Litigating to Advance the Substantive Equality Rights of People with Disabilities

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A. Introduction

This paper analyzes the legal landscape for litigating the substantive equality rights of people with disabilities in Canada since the two landmark human rights decisions of the Supreme Court of Canada, *Meiorin* and *Grismer*. [1]

Together, *Meiorin* and *Grismer* offered the promise that human rights legislation would take adverse effects discrimination seriously and that the duty to accommodate would engage with systemic obstacles to equality. However, this promise has been under attack. Post-*Meiorin* and *Grismer* case law reveals disturbing trends. Efforts have been made to return us to a minimalist version of accommodation, by narrowing the definition of discrimination and returning to an emphasis on stereotype, applying formalistic versions of comparator group analysis that defeat legitimate claims and distort accommodation analysis, and adopting too narrow definitions of services.

Respondent push-back has created new knots in the jurisprudence, which the authors describe and attempt to untangle. The Supreme Court of Canada had an opportunity when it heard the appeal in *Moore v British Columbia (Ministry of Education)* to renew its recognition that the fulfillment of the rights of persons with disabilities requires far-reaching, deliberate, and systemic change to workplaces and services.[2] In the twenty first century,

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[1] An earlier version of this paper — *Accommodation in the 21st Century* (March 2012), online: Canadian Human Rights Commission www.chrc-ccdp.gc.ca — was referred to by several interveners in the appeal in the Supreme Court of Canada of *British Columbia (Ministry of Education) v Moore*, 2010 BCCA 478, aff'g 2008 BCSC 264, leave to appeal to SCC granted, 34040 (30 June 2011) [*Moore* BCCA]. It was cited with approval by the Court in its decision in *Moore v British Columbia (Education)*, SCC 2012 61 at para 28 [*Moore* SCC].

[2] At issue in *Moore* SCC, above note 1, is a claim that the BC Ministry of Education and North Vancouver School District No 44 discriminated against Jeffrey Patrick Moore and other students with severe learning disabilities by failing to accommodate their needs in the public school system. While at elementary school Jeffrey Moore was diagnosed as having a severe learning disability, in the form of dyslexia, which interfered with his ability to learn to read and to comprehend words. In the wake of funding cuts by the Province for education, the School Board closed the facility that provided the intensive remediation required by Jeffrey and other students with dyslexia. On the advice of District officials, Jeffrey's parents removed him from the public school system and, at significant personal expense, sent him to private schools that provide special assistance to students with severe learning

especially in light of Canada's recent ratification of the *Convention on the Rights of People with Disabilities*, adjudicators and governments should be striving to move us, with all speed, towards the goal of full inclusion. In *Moore*, the Supreme Court of Canada took some important steps towards untangling the jurisprudence, and provided some much needed direction for achieving full inclusion.[3]

B. Background

The substantive equality rights of people with disabilities in Canada have not yet been realized. People with disabilities are more likely to be poor. Among working age adults, experts estimate that people with disabilities are about twice as likely to live in poverty as their non-disabled counterparts.[4] They have lower education attainment than people without disabilities,[5] and are less likely to be employed.[6] When they are employed, they have lower incomes.[7]

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disabilities. The Moores alleged that the Ministry and the District discriminated against Jeffrey Moore individually and that they also discriminated on a systemic basis against students with severe learning disabilities. The claim was successful before the BC Human Rights Tribunal (2005 BCHRT 580). But the well-reasoned judgment of the Tribunal was overturned on judicial review, based on the BC Supreme Court's comparator group analysis and approach to defining the service in issue. On further appeal, a majority of the British Columbia Court of Appeal also ruled against the complainant. Justice Rowles dissented.

[3] *Moore* SCC, above note 1.

[4] Cam Crawford, "Personally Speaking: Poverty and Disability in Canada", online: Council of Canadians with Disabilities www.ccdonline.ca (Cam Crawford is the Senior Research Advisor to Canadian Association for Community Living).

