fall. She was content to leave Barbie there with instructions that ice be applied. At 5:30 pm Barbara checked again and was satisfied there was no cause for concern. At 9:30 pm, it was staff who called Barbara to tell her that Barbie could not get off her bed.

[146] I am satisfied that had Barbara been called immediately after the fall it would have made absolutely no difference to Barbie's treatment. Further, I am satisfied that the evidence does not support the conclusion that the slippers caused the fall. Even if I were able to conclude otherwise, staff could not be blamed for the fact that Barbie was wearing slippers. They did not have the time to monitor Barbie's footwear when it was her habit to continually put the slippers on.

[147] Barbara saw her interventions throughout Barbie's time at Le Chemoi as helping staff to do their jobs better. She did not appreciate or could never accept that staff did not have the time to give Barbie the attention Barbara suggested. Staff perceived "suggestions" as demands. Given Barbara's frequent aggressive and accusatory interactions with CACL, I can understand their perception.

[148] Accordingly, I am satisfied that CACL had no choice but to serve Barbara with a *Protection of Property Act* notice. Barbara's continued presence at Le Chemoi had become detrimental to its viable operation. Both management and staff had done everything that could be reasonably expected of them to accommodate Barbara's wishes. They perceived that what they did had never been enough and they concluded that it never would be. When Barbara could no longer visit Barbie at Le Chemoi, Barbie's removal from the home became inevitable. I am satisfied that in light of all the circumstances CACL's decisions to ban Barbara from Le Chemoi, and subsequently evict Barbie, were justified and reasonable.

#### **THE LAW:**

[149] This action is framed in negligence. The Plaintiff says in effect that I should draw the inference that CACL negligence caused Barbie both physical and mental harm. The Plaintiff relies on *Saadati v Moorhead* 2017 SCC 28 for the

proposition that I can infer that Barbie suffered mental harm because of CACL's negligence. Paragraph 23 of that decision reads.

23....Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one's mental health...

[150] I agree that I could do that if I were satisfied that CACL breached the required standard of care **and** that breach caused Barbie mental injury. I would emphasize that the burden of proof lies with the Plaintiff to prove on a balance of probabilities that CACL breached the required standard of care. The Plaintiff has failed to do that. Even if there was a breach, there is no evidence to support an inference that any deficiency in CACL's care of Barbie caused (or contributed to) either her physical or mental difficulties.

[151] The Plaintiff's case is that Barbie was healthy both before and after her stay at Le Chemoi. During her time at Le Chemoi, Barbie experienced physical and mental problems which I should infer were caused by the Defendant's negligence.

[152] This I cannot do. At the time of the non suit motion I said that a properly instructed jury could find for the Plaintiff. It has to be borne in mind that I made that conclusion based upon the Plaintiff's evidence only. I have now had the opportunity to consider the Defendant's evidence. I am satisfied that the

Defendant's evidence produces a reasonable explanation for what occurred that is consistent with no negligence. The Plaintiff bears the responsibility of proving on a balance of probabilities that negligence on the part of the Defendant caused the Plaintiff's injuries. This the Plaintiff has clearly failed to do. [See *Fontaine v B.C. (Official Administrator)* ]1998] 1 SCR 424 at p. 433 for a succinct statement of the law.]

[153] In the non suit motion, I quoted *Johannson v General Motors of Canada Ltd* 2010 NSCA 120:

In paragraph 100 of *Johannson*, Justice Fichaud quotes *Ryan v Victoria (City)* [1999] 1 S.C.R. 201, and paragraph 28 of that case:

28 Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability a person must exercise **the standard of care that would be expected of an ordinary, reasonable and prudent person in the circumstances.** (Emphasis added)

[154] And further:

Justice Fichaud quoted Justice Beveridge who cited *Burbank v. Bolton*, [2007] B.C.J. No. 752 at para 57:

[57] It is first important to recognize that in a negligence action, it is not usually necessary to adduce evidence, much less expert evidence, to prove the standard of care. **It is generally a matter to be determined by the trier based on common experience, having due regard from what may be taken from any applicable legislation or policies governing the activity in question;** (Emphasis added)



[155] The relevant portions of the applicable legislation are referenced in paragraphs 7 to 11 of the Statement of Claim which reads:

7. At all material times to this proceeding, the defendant had a duty to exercise reasonable care to ensure that it provided a safe and proper environment for its residents, this being mandated by “the Homes for Special Care Act” and further specified in the regulations, in particular, regulations 5(1) and (2) which state:

5(1): The primary purpose of community based residential facilities, adult residential centres, and regional rehabilitation centres shall be to encourage, foster, and promote the social, educational and vocational development and well-being of the residents for the purpose of integrating the residents into the community as self-sufficient and independent individuals;

5(2): All matters relating to the administration and operation of a community based residential facility, an adult residential centre and a regional rehabilitation centre, shall be conducted in accordance with the primary purpose as stated in subsection (1) of this Section.

