

View Point...

Compensation Decision Is Shocking, If Not Outright Discriminatory

The decision of the Nova Scotia Board of Inquiry on compensation for discrimination against Beth MacLean, Sheila Livingston and Joey Delaney is deeply disturbing. In essence, the Board failed to acknowledge the enormity of the violations at issue. The Board also limited the amount of the award because, it reasoned, the complainants have a diminished capacity to enjoy the fruits of a large award.

The three complainants have physical and mental disabilities. In its decision on the merits, the Board found that they were held in a locked psychiatric ward in Emerald Hall at the Nova Scotia Hospital for years, even though this was a completely inappropriate setting for them and they should have been allowed to live in small options homes in the community.

The record is replete with evidence that the complainants suffered adverse effects because they were detained in Emerald Hall, which was not designed for long-term residence, but only for short-term psychiatric treatment. The Board of Inquiry wrote:

There is no evidence that residence in Emerald Hall has anything but an adverse impact. No one suggests that Emerald Hall is conducive to the expansion of the human spirit. Indeed, the evidence consistently speaks of the deleterious effects of life in such a setting. One loses life skills. One becomes more dependent upon others for basic needs. One loses self-confidence and self-esteem. One becomes apathetic and withdrawn to the point where some do not want to live in the community. One loses contact with friends and relatives. One loses track of time. One's physical condition deteriorates. One loses opportunities to be outside, to engage in employment, to engage in recreation, to go to the movies, to go to Tim's and everything else that we take for granted to occupy and entertain ourselves. Patients begin to engage in power struggles with staff and begin to respond to staff with aggression or self-harm. Rehabilitation and expert staff hired to provide rehabilitation are frustrated. Staff quit the service at Emerald Hall because there is no point to rehabilitation since, come what may, the likes of MacLean, Delaney and Livingstone are not going anywhere ...

The evidence shows that placement in Emerald Hall denied the three of almost every opportunity for something resembling a normal kind of life.

(MacLean v. Nova Scotia (Attorney General) (No. 2) (2019), 93 C.H.R.R. D/214 (N.S. Bd.Inq.) at paras. 352–53.)

The complainants, and advocates on their behalf, made persistent and repeated efforts to obtain placements in appropriate homes. Staff also tried. Reports were written. The Province met the pleas on behalf of the complainants “with an indifference that really, after time, becomes contempt”.

The three complainants, over years, were locked in, suffered deterioration and harms to their mental and physical health, and were unable to develop their full potential. They experienced confinement and loss of liberty, contrary to medical evidence and legal authority, because of their disabilities.

However, the Board of Inquiry seemed to roll back its own findings when it came to awarding compensation. The Board found that the violation of rights experienced by the complainants should not be compared to non-disabled persons who have been wrongfully held in locked facilities and institutionalized, but rather to the plight of other disabled people who are on wait lists for services, an experience that the Board refers to as “ordinary”.

Neither the Board's rejection of persons wrongfully incarcerated as a comparator, nor the characterization of the complainant's experience as “ordinary”, is persuasive. The equality rights violations at issue here, and their effects, are egregious. These complaints are not similar to other housing, or services cases, because of the seriousness of the discrimination and its impacts, and the many years over which the discrimination was maintained, with the Province's full knowledge.

Counsel for the complainants selected comparison with the situation of those who have been wrongfully incarcerated in Canada — Donald Marshall, Guy Paul Morin, Steven Truscott, Gregory Parsons, Thomas Sophonow, David Milgaard — for good reasons. Like the complainants, these men suffered being locked in and institutionalized, and they lost the opportunity for a normal life. The average amount of damages paid to them for pain and suffering and violation of their rights was somewhere between \$250,000 and \$500,000 per year. Following this model, counsel for the complainants sought a substantial award for each year of detention in Emerald Hall.

Perhaps it is not surprising that the Board of Inquiry balked, since the complainants were held for years, and, on this model, awards would have been high. But the awards ordered by the Board of Inquiry (\$100,000 to the two living complainants) seem low even in the human rights context. We note, for example, that the Ontario Court of Appeal just upheld a Tribunal award of \$200,000 for prolonged sexual harassment.

What is surprising is that the Board of Inquiry's justifications for the amount of its awards are patronizing, if not outright discriminatory.

The Board of Inquiry states that the goal of damages in human rights cases is to restore the complainants to the position that they would have been in had the breach not occurred. Since the Province has always kept them safe, clean, warm, fed, clothed and healthy, “what more,” the Board queries, “can one reasonably ask for them?” The Board says that money will not restore these complainants to what they have missed, and “their lack of capacity to benefit” persuaded the Board to provide what it calls a “measured” award.

The Board commented further that “quite apart from the consequences of so much time in Emerald Hall, Mr. Delaney and Ms. MacLean live lives in which their potential is severely compromised by their disabilities” and a large damage award will not fix this.

This reasoning is profoundly problematic. The complainants did not seek a legal remedy for being persons with disabilities. They sought a legal remedy that would acknowledge their equal dignity and worth as human beings, notwithstanding their disabilities. That is a remedy they did not get.

Fortunately, this decision is being appealed, and that opens an opportunity for this troubling and discriminatory reasoning to be rejected.

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