[5] Cam Crawford, "Trying to 'Make the Grade': Education, Work-Related Training", online: Council of Canadians with Disabilities www.ccdonline.ca (for example, people with disabilities are less likely to have completed high school education than non-disabled people: 27.4 percent vs. 18.3 percent, respectively. They are also less likely to have a university degree or certificate (13.2 percent vs. 20.7 percent). An increase in formal education helps people with disabilities, as it does other groups, to reduce the likelihood of poverty. However, even when they have higher levels of education, people with disabilities have a poverty rate twice as high as non-disabled people.

[6] Cam Crawford, "Low Household Income and Disability: Income Sources, Employment and Employment Discrimination", online: Council of Canadians with Disabilities www.ccdonline.ca (for example, in 2006, 51.3 percent of persons with disabilities were employed compared to 75 percent of persons without disabilities).

[7] *Ibid* (Crawford describes the employment situation of employed people with disabilities as follows. About 11 percent of people with disabilities who are employed continue to experience low incomes, compared to 7.3 percent of those without disabilities. Compared to people without disabilities living on low incomes, people with disabilities in similar circumstances are twice as likely to work part time: 14.9 percent and 27 percent respectively. Among those persons with disabilities who are

The many people with disabilities who are not employed are generally reliant on social assistance programs, which are unstable, rule-heavy, and stigmatized.

To improve these basic conditions of disadvantage for people with disabilities in Canada, norms that are based on being able-bodied must be discarded in favour of universal norms that accommodate people with disabilities from the outset in the design of standards, practices, and institutions. In Canada, human rights legislation is a primary means for giving effect to Canada's obligations under international human rights law, including obligations to fulfill the rights to work and education, social security, and an adequate standard of living. Canada's obligations to persons with disabilities are now extended and clarified by the recent ratification of the *Convention on the Rights of People with Disabilities*.[8]

If the duty to accommodate embedded human rights legislation were seriously implemented by governments at all levels and if tribunals and courts adjudicated human rights legislation purposively and substantively to provide clear-sighted direction to public and private actors, much could be done to improve the lives of people with disabilities.

The Supreme Court of Canada's landmark decisions on the duty to accommodate, *Meiorin* and *Grismer*, and the *Convention*, provide different articulations of the same idea – that accommodation, properly understood, mandates genuine inclusiveness. Our question in this paper is: is the jurisprudence of tribunals and courts helping us to fulfill that promise?

C. The Duty to Accommodate

The duty to take positive steps to remove barriers to inclusion is a pillar of Canadian human rights law. The duty to accommodate applies to all prohibited grounds of discrimination, but it is of central importance to persons with disabilities. Through more than two decades of statutory human rights decisions dating back to *Huck v Odeon Theatres*, a 1985 decision of the Saskatchewan Court of Appeal,[9] tribunals and courts have developed the principle that the right to non-discrimination encompasses a positive duty, known as the duty to accommodate. It requires employers, service providers,

working, the rates of poverty are lowest for the 32.4 percent whose employers who have more than one location and 500 or more employees. This is also true for the 32.1 percent who work in a unionized workplace or are covered by a collective agreement. Unfortunately, only 18.1 percent of people with disabilities enjoy this kind of employment).

[8] 13 December 2006, 2515 UNTS 3, GA Res 61/106, (entered into force 3 May 2008) [*CRPD*].

[9] *Canadian Odeon Theatres Ltd v Human Rights Commission (Sask) and Huck* (1985), 18 DLR (4th) 93, [1985] 3 WWR 717 (SKCA), leave to appeal to SCC refused (1985) [*Huck*].

and landlords, including governments, to make such adjustments as are required to remove barriers to access by persons with disabilities to employment, services customarily provided to the public, and housing. There was incremental progress in cases like *Huck*,[10] which clarified that public places, like movie theatres, needed to be modified to make space for people with disabilities. But the decisions in *Meiorin*[11] and *Grismer*,[12] released by the Supreme Court of Canada in 1999, were especially important victories that ignited a larger aspiration for equality in employment and services and genuine optimism among people with disabilities.