7. The defendant breached its duty to ensure that the said environment was safe and proper in accordance with the Act and regulations;

8. At all material times to this proceeding, the defendant had a duty to Barbie to provide her with personal services commensurate with the needs of individual residents in accordance with the Act and regulations, specifically, though not limited to the following:

#### Regulations

18(1): Every home for special care shall have sufficient staff that will ensure: compliance with the requirements of these regulations;

19(1): Every home for special care shall have an administrator who shall be responsible for: the overall daily management of the home, ensuring that the home complies with the requirements of these regulations, ensuring that the residents receive the standard of care prescribed in the Act and these regulations, staff orientation and inservice training programs and planning and implementing programs and activities in the home and community which provide social, educational, vocational, religious and recreational opportunities for the residents;

19(2): In addition to subsection (1), the administrator of a community based residential facility or home for the disable shall be responsible for ensuring that the programs and activities of the home are in compliance with the primary purpose as stated in subsection 5(1))

20C. The operator of a home for special care shall ensure that there is opportunity for management and the residents of the home to meet together on a regular basis to discuss the operation of the home as it relates to the care and well being of residents and safety and security of home.

22.(2) Every home for special care shall have social, educational, vocational, religious and recreational programs and activities in accordance with the interests and abilities of residents;

22.(3) Residents shall be encouraged by the staff of a home for special care to join with other members of the home in various leisure times activities.

22. (5) No resident shall be deprived of the right to have visitors during reasonable hours of the day.

24. (2) No person shall disclose a record or any part of a record relating to a resident or any information contained therein except in the court of his duty of when required by law.

26. (1) Every resident of a home for special care has the right to be examined and treated by a qualified medical practitioner of his own choice.

36(1) Every home for special care shall provide to its residents, (a) nutritionally well balanced meals served at morning, noon and evening, (b) meals which are in accordance with the likes, dislikes and eating habits of the residents and which provide the recommended dietary allowances according to Canada Food Guide, (c) an afternoon and bedtime snack.

9. The personal services that the defendant was obligated to provide to Barbie by virtue of the Act and regulations included twenty-four (24) hour responsibility for the well being of the residents and protective care and watchful oversight including, though not limited to, a daily awareness by the management and staff of the resident's functioning and specific needs and the ability to properly respond to them and intervene if crisis arises for the resident.
10. The defendant breached the above noted duties imposed upon it by the Act and regulations, as set forth in paragraphs 8 and 9, to wit:

- (a) failing to properly monitor and attend to Barbie's medical and health status and to provide for her best interests in these regards;
  - (b) failing to properly train and supervise certain providers responsible for Barbie's care.
  - (c) failing to provide Barbie with a sound and nutritional diet;
  - (d) failing to provide for Barbie's proper social and recreational needs;
  - (e) failing to properly communicate with and consult Barbara's parents, respecting her care and needs;
  - (f) failing to provide for Barbie's safety and protection;
  - (g) deliberately attempting to prevent and discourage Barbie's parents from visiting her, assisting with her needs or properly participating in the care and living activities of their daughter, culminating on 15 April 2010 when the defendant provided her mother and attempted to provide her father with notices under the Protection of Property Act forbidding their attendance at the defendant properties and threatening referral of the same to the RCMP.
  - (h) providing a written notice to the plaintiff's solicitor on 19 July 2010 that the plaintiff was to be evicted from the defendant home within 30 days, said notice providing no reasons or explanation.
11. All of the above cited breaches constituting negligence, a violation of the Act and regulations and causing Barbie harm and losses.

[156] Though not specifically pleaded, Barbara stated in her evidence that

CACL abused Barbie. Section 3(1) (b), and (g) define abuse as follows:

3(1) Subject to subsection (2), in the Act and these regulations, "abuse" means, with respect to adult patients or residents, any of the following:

...

(b) mistreatment causing emotional harm, including threatening, intimidating, humiliating, harassing, coercing or restricting from appropriate social contact;

...

