

# A Solomonic Human Rights decision

Last month, **Walter Thompson** ruled that **Nova Scotia** violated the rights of three people with intellectual disabilities when it confined them for lengthy periods in a locked unit at the **N.S. Hospital** rather than making serious efforts to place them in small options homes, residences with usually around **four** people. One of the complainants died during the course of these hearings.

The **100-plus-page** decision is very detailed and painstaking. It throws light on what has been an apparent moratorium on such small options homes over the past **20 years**. Two developments in the **1990s** altered policy assumptions regarding people with intellectual disabilities.

First, the province took over responsibilities for such placements from municipalities. The consequences of this decision seem to have been especially severe for the **Halifax** area.

Second, **Ottawa**, through a series of **Paul Martin** austerity budgets, eliminated shared cost funding for social programs, what provinces came to see as **50-cent dollars**; and replace these with block grants that were not linked to the level of provincial expenditures.

Anyone involved with the provincial government during the 1990s will vividly recall the fiscal turmoil occasioned by deficit cutting Paul Martin budgets of that decade.

I have a personal link to this decision. Lawyer Thompson noted how the prime legal counsel for the three complainants had died during the course of these proceedings. That was my late sister, retired **Dal** law professor **Dianne Pothier**.

Thompson's decision has come in for sharp criticism from disabilities advocates and activists, as he did not lay down specific criteria that could potentially apply to the approximately **1,500** people with intellectual disabilities who might most benefit from small options homes.

He held that each individual should be assessed on a case-by-case basis; and that the principle of "meaningful access" to services might not require specific limits on wait times or placement within a maximum distance from family members. Reading his decision reminded me of what an **American** appellate judge once said about criminal procedure: a defendant is entitled to a fair trial, not a perfect trial.

The most far reaching argument presented to Thompson for an expansive view of disability rights came from retired **Ryerson University** professor and former chair of the **Ontario Human Rights Commission**, **Catherine Frazee**. Another point of personal disclosure: Frazee spoke

eloquently at my sister's funeral.

Frazee argued that systemic exclusion of people with disabilities arises from what she calls ableism. People with disabilities are devalued since they are assumed not to be economically productive. Therefore, they can be consigned to total institutions that presume to take control of their lives and restrict their autonomy.

Frazee's argument, as Thompson summarized it, has echoes of the movement a generation ago to "liberate" mental patients from what were seen as the snake pits of mental hospitals. In this instance, simple de-institutionalization without follow-up may have had baleful consequences.



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Thompson's response to Frazee's presentation provoked particular ire from some disability advocates when he said that he could not accept the argument that ableism as defined by Frazee is equivalent or comparable to racism or sexism. If this proves that he is not woke, he wrote, so be it.

I cannot help having some respect for someone who does not simply conform to current fashion when it comes to theories of systemic privilege or exclusion simply in order to demonstrate a higher level of enlightenment or superior moral concern.

Thompson seemed especially perturbed that systemic claims about ableism would unfairly slur senior Nova Scotia bureaucrats and Cabinet members whom he could not see as harbouring conscious, deliberate prejudice regarding disabilities or other issues.

This may reflect his being securely ensconced in the Nova Scotia legal/political/social establishment. His brother is **Ian Thompson**, who has held senior positions at the **Herald**, has been a provincial deputy minister, and was a principal of a leading PR firm in the **Maritime** region.

However, from my own experience, I can offer more concrete instances of ableism or sightism — that is not so freighted with the sometimes-clotted jargon of post-modernist theorizing.

- Last summer, a retired Halifax professor proposed to share with me materials on a topic I had discussed in this space. He asked me if I had access to Braille in order to read it.

- **15 or 20 years** ago, I suggested to an environmentalist friend that active transportation, especially cycling, might well be termed ableist transportation. To which she replied: you are different in every way.

- I was once told that people at one of my favourite **Inglis Street** dives sometimes call me **Radar**, since they are puzzled over how I navigate my way around

the Halifax peninsula.

- On a couple of occasions, I have confronted workplace situations where managers or HR people dealing with me have appeared to regard it as an imposition to be required to wade through files and educate themselves about the exact nature of my visual impairment, and what workplace adaptation this might require. That perceived burden of information to sort out and assimilate may have closed some occupational doors to me.

I don't think I have ever encountered Walter Thompson. I sense someone innately conservative; wanting to see the best in an establishment of which he is undoubtedly a member; and reluctant to exploit **Charter** provisions or social science or post-modernist theories to bring about major social transformations from the bench. He seems to think it a prudent course to leave major policy innovation to the political process.

Towards the end of his ruling, Thompson hints at a possible resolution to this issue. He quotes an American appellate decision that held that government might fulfill its obligation to people with disabilities if it sets forth a construction schedule for, for example, small options homes that would eliminate the backlog of people awaiting such placements, in a finite period of time. Thompson would almost certainly see such a judgment as beyond his jurisdiction as a hearing officer in a human rights tribunal.

Thompson notes an issue lurking in this debate that has been raised more clearly by **Wendy Lill**, playwright and one-time federal **NDP** MP, who has a family involvement in disability issues. She told Thompson that the potential cost for placements for people with disabilities could be the elephant in the room. Thompson quotes Lill again on this issue in the final line of his decision. (Catherine Frazee told Thompson that the only limit to provincial liability for placing the disabled in home-like settings should be provincial bankruptcy.)

There may be another issue relating to disability housing that is scarcely hinted at in this decision. If the elephant is out-of-control costs, the pride of lions relating to small options homes may be fear of **NIMBY** backlash to such proposed homes.

Not just group or small options homes. But also housing for parolees or mental patients. Even social housing in general. Neighbourhoods may not always draw distinctions between any of these forms of housing. Any or all such housing may be seen indifferently as a threat to what residents may perceive to be neighbourhood cohesion and integrity.

**NIMBYism** may prove to be the biggest social justice issue in the future.

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