In *Meiorin*, a sex discrimination case, the Court established that the duty to accommodate requires that *standards* be as inclusive as possible, going beyond the idea of accommodation as merely requiring individual exceptions. The Court also untangled some doctrinal knots that had developed because of a failure to take adverse effects discrimination seriously, and a conception of accommodation that did not go far enough.[13] Dianne Pothier described *Meiorin* as "a significant turning point in Canadian human rights law," because the Court accepted that "in all types of discrimination, the analysis has to start with scrutinizing general rules or standards claimed to be discriminatory. The Court understood that the particular case was about job definition constructed around traditional male norms, and that had to be directly confronted to advance equality for women."[14] Similarly, Yvonne Peters said:

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[10] Some jurisdictions, notably Ontario and British Columbia, recognized adverse effects discrimination in early cases. Ontario named it "constructive discrimination" and remedial orders in some cases required reasonable accommodation.

[11] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*].

[12] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*].

[13] See Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can Bar Rev 433 (the authors provide a critique of pre-*Meiorin* problems); Gwen Brodsky, Shelagh Day & Yvonne Peters, *Accommodation in the 21st Century* (March 2012), online: Canadian Human Rights Commission www.chrc-ccdp.gc.ca (the authors provide a fulsome discussion of the Court's decisions in *Meiorin* and *Grismer*).

[14] Although Pothier described *Meiorin* as a significant turning point, she also cautioned that the *Meiorin* judgment gives mixed messages about how far anti-discrimination law can go in challenging dominant norms since, in her view, the judgment does not grapple sufficiently with the difference between the two branches of the old bifurcated approach, and suffers from confusion between the idea of accommodation through individual exceptions and the remaking of standards. Dianne Pothier, "BCGSEU: Turning a Page in Human Rights Law" (1999) 11:1 Const Forum 19 [Pothier].

> The Court's analysis in *Meiorin* represents a significant step forward in that it begins to redefine and reformulate the objectives of reasonable accommodation…*Meiorin* shifts the emphasis from the individual to the standard.[15]

In *Grismer*,[16] the Court confirmed that the accommodation analysis articulated in *Meiorin* applies to disability discrimination, and explained: "Accommodation refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible."[17]

Together, *Meiorin* and *Grismer* raised reasonable expectations in the disability rights community that, going forward, human rights legislation would be interpreted liberally and purposively, to achieve its substantive equality goals, more particularly, to:

- Treat adverse effects discrimination as no less serious or less worthy of remediation than direct discrimination;
- Avoid reducing the duty to accommodate to only after-the-fact, individual tinkering on the margins rather than challenging discriminatory norms;
- Require that disability discrimination embedded in facially neutral standards for services and employment, wherever possible, be tackled systemically and proactively, at the stage of their initial design;
- Maintain a strong analytical distinction between proof of discrimination and proof of justificatory criteria;
- Ensure that endeavours to justify the maintenance of exclusionary able-bodied norms are subjected to rigorous scrutiny;
- Resist formalistic methods of interpretation that do not advance the purpose of human rights legislation; and
- Provide meaningful remedies for discrimination, regardless of the form that the discrimination takes.

Meiorin made the first line of inquiry whether the norm can be disregarded altogether without any need to consider exceptions. This decision, followed by *Grismer*, represented the beginnings of a systemic approach to the duty to accommodate.[18]

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15 Yvonne Peters, "From Tinkering to Transformation: Meiorin Breathes New Hope into Reasonable Accommodation" (Paper delivered the Transforming Women's Equality: Equality Rights in the New Century Conference, Vancouver 4-7 November 1999) at 4, as cited in Pothier, above note 14 at 25.

16 *Grismer*, above note 12.

17 *Ibid* at para 22.