(g) failure to provide adequate nutrition, care, medical attention or

necessities or life without valid consent.

[157] Section 3 (2) (a) reads:

3 (2)“Abuse” does not occur in situations in which

- (a) a service provider carried out their duties in accordance with professional standards and practices and health-facility-based policies and procedures;

[158] I will deal specifically with the alleged breaches set out in paragraph 10 of the Statement of Claim. Before I do so, I want to emphasize the observation of Major, J. in *Fontaine, supra*. There Justice Major noted that whether an inference of negligence can be drawn is highly dependent upon the circumstances of each case. That was never more apparent than in this case (and that is why I have so extensively set out the evidence).

[159] As noted above, paragraph 10 (a) to (h) of the Statement of claim sets out the alleged breaches of the standard of care by CACL. I will deal with each in turn.

**10(a): Failing to properly monitor and attend to Barbie’s medical and health status and to provide for her best interests in these years.**

[160] **Finding:** The evidence overwhelmingly establishes the opposite. I am satisfied that Barbie got appropriate medical attention when she required it. After

both major falls (November, 2008 and March, 2010) for example, Barbie received timely and appropriate medical attention.

[161] Further, staff fully cooperated with Barbara in an attempt to determine what was causing Barbie's bowel issues. CACL staff also took reasonable steps, to the extent its resources permitted, to manage Barbie's bowel issues. (e.g. accompanying her to the toilet and waiting with her for 10 minutes when staff had the time to do so).

**(b) Failing to properly train and supervise certain care providers responsible for Barbie's care.**

[162] **Finding:** Chiasson gave evidence about the training requirements for staff. She acknowledged that sometimes staff received on the job training. I am satisfied that the training staff received was appropriate. I appreciate that there is always room for improvement. It is obvious from a review of the evidence that the work of a caregiver can be physically and mentally demanding. I am able to endorse Chiasson's evidence that "most of them are there for the right reasons."

[163] Barbara complained that staff did not treat Barbie in an age appropriate manner. I am satisfied that staff made reasonable attempts to interact with Barbie as Barbara suggested. There is evidence, for example, that they refrained from shouting at Barbie; attempted to re-direct Barbie rather than saying no to her; and,

when staff felt it necessary to take any of Barbie's belongings, to do so for brief time limits as suggested by Barbara. Chiasson testified that DCS approved of "time out" to deal with difficult behavior.

[164] Barbara's main complaint about care providers related to Lucille Poirier (Lucille). Barbara felt that Lucille was incompetent and not healthy enough to do the job. There is no evidence to support Barbara's claim. Lucille's failure to follow protocol at the time of Barbie's March 2010 fall resulted in a reprimand by CACL. I am satisfied that following protocol would have made no difference in the outcome. It is interesting that eight years later, according to Lucille's daughter Jeanne Poirier, Lucille is still working at Le Chemoi.

**(c) Failing to provide Barbie with a sound and nutritional diet.**

[165] **Finding:** I am satisfied that this allegation is not supported by the evidence. Barbie weighed 190 lbs in November 2006. She entered Le Chemoi in June 2007. According to the weight chart, Barbie weighed 168 lbs in September 2007. There is no record of what she weighed in June, 2007. She may have lost weight between November 2006 and June 2007, that is, before she entered Le Chemoi.

[166] Even if I assume that Barbie lost 22 lbs between June, 2007 and September, 2007, that may have been attributable to her difficulty adjusting to her new diet or

to some unrelated and undiagnosed health issue. In any event, the weight chart (Ex 1 Tab 3 pp 84-5) indicates that Barbie back up to 180.8 lbs by December, 2007, and 197.2 lbs by December, 2008. Barbie was not malnourished. It was therefore puzzling that Ken would give a CBC interview in November, 2008 alleging that Barbie was not getting enough to eat. Barbara testified that she agreed that Barbie was not getting enough to eat (compare with her evidence para. 21 above). To her credit, Barbara dissociated herself from the CBC interview. It was an irresponsible and unjustified act by Ken which must have caused great anguish for CACL management and staff.

[167] The DCS January, 2009 report found no “...evidence of resident malnourishment, and did find that residents with weight loss had an accompanying health/medical issue or requirement that accounted for the weight loss.” (Ex 11 Tab 17 p. 6). The menus were reviewed by a nutritionist who complimented them.

