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February 2, 2018

Walter Thompson QC
Quackenbush Thomson Law
2571 Windsor Street
Halifax, NS B3K 5C4
By email

Dear Mr. Thompson:

Re: MacLean et al v Nova Scotia; H14-0418

Please accept the following as the submissions of the Disability Rights Coalition (DRC), filed in reply to the Respondent's memorandum of law dated January 29, 2018.

These submissions will address the following points raised by the Respondent:

1. The DRC's approach is "deeply flawed" because it lacks a "comparative lens"[1]
2. That the U.S. Supreme Court decision in *Olmstead* (as cited in the DRC brief starting at paragraph 40, relying on the *Americans with Disabilities Act* (*ADA*)) is not applicable to this human rights complaint because
    a) other human rights tribunals have found that the *ADA* is different from the Canadian approach to disability
    b) that the *ADA* jurisprudence has not been followed in Canada

Comparator groups and disability

In the context of this claim of discrimination, the Disability Rights Coalition argues that overcoming exclusion and making social services equally accessible to disabled and non-disabled persons results in an inherently comparative exercise. At the

[1] Respondent's memorandum, starting at paragraph 37 under the heading "The DRC's non-

same time, this is not the type of claim where a 'comparator group' analysis is required or appropriate, and in fact the Supreme Court of Canada has never applied a comparator group analysis where persons with disabilities are seeking accommodation for their differences.[2]

Overcoming the exclusion of persons with disabilities itself involves a comparison between people without disabilities, and those with disabilities. Those non-disabled individuals (including some disabled individuals who do not need supports and services to live in the community) do not face exclusion as a result of their need for social services.

Conversely, those persons with disabilities who do require such supports and services, are faced with exclusion, in the form of placement in an institution, as a condition of receiving social services. Underlying this difference in treatment, is a dominant norm or assumption that people who require such supports and services, do not belong in the community.

In a unanimous decision of the Supreme Court of Canada in *Moore*,[3] in overturning the British Columbia Court of Appeal, Justice Abella cited with approval an article by Brodsky and Day that addressed this very point:

> …in accommodation cases like Jeffrey Moore's, comparator group analysis can be conducted in a way that is wrong-headed and unfairly defeating. It is not necessary to apply a detailed comparator group analysis in such a case. This does not mean that accommodation entails no comparison between groups. **Underlying the remedial purpose of overcoming a history of exclusion, and making society's structures and services equally accessible to persons with disabilities is an inherent comparison.** That comparison is between persons with disabilities and persons without disabilities with regard to the relatively *disadvantageous effects on persons*

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[2] Brodsky, Gwen and Shelagh Day, *Accommodation in the 21st Century,* Canadian Human Rights Commission, May 2012.

[3] *Moore v BC* Para 31

> *with disabilities of dominant norms designed for persons without disabilities.*[4] [emphasis added]

Later in the same article, the authors quote Justice Sopinka speaking for the majority in *Eaton v Brant Board of Education*[5] where he explained the two fold objectives of section 15 in relation to discrimination based on disability.[6] On the one hand, it is to ensure equality by preventing untrue characteristics from depriving people of benefits enjoyed by others. On the other hand (and this is the objective sought by the DRC in this case) non discrimination requires the removal of barriers that arise through the failure to take into account the true characteristics of the individual or group. In this case it is that failure to take into account true characteristics that results in disadvantage to persons with disabilities and interferes with their inclusion in their community. In the words of Justice Sopinka:

> The principal object of certain of the prohibited grounds [referring to s. 15 of the Charter] is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. **In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them.**[7] [emphasis added]

Brodsky and Day characterise this second objective as "the accommodation of difference" and, in contrast to a discrimination claim that seeks 'same treatment,' they note that this model seeks different treatment, or accommodation.

The DRC's claim in this complaint is based on this second objective of non discrimination: a failure to accommodate difference. The DRC claims that the policies of the Department of Community Services in funding institutional options for persons with disabilities who do not require institutionalisation, has a

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[4] Brodsky *ibid.*
[5] *Eaton v Brant Board of Education* [1997] 1 SCR 241
[6] Brodsky, *ibid* p 35.
[7] *Eaton supra* Note 5, para 67.

disadvantageous effect in comparison to other non-disabled persons who enjoy the full benefit of choosing to live in the community.