18 Dianne Pothier, "Tackling Disability Discrimination at Work: A Systemic Approach" (2010) 4:1 MJLH 17 at 22 & 27 (a systemic approach to accommodation challenges able-bodied norms by contemplating diversity from the start. Systemic

D. The Promise Under Attack

The promise that human rights legislation would take adverse effects discrimination seriously, and engage with systemic obstacles to equality, has been under attack. In the post-*Meiorin* and *Grismer* period of human rights litigation, respondents intensified their efforts to prevent complainants from advancing beyond the *prima facie* discrimination stage of a case, in order to avoid the requirement to demonstrate that they could not accommodate complainants without incurring undue hardship. The result has been new conflicts and confusion in the jurisprudence, particularly concerning the meaning of discrimination, and where the analytical line should be drawn between *prima facie* discrimination and justification.

1) A Divisive Question: Can Discrimination Exist Without Stereotypes?

The most significant question that has emerged in the jurisprudence is whether the complainant must prove stereotyping to establish a *prima facie* case of discrimination. Repeatedly, respondents have sought to recall decision-makers to an old paradigm of discrimination that is solely concerned with stereotyping. Despite the fact that this move entails rolling back the right to protection from adverse effects discrimination, well-established in Canadian human rights jurisprudence for over twenty five years to pre-*Meiorin* days, decision-makers have been divided about how the issue should be resolved.

This can be seen, for example, in the Supreme Court of Canada's decision in *McGill University Health Centre (Montreal General Hospital).*[19] At issue in *McGill* was whether an automatic termination clause applied to persons absent from work for an extended period. The grievor had been absent from work for 36 months, because of health problems and was unable to return to work for a further indeterminate period. The employer had provided rehabilitation periods more generous than stipulated in the collective agreement.

In the Supreme Court of Canada, the majority addressed the issue as a question of undue hardship. Justice Deschamps explained, "[t]he duty to accommodate in the workplace arises when an employer seeks to apply a standard that is prejudicial to an employee on the basis of specific characteristics that are protected by human rights legislation."[20] This was,

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accommodation is founded on "inclusive thought…Such contemplation gives the duty to accommodate the potential to be genuinely transformative in challenging able-bodied norms, instead of limiting it to ad hoc minor modifications.")

[19] *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 [*McGill*].

[20] *Ibid* at para 11.

then, the majority's version of *prima facie* discrimination. Justice Deschamps then proceeded to apply the three steps established in *Meiorin*, to determine whether the termination was "reasonably necessary," in other words, whether further accommodation would cause undue hardship for the employer. The majority agreed with the Arbitrator that the employer had discharged its duty of reasonable accommodation. The majority considered various factors in assessing the question of undue hardship including, among other things, the length of the rehabilitation period negotiated by the parties. The Court viewed the period negotiated by the parties to be one factor when assessing the duty of reasonable accommodation, which, the majority explained, cannot be applied mechanically, but which may be taken into account in the overall assessment of the accommodation granted by the employer.

However, Abella J, with McLachlin CJ, and Bastarache J, concurring, would have allowed the appeal on the basis that there was no *prima facie* case of discrimination. Justice Abella imported into the definition of *prima facie* case, a requirement that the claimant prove that the impugned standard was based on stereotype. For Abella J, the issue in the *McGill* appeal was not whether the employer had accommodated the claimant sufficiently, but whether the claimant had satisfied the threshold onus of demonstrating that there was *prima facie* discrimination. According to Abella J, the claimant was required to show that she had been disadvantaged by employer conduct, which was *based on stereotypical or arbitrary assumptions about persons with disabilities.* In Abella J's judgment the terms stereotypical and arbitrary are apparently interchangeable. On her approach the employer was not required to justify the termination, even though termination was because of disability-related absence from work. Abella J wrote:

> There is no need to justify what is not, *prima facie*, discriminatory. Unlike Deschamps J., then, the issue for me is not whether the employer has made out the justification defence of having reasonably accommodated the claimant, but whether the claimant has satisfied the threshold onus of demonstrating that there is *prima facie* discrimination, namely, that she has been disadvantaged by the employer's conduct *based on stereotypical or arbitrary assumptions about persons with disabilities*, thereby shifting the onus to the employer to justify the conduct [emphasis added].[21]

To explain why automatic termination clauses are not discriminatory, Abella J asserts, "they are not arbitrary in the way we understand arbitrariness in the human rights context, that is, they do not unfairly disadvantage disabled employees because of *stereotypical attributions of their ability*."[22] This singular focus on stereotyping overlooks the possibility that such clauses may

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21 *Ibid* at para 53.