[168] Barbara was given extensive leeway in suggesting menu changes and increasing portion sizes. Her changing lists of Barbie’s allergy-related foods were accommodated by CACL staff. There is no evidence to link any of Barbie’s difficulties to her diet at Le Chemoi.

**(d) Failing to provide for Barbie’s social and recreational needs.**

[169] **Finding:** I am satisfied that the evidence does not support this allegation. Barbie appears to have had a full opportunity to socialize with the other residents of the home and participate in a range of house activities. In addition, she attended the Green Door workshop on a daily basis where she could access the social and recreational offerings there. There is evidence that she would sometimes go for a walk with staff.

[170] Barbara and Ken seem to rely on the fact that initially the recreation room in the basement was not available for the residents. This was rectified by 2009 when funding for the installation of a sprinkler system was approved by DCS. (the Fire Marshall had prohibited use of the recreation room because it lacked sprinklers). (Ex 11 Tab 77 p. 8)

[171] There is evidence that supervisor Stacey Miller would not allow residents to use the recreation room while she was in her office. I cannot infer that any restriction on the use of the recreation room had any negative impact on Barbie.

[172] There is also evidence that the building itself was too small for nine residents. However, there is no evidence that the building size impacted Barbie's social and recreational needs. It is true that Barbie had to share a room during her first two years but Barbara knew that when she agreed to Barbie's placement. And



Barbara indicated that at times Barbie had had to share a room while she was living at home.

[173] I have also considered the possible impact of “Stacey’s rules” as noted during Jeanne Chiasson’s cross-examination. Some of the rules undoubtedly at times made the atmosphere in the home less pleasant for the residents. I am unable however to relate the rules to any specific impacts upon Barbie.

[174] As well, I am not persuaded that Miller’s habit of by-passing Chiasson in favor of going directly to Muise had any specific impact upon Barbie’s well being in the home. It will be recalled that both Miller and Muise were gone by mid 2009 and by then Chiasson had countermanded most of the rules. I was impressed by Chiasson. I am satisfied that she did her best for Barbie. Unfortunately, she was often kept out of the loop by Muise and Miller.

**(e) Failing to properly communicate with and consult Barbie’s parents, respecting her care and need.**

[175] **Finding:** I am satisfied that this allegation is completely without merit. The evidence is replete with instances of communication between Barbara and Ken with both CACL staff and management. The communication was regular and ongoing. CACL regularly responded to the Deals in a respectful and accommodating manner. The Deals’ approach to CACL was often confrontational

and accusatory. The instances where CACL pushed back are therefore understandable. It is commendable that CACL did not allow its conflict with her parents to detract from the care and attention it gave Barbie.

[176] There were instances of conflict notably between Barbara and Miller. Barbara shares the blame for some of this conflict most notably when she had demanded Barbie's medication card at a particularly inconvenient time. This encounter resulted in a letter from Muise to Barbara wherein he advised her that from then on supervisors had the authority to ask her to leave if the supervisor felt the situation demanded it. In any event, there is no evidence from which I could reasonably infer that Barbara's conflict with Miller had any impact on Barbie's care and well being.

**(f) Failing to provide for Barbie's safety and protection.**

[177] **Finding:** I reject this allegation out of hand. This contention appears to be rooted in Barbara's belief that Barbie fell on March 7, 2010 because she was wearing slippers rather than her prescribed sneakers. I have already referred at length to this event. I noted that there is no evidence that the slippers caused the fall. I have also noted that it was not reasonable to expect staff to constantly monitor Barbie's footwear when she was continuously removing her sneakers in

favor of her slippers. This was a simple accident for which CACL cannot be held responsible.

**(g) Deliberately attempting to prevent and discourage Barbie's parents from visiting her, assisting with her needs or properly participating in the care and living activities of their daughter, culminating on 15 April 2010 when the defendant provided her mother and attempted to provide her father with notices under the Protection of Property Act forbidding their attendance at the defendant properties and threatening referral of the same to the RCMP.**

[178] **Finding:** This allegation has no merit. First, CACL did not prevent Ken Deal from visiting his daughter. He was never served with a *Protection of Property Act* notice. In fact Ken continued to visit Barbie between April and October, 2010 when she left Le Chemoi.

[179] Second, Barbara had frequent and regular contact with Barbie until April 15, 2010, that is, for almost three years. It was not until Barbara's continued presence in the home became incompatible with its viable operation that CACL banned Barbara.