With the exception of those who are imprisoned or have their freedoms legally curtailed pursuant to the *Criminal Code* or involuntary psychiatric treatment legislation, non-disabled persons in Canada can take for granted their right to live in the community of their choosing. In this context, the comparative disadvantage of persons with disabilities who are unable to access supports and services to live in the community compared to those without such disabilities is clear. As Brodsky and Day note:

> Accommodation is not about same treatment. It is about inclusion for people with disabilities, who have historically been excluded from full participation in society. In an accommodation case, the issue is not whether the claimant has received formal equality of treatment but whether the actual characteristics of the person have been accommodated so that they can access a benefit that is otherwise unavailable.

Unnecessary institutionalisation results in the denial of the benefit of community living to persons with disabilities, benefits ordinarily available to non-disabled members of our community.

Supreme Court of Canada and the *ADA*

In *CCD v VIA Rail*,[8] a case involving the exclusion of the use of personal wheelchairs by persons with disabilities on certain VIA rail cars, Justice Abella, speaking for the majority, emphasized of the importance of minimising or eliminating the disadvantages created by disabilities:

> To redress discriminatory exclusions, human rights law favours approaches that encourage, rather than fetter, independence and access. This means an approach that, to the extent structurally, economically and otherwise reasonably possible, seeks to minimize or eliminate the disadvantages created by disabilities. It is a concept known as reasonable accommodation.[9]

[8] [2007] 1 SCR 650
[9] *ibid* para 110

In that case, Abella J noted that the *Americans with Disabilities Act* legislation is a useful source of minimum standards with respect to what constitutes accessible transportation.

In a more recent human rights case, the Supreme Court of Canada referred to American case law including the *ADA,* in interpreting provisions concerning the employment relationship, in determining liability.[10]

In *Granovsky,* cited by the Respondent, in addressing the scope of the definition of disability, the Court simply noted that it was not bound to follow the narrower test set by the U.S. Supreme Court. This case did not comment on the test for discrimination in Title II, or the *Olmstead* decision.[11]

The *ADA* jurisprudence was also referred to in a decision from the Nova Scotia Family Court, in determining whether the government agency had met its obligation to provide 'effective communication' to parents with a disability in a child welfare case.[12]

Other human rights tribunals have declined to apply the *ADA*

The cases cited by the Respondent address discrete sub-issues such as the definition of disability, and reasonable accommodation, but do not address the discrimination analysis itself. As such, they are of minimal relevance to the case before the Board.

For instance, in *Gichuru*[13] the full quote from the BC Tribunal is as follows:

> The American case law has developed in often quite different statutory contexts, both as to the governing human rights legislation (particularly the Americans with Disabilities Act), and as to the statutory regimes governing

[10] *McCormick v. Fasken Martineau Dumoulin LLP* [2014] SCC 39 at para 25-27, 34.
[11] *Granovsky,* at para 36.
[12] *Family & Children's Services of Kings (County) v. S. (M.)* [2003] NSFC 2
[13] Respondent's memo para 42

> licensing authorities involved. Further, there is no single line of authority to be found within the body of U.S. jurisprudence on whether medical fitness questions are liable to result in prohibited discrimination. As a result, in my decision, I have not relied on the American case law.

The *Gichuru* decision does not address the application of the test for discrimination in Title II of the ADA, and has no relevance to the issues in this case.

In *Snow*[14], a Nova Scotia human rights Board of Inquiry dismissed arguments presented by an employer School Board, which relied on cases decided under the *Americans with Disabilities Act* limiting the definition of 'employment' and the duty to accommodate. In those American cases, the activity of commuting to work was found to lie outside the employment relationship and therefore outside a claim under the *ADA*. In contrast, the Board in *Snow* decided that an employee's commute to work formed part of the employment relationship, effectively finding that Canadian human rights protections were more expansive than those decided under the *ADA*. The Board did *not* direct itself at the test for discrimination in Title II of the *Americans with Disabilities Act* that lies at the heart of the *Olmstead* case. With respect to its treatment of the *ADA* case law, the decision is of marginal relevance in this case, except to the extent that it suggests that Canadian law is *more* expansive in promoting equality.