22 *Ibid* at para 56.

have a discriminatory effect on someone who has been required to be absent from work because of disability.

The approach of the majority in *McGill*, regarding what constitutes a *prima facie* case of discrimination, is consistent with *Meiorin* and *Grismer* and with the *O'Malley* framework. In *O'Malley*, the issue was the adverse effects of a scheduling requirement on the religious beliefs of an individual employee, Theresa O'Malley. A commonly stated version of what constitutes a *prima facie* case in a disability case, based on the *O'Malley* framework, is:

1. the employee has (or is perceived to have) a disability;

2. the employee received adverse treatment (sometimes stated as 'differential treatment' or 'adverse effects'); and

3. the employee's disability was a factor in the adverse treatment or adverse effects.

On the other hand, the approach of the minority in *McGill* represents a significant departure from the *O'Malley* framework. The minority approach purports to add a fourth step to what the complainant must prove. It is not enough that disability was a factor in the adverse treatment experienced by a person with a disability. The complainant must go further to show that the adverse treatment and the disability are linked by stereotyping.

The issue of what constitutes a *prima facie* case of discrimination is important because insistence on either a too-limited conception of discrimination, or a misallocation of the burden of proof, may mean that the respondent's obligation to rigorously justify systemic obstacles to substantive equality, against the standard of undue hardship, is never reached. More particularly, if the complainant cannot discharge the burden of establishing a *prima facie* case, the respondent is able to avoid having to answer the question: is there a way that the adverse effect could be avoided, without causing undue hardship for the respondent?

2) Adverse Effects Discrimination Must Not be Rendered Inactionable

There are various reasons why it would be wrong to make stereotyping an essential element of what a claimant must prove to establish a *prima facie* case of discrimination.[23] The central objection to making stereotyping an

[23] See for example, *Coast Mountain Bus Company Ltd v National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111*, 2010 BCCA 447 (some decision-makers have declined to apply the minority decision in *McGill*; *National Automobile, Aerospace, Transportation and General Workers of Canada (CAW - Canada) Local 111 v Coast Mountain Bus Company (No 9)*, 2008 BCHRT 52, at paras 472-73 (the decision maker explicitly relied on *Eaton*, and found that stereotype is not the only source of discrimination, and that in some cases failing to accommodate the real characteristics of disabled persons may be the source of discrimination The

essential element of a *prima facie* case of discrimination is that stereotyping is grounded in an insufficient understanding of discrimination. In particular, discrimination as stereotyping does not work for adverse effects discrimination: it simply misses the mark. Although some disability discrimination arises because of the attribution of inaccurate group-based generalizations (stereotype), a lot of disability discrimination takes the form of facially neutral standards that simply fail to take people with disabilities into account. [24]

Although the case law does not really define stereotype, it can be inferred that what decision-makers have in mind, when they refer to stereotyping, is quite often a generalization or misconception about a group or an individual, based on characteristics related to human rights grounds such as

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Tribunal thus concluded that the employer's Attendance Monitoring Program was an instance of systemic discrimination against persons with disabilities because it failed to accommodate their needs; *Coast Mountain Bus v CAW Canada*, 2009 BCSC 396 at paras 97-99 **(**on judicial review of the Tribunal's decision the BC Supreme Court found that the Tribunal erred in finding systemic discrimination because its reasoning was contrary to the opinion of Abella J in *McGill* and the Program was not based on stereotypical or arbitrary assumptions. The Court did, however, uphold some of the individual complaints in the case)

[24] *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 [*Eaton*] (this insight is captured by the words of Sopinka J:

> The principal object of certain of the prohibited grounds 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.* Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. *The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here.* It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability [emphasis added] at para 67).

disability or sex. The Supreme Court of Canada has said, "[a] stereotype may be described as a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess."[25]

Although discrimination as stereotyping, so defined, works for cases of direct discrimination, in which a misconception or negative generalization about the group is made explicit, it does not work for the analysis of adverse effects discrimination. In adverse effects discrimination the group generalization is rendered invisible, or at least less easily visible, by the very facial neutrality of the standard in issue. Thus, an insistence on proof of stereotyping risks rendering adverse effect discrimination inactionable.