**(h) Providing a written notice to the plaintiff's solicitor on 19 July 2010 that the plaintiff was to be evicted from the defendant home within 30 days, said notice providing no reasons or explanations.**

[180] **Finding:** This claim has no merit. As I have noted earlier, once Barbara was banned from visiting Le Chemoi, Barbie's days there were numbered. It was inconceivable that Barbie could remain at Le Chemoi for any extended period if

her mother did not have the right to visit her there. CACL had no choice but to ban Barbara. Barbie therefore would in short order have to find accommodation elsewhere.

**ABUSE ALLEGATIONS:**

[181] As I noted earlier, though it was not pleaded, in her testimony Barbara testified that CACL had abused Barbie. In cross-examination, Barbara listed what she considered to be specific examples of abuse by CACL. After thoroughly considering all of the evidence, I am satisfied that at no time during her stay at Le Chemoi was Barbie subject to a single instance of abuse.

[182] In conclusion, I am not able to infer that Barbie's physical problems (bowel issues, hair loss, tongue swelling) were caused by anything CACL did or did not do. Nor am I able to infer that Barbie's mental issues (e.g. her aggressive behavior; her hoarding; her trance-like state; her speech deterioration) were caused by CACL's conduct. I am mindful of the fact that causation need not be determined by scientific precision. Causation is "...essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory." [See *Snell v Farrell* [1990] 2 RCS 311 (SCC) at p. 328]. (

See also *Clements v Clements* 2 RCS 181 at p. 205). There is no evidence that Barbie was abused or mistreated in any way.

[183] I can infer that if CACL had had funding for one on one care for Barbie, she likely would have done better. If there had been a higher level of care available, her bowel issues, for example, could have been better managed. Obviously that would have spared Barbie significant humiliation (she might not have been called a “poopie pants”) and physical discomfort. She would have been spared the indignity of wearing a diaper. A specifically dedicated staff member would have had time to help Barbie re-direct her aggression. Her behavioral issues would have been better managed.

[184] It is not the fault of CACL that Barbie did not receive a higher level of care. CACL was literally caught between DCS and the Deals.

[185] DCS controlled the funding CACL could receive. In the first place, DCS wrongly assessed Barbie’s developmental level (understandably that assessment was based upon what Barbara had told Wager). When it should have been apparent that Barbie had been mistakenly classified (and therefore mistakenly placed), DCS failed to re-classify her. In fairness to DCS, it was facing strong resistance to any re-classification from the Deals. Mr. & Mrs. Deal realized that

any re-classification would leave them with two unpalatable choices: move Barbie to Le Maison Roderique or take her home. They clearly wanted neither.

[186] On the other hand, CACL was being pushed (and pushed hard) by the Deals to provide a level of care for Barbie that it simply could not provide at Le Chemoi.

[187] DCS was effectively telling CACL that Barbie belonged in Le Chemoi. CACL could hardly tell the Deals that Barbie should be elsewhere. And it was not immediately apparent to CACL that Barbie was not a good fit for Le Chemoi. From the evidence before me, it is apparent that Barbie's issues may not have started until after she had spent several months at Le Chemoi. CACL therefore opted to try and accommodate Barbie and do the best it could with its existing resources.

[188] As I stated earlier, CACL did everything that could reasonably have been expected of it to provide the best possible care for Barbie. CACL tried for three years to do its best before it finally got to the point where it could not continue. CACL was not to blame for what happened to Barbie. By keeping Barbie at Le Chemoi, CACL did not undertake "an objectively unreasonable risk of harm" to Barbie. It exercised "the standard of care that would be expected of an ordinary, reasonable, and prudent" operator of a group home in the circumstances. As noted,

DCS saw no problem with CACL's conduct. CACL's conduct was in no sense negligent.

[189] And obviously Barbie was not to blame. She deserved better. She spent over three years at Le Chemoi that, to understate it, were not as happy as they might have been. My job was to decide whether CACL should be held accountable. I have decided that it should not. If there is any consolation, it is that Barbie is today the happy person she ought to be, receiving the care she ought to have.

[190] I am therefore dismissing the Plaintiff's action. I will accept written submissions on costs. Normally the Defendant, as the successful litigant, is entitled to its costs. Here that could mean a cost award against Barbie personally. CPR 36.07 notes when the litigation guardian could be personally liable for costs. The Defendant's brief is due January 31, 2019. The Plaintiff's response brief is due February 8, 2019 with an optional brief reply by the Defendant no later than February 14, 2019.

Edwards, J.