View Point…

MacLean: Board of Inquiry Fails to Recognize Systemic Discrimination Against People with Disabilities

In a much-anticipated decision in *MacLean v. Nova Scotia (Attorney General) (No. 2),* the Nova Scotia Human Rights Board of Inquiry was tasked with determining whether the complainants had met the test for *prima facie* discrimination, in the context of a claim of systemic discrimination on behalf of persons with disabilities in their access to community based, residential supports and services. Four separate complaints — three by individuals with disabilities and a fourth by the Disability Rights Coalition — were heard jointly in a challenge to decades old policies and practices by the Province.

Many people with disabilities who require residential supports and services in Nova Scotia are faced with a lack of community-based options and long waitlists while over a thousand are warehoused in anachronistic institutions, and still others are actually 'housed' in hospitals. Some people with disabilities in their 40s and 50s, live with ill or aging parents while they wait on years-long waitlists for the offer of a place to live independently.

The three individuals filed their complaints while 'housed' in a locked, acute-care psychiatric hospital. One of them, Beth MacLean, lived there for 16 years before she was transferred to an institution outside Halifax. Everyone involved in her case agreed that all of the complainants could have been supported throughout the relevant periods to live in community.

During the 32 days of evidence, the Board heard from many experts who all testified to how institutionalization does not simply limit the opportunities for growth and development but actually causes a regression in a person's social and physical skills. Indeed, the Province's own Deputy Minister of Community Services, in her two days of evidence, freely admitted that institutionalization is not in the best interest of the people they are serving.

Ultimately the Board upheld the complaints from the three individuals while dismissing the Disability Rights Coalition's systemic discrimination complaint.

On the positive side, it is a significant win to have a human rights Board of Inquiry hold that an institutionalization complaint falls within the scope of human rights law and that for people who want to live in community, continued institutionalization is inconsistent with their equality.

In its reasons, the Board made strong evidentiary findings concerning the disadvantage experienced by the three individual complainants, including that Beth MacLean's appalling experience at the hands of the Province was 'soul-destroying'. Reviewing the evidence of years of requests and advocacy seeking community-based placements (for all three individual complainants), the Board found: "The Province met their pleas with an indifference that really, after time, becomes contempt".

The finding of discrimination against the Province based on the unnecessary institutionalization of three individuals establishes an important precedent concerning the obligation on government to consider the discriminatory impacts of decisions to unnecessary institutionalize persons with disabilities.

However, on the systemic side, and despite what appears to have been a mountain of evidence, the Board's decision is profoundly disappointing. The Board of Inquiry was incapable of grasping the clear systemic discrimination foundation of all of the complaints.

For example, the Board was dismissive of the expert evidence of noted human rights scholar and activist, Catherine Frazee, whose expert report and testimony explained the underpinnings and operation of the well-recognized concept of ableism. Frazee's description of ableism and its operation calls to mind the ways in which, for instance, systemic racism and sexism work. Indeed, in *Meiorin (British Columbia (Public Service Employee Relations Comm.) v. B.C.G.S.E.U.* (1999), 35 C.H.R.R. D/257), the Supreme Court of Canada approved of a passage from the work of Gwen Brodsky and Shelagh Day who refer to "the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others" ("The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can. Bar. Rev. 433 at 462).

Accordingly, the Board's observation that the Province's witnesses involved in either the complainants' care or the implementation of its programs "gave every appearance to me of the utmost respect and the most positive attitudes towards the disabled" entirely misses the point of systemic discrimination.

At bottom, the Board's flawed discrimination analysis focused on how people eligible for the Province's disability supports program were treated in comparison to other persons with disabilities. This formal equality approach left the Board unable to see the dramatic and glaring substantive inequalities experienced at virtually every turn by persons with disabilities who require residential supports and services, when compared to those people — both those with disabilities and those without — who do not require supports and services. The decision also failed to address the negative impact of institutionalization, and distinguished the U.S. Supreme Court decision in *Olmstead v. L.C.,* 527 U.S. 581 (1999), which found that unnecessary institutionalization of persons with disabilities who both want and are capable of community living, is discriminatory.

For those wondering whether the Board's decision in *MacLean* would advance the position of persons with disabilities in their struggle for social equality, the result is mixed. The good news, however, is that the Board's decision will not be the final word as the Disability Rights Coalition has appealed the Board's decision to the Nova Scotia Court of Appeal.