Furthermore, discrimination defined as stereotyping does not yield effective remedies for disability discrimination. Typically, the proposed antidote to discrimination through stereotyping (the deployment of inaccurate generalizations) is to ignore group characteristics ostensibly so that individuals may be judged on their merits rather than their group characteristics. There are many circumstances in which liberation from stereotyping, and being treated the same as non-disabled persons, is precisely what persons with disabilities need. However, in other circumstances, it is some form of accommodation that is required, whether it be individual or systemic.

Accommodation, rather than ignoring disability, demands a focus on disability and a quest for the means to achieve inclusion. If we say either that a complainant must prove stereotyping, or that the absence of stereotyping can constitute a complete defence to a *prima facie* case of discrimination, this changes the definition of discrimination, taking human rights law backwards to a time long before cases such as *O'Malley* and *Meiorin*, when adverse effects discrimination had not yet been recognized as actionable in law. Introducing stereotyping as part of the definition of discrimination, regardless of who bears the onus of proof, will likely result in defeat of a claim of adverse effects discrimination.

If stereotyping is an essential element of discrimination, many human rights decisions have been silently over-ruled.[26] Not only was there a complete absence of reference to stereotyping in *Meiorin*, it is clear from the

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[25] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 64 [*Law*].

[26] See for example, *Ontario (Human Rights Commission) v Simpsons Sears*, [1985] 2 SCR 536 [*O'Malley*] and *Eldridge v British Columbia Attorney General)*, [1997] 3 SCR 624 [*Eldridge*] (to find that the facts of these cases demonstrate any stereotyping would require an incredible stretch). See *Vriend v Alberta*, [1998] 1 SCR 493 at para 72 ("it is not *only* through the 'stereotypical application of presumed group or personal characteristics' that discrimination can occur…."). See also *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at paras 115-20.

reasons of McLachlin J, as she then was, that the Court was not operating on an understanding that the case was about protection from stereotyping.

Meiorin reveals another understanding of the purpose of human rights legislation, namely the elimination of the "systemic discrimination"[27] which occurs through the application of facially neutral exclusionary *standards* that fail to take into account the real characteristics of a group. The Court explained:

> Employers designing workplaces owe an obligation to be aware of both the differences between individuals, and differences that characterise groups of individuals. Employers designing workplace standards...must build conceptions of equality into workplace standards...standards governing the performance of work should be designed to reflect all members of society, in so far as reasonably possible.[28]

As the Supreme Court understood in *Meiorin*, addressing discrimination is not only about the avoidance of differential treatment based on stereotypes, with possibly a bit of affordable,[29] individual after-the-fact accommodation added on. Addressing discrimination also entails dealing with "the effects of systemic discrimination,"[30] "rigorously assessing" standards that have adverse effects on groups protected by human rights grounds,[31] and challenging "deep seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness" and the "legitimacy" of standards that systematically privilege certain characteristics over others.[32] It is crucial to people with disabilities, and the project of advancing their substantive equality rights, that these insights about discrimination not be shut out by a definition of discrimination that, once again, is too narrowly and exclusively focused on stereotyping.