In *Morris v BC Railway Company*[15] the tribunal was concerned whether the claim fell within the *definition of disability*. The Court determined that the *ADA* case law imposed *too narrow* a definition, given the facts of the case, and decided not to follow those rulings that limited the definition of disability based on functional limitations, in favour of a broader, more liberal understanding of disability. In contrast to that decision, the disability of those affected in the complaint before this Board is not contested, nor were similar mental and intellectual disabilities in

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[14] Respondent's memo at para 42, decision para 53-57
[15] Respondent's memo para 42, decision para 212-214

Olmstead. The aspect of the *Morris* decision of the BC Tribunal cited by the Respondents thus has no relevance to the issues in the complaint before this Board.

ADA legislation different from the NS HRA

In its argument concerning the *Olmstead* decision, the Respondent omits the fact that *Olmstead* concerned the proper interpretation and application of the test for discrimination in Title II of the *American with Disabilities Act.* As stated by Justice Ginsburg speaking for the majority of the U.S. Supreme Court in that case:

> This case concerns **the proper construction of the anti-discrimination provision contained in the public services portion (Title II)** of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, 42 U.S.C. § 12132. Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[16] [emphasis added]

In *Olmstead*, the U. S. Attorney General supported the claim of LC and EW, while the State of Georgia opposed the claim. The Court was presented with at least two versions of the proper construction of the *ADA,* and following extensive reasoning concluded that unnecessary institutionalisation constituted a prohibited form of discrimination under the *ADA*:

> For the reasons stated, we conclude that under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[17]

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[16] *Olmstead* at 2181
[17] *Olmstead,* at 2190.

The anti-discrimination provision of Title II of the *ADA* mirrors in every important respect the test for a violation contained in s. 4 of the NS *Human Rights Act.* The *ADA* provision reads as follows:

> Title II Public Services
> Subtitle A – Prohibition Against Discrimination and Other Generally Applicable Provisions
>
> Sec. 202 [12132] Discrimination
> Subject to the provisions of this title [subchapter], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[18]

The main difference between the American and Canadian test for discrimination is that the American jurisprudence places the justification within the test for a violation, unlike Canadian jurisprudence, which has held that the violation and justification steps of the discrimination analysis are discrete and must be kept separate.

After citing the *ADA* definition of disability and 'public entity', Justice Ginsberg reviewed the relevant *ADA* regulations but noted that "we recite these regulations with the caveat that we do not here determine their validity."[19] The *ADA* regulations cited include the following:

> A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.[20]
>
> The preamble to the Attorney General's Title II regulations defines ``the most integrated setting appropriate to the needs of qualified

[18] *Americans with Disabilities Act of 1990*, 42 USC Title II, 202 [12132, 2008 amendments]; also referred to as Title II.
[19] *Olmstead* at 2183.
[20] *Olmstead* at 2183

> individuals with disabilities'' to mean ``a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.[21]

In her decision, Justice Ginsberg noted that she could refer to the *ADA* regulations for "guidance." The clear inference is that the Court is not bound by such regulations ``[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute `constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' ''[22]

A fair reading of the *Olmstead* decision demonstrates that while the Court refers to the *ADA* regulations, it relies on its own non discrimination jurisprudence and the evidence, in interpreting and applying the non discrimination provisions of the *ADA*. Citing earlier Supreme Court jurisprudence concerning racial and gender discrimination, as well as the brief presented by the *Amicus Curiae,* the Court finds that unjustified institutional isolation perpetuates stigmatising assumptions about people with disabilities, and that it "severely diminishes" everyday life including family relations, work, social, education, cultural and everyday life activities of people with disabilities.

Finally, on a different but related point, Justice Ginsberg dismisses the arguments of the State of Georgia, one of which reflects the argument put forward by the Province of Nova Scotia in this case; namely that LC and EW "had identified no comparison class."[23] In determining that the claim of discrimination had been demonstrated in *Olmstead* the Court declined to impose a requirement of a 'comparator group,' an approach that is consistent with the Supreme Court of Canada's treatment of claims of accommodation of differences.

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[21] *Olmstead* at 2183
[22] *Olmstead* at 2186
[23] *Olmstead* at 2186

All of which is respectfully submitted.

Claire McNeil
Counsel for the Disability Rights Coalition

Cc Kymberly Franklin and Kendrick Douglas, by email

Cc Dorianne Mullin and Kevin Kindred, by email

Cc Vince Calderhead, by email

Attachments:

Brodsky and Day, *Accommodation in the 21st Century*
CCD v VIA Rail
Americans with Disabilities Act 1990
Olmstead v Zimring et al