3) The Analytical Distinction between *Prima Facie* Case and the BFOR Defence Must Be Maintained

Reducing the definition of discrimination to stereotyping transcends the question of where the line should be drawn between *prima facie* discrimination and justification. But *McGill* also raises the issue of reversing the burden of proof for making out a justificatory defence. A requirement for proof of stereotyping can too easily slide into a requirement that the complainant prove, in order to make out a *prima facie* case, that the

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27 *Meiorin*, above note 11 at para 41.
28 *Ibid* at para 68.
29 *Ibid* at para 41.
30 *Ibid* at paras 41-42.
31 *Ibid* at para 42.
32 *Ibid* at para 41.

respondent's conduct was not justified. This can be seen in the minority judgment of Abella J in *McGill*, in that the terms 'stereotyping' and 'arbitrariness' are used somewhat interchangeably. Arbitrariness is concerned with the reasonableness of the respondent's intention or purpose and the fit or rational connection between means and purpose. It goes to justification, and as such is a BFOR issue.[33] If the burden of proof is misallocated this can be another way of filtering out meritorious claims. The majority in *McGill* respects the analytical distinction between a *prima facie* case of discrimination, putting the respondent to the test of justifying its decision not to provide further accommodation. However, the minority conflates the *prima facie* case and the BFOR defence by adding to the claimant's burden the responsibility of proving that the discrimination is arbitrary. Any erosion of the analytical distinction between *prima facie* case and justificatory considerations risks weakening the scrutiny of the respondents' justificatory arguments, and may shield the respondent from the duty of showing that it has accommodated to the point of undue hardship. Ultimately, the danger is that statutory human rights protections are reduced to providing protection only against blatant bigotry.[34]

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[33] See *ibid* at para 54; *Grismer*, above note 12 at para 20 (It corresponds to steps one and two of the BFOR analysis).

[34] See *British Columbia (Public Service Agency) v BCGSEU*, 2008 BCCA 357, leave to appeal to SCC refused, [2008] SCCA No 460 (QL) [*Gooding* BCCA] (this is a concrete example of the difference it can make to reverse the onus of proof. The British Columbia Court of Appeal excused the employer from having to justify the termination of an employee whose misconduct was attributable to alcohol dependency. *Gooding* not only erodes the analytical distinction between *prima facie* case and justificatory arguments, but revises the definition of discrimination to mean intentional discrimination. This flies in the face of established human rights jurisprudence recognizing that a lack of intention to discriminate does not negate discrimination. Although recent decisions of the Ontario and British Columbia Courts of Appeal circumvent the minority decision in *McGill* SCC, it is not without influence). See *Honda Canada Inc v Keays*, 2008 SCC 39 at para 71; *International Forest Products Ltd v Sandhu*, 2008 BCCA 204; *Mortillaro v Ontario (Minister of Transportation)*, 2011 HRTO 310; *Dufferin-Peel Catholic District School Board v OECTA* (2008), 177 LAC (4th) 362*; Baum v City of Calgary*, 2008 ABQB 791; *Goode v Interior Health Authority*, 2010 BCHRT 95; *Boehringer Ingelheim (Canada) Ltd/Ltée v Kerr*, 2010 BCSC 427, aff'd 2011 BCCA 266; *Cassidy v Emergency Health and Services Commission and others (No 2)*, 2008 BCHRT 125, judicial review allowed, 2011 BCSC 1003; *USW, Local 1-423 v Weyerhaeuser*, 2009 BCHRT 328; *CSWU Local 1611 v SELI Canada and others (No 8)*, 2008 BCHRT 436, judicial review by BCSC requested, Vancouver Registry S-090740 (These are numerous cases in which courts and tribunals have referred to the minority decision in *McGill*. Because the cases are quite fact specific it is beyond the scope of this paper to analyze each one. However, it is fair to say that in numerous cases respondents have relied heavily on the minority decision in *McGill* and that decision-makers have felt it

a) Proof of Stereotyping or Arbitrariness is not Mandated by the Charter

It has been argued by respondents that section 15 *Charter* jurisprudence mandates proof of stereotyping or arbitrariness as an essential element of the definition of discrimination. Respondents have placed particular reliance on the *Law* case to argue that, to establish a *prima facie* case, stereotyping must be proven.[35] This is ironic because *Meiorin* and Grismer, which were both decided after *Law*, make no mention of the *Law* framework. *Meiorin* and *Grismer*, as indicated above, applied the *O'Malley* framework for determining what constitutes *prima facie* discrimination. Therefore, it makes no sense to claim that *Law*, a section 15 *Charter* case, altered the jurisprudence with regard to interpretation of human rights legislation. Furthermore, a closer look at section 15 *Charter* jurisprudence reveals that this is not an accurate account even of the requirements of a section 15 analysis. Proof of an underlying stereotype is not a requirement imposed by section 15 *Charter* jurisprudence. Understanding where we are on this question requires actually going back to the *Law* case.

In *Law*, the Supreme Court identified contextual factors[36] which, it indicated, could be of assistance in determining whether a law which has

necessary to either apply or distinguish *McGill*. Fortunately, the *Gooding* decision by the British Columbia Court of Appeal is rarely mentioned by decision-makers, and in *Weyerhaeuser* it was distinguished as having "turned on its unique facts." It appears to be accepted by both union-side and employer-side lawyers that *Gooding* is not good law).

35 *Law*, above note 25.The case law reveals uncertainty and differences of opinion among courts and tribunals about whether and how the *Law* contextual factors apply in the statutory human rights context, particularly in cases decided prior to 2008 when the Supreme Court of Canada issued its decision in *R v Kapp*, 2008 SCC 41 [*Kapp*], discussed below. *Gwinner v Alberta (Human Resources and Employment)*, 2002 ABQB 685, aff'd 2004 ABCA 210, leave to appeal to SCC refused [2004] SCCA No 342 (QL); *BCGEU v British Columbia (Public Service Employee Relations Comm)*, 2002 BCCA 476; *British Columbia Public School Employers' Assn v British Columbia Teachers' Federation*, 2003 BCCA 323; *Vancouver Rape Relief Society v Nixon (No 2)*, 2005 BCCA 601, leave to appeal to SCC refused, [2006] SCCA No 365 (QL); *Health Employers Assn of British Columbia v BCNU*, 2006 BCCA 57, leave to appeal to SCC refused, [2006] SCCA No 139 (QL); *Kemess Mines Ltd v IUOE, Local 115*, 2006 BCCA 58, leave to appeal to SCC refused, [2006] SCCA No 140 (QL) (these are leading pre-*Kapp* cases concerning the application of *Law* SCC).

36 The contextual factors are concerned with (a) pre-existing disadvantage, stereotyping, prejudice or vulnerability; (b) the correspondence between the ground or grounds on which the claim is based and actual need, capacity, or circumstances; (c) ameliorative purpose or effects of the impugned law on a more disadvantaged person or group in society; (d) the nature and scope of the interest affected.

adverse effects based on a listed ground, discriminates in a substantive sense or, in other words, infringes human dignity. In *Law*, the Court used the concepts, substantive discrimination and infringement of human dignity interchangeably.

In statutory human rights cases, respondents have attempted to impose the contextual factors in *Law* as though they amounted to a *legal test*, something to be added on to *prima facie* case.[37] The 'correspondence' factor set out in *Law* can be particularly problematic because it is roughly equivalent to the idea of stereotyping. Is the group-based distinction grounded in an inaccurate generalization about need, capacity, or circumstance, or does it, in fact, correspond to need, capacity, or circumstance?

Law, however, did not make stereotyping an essential ingredient of the definition of discrimination. The Court acknowledged in *Law*, that substantive discrimination may manifest without regard to any of the contextual factors to which the Court referred.[38] *Law* presents the application of stereotypical characteristics, and the "effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition" as *alternative* bases for finding discrimination. Support for the proposition that stereotype is not a prerequisite to a finding of discrimination can be found throughout the Court's section 15 equality jurisprudence.[39]

When considering the question of what *Law* means today for the interpretation of human rights legislation, account must also be taken of the fact that a lot has transpired in section 15 jurisprudence since *Law*. In the

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[37] Leslie A Reaume, "Postcards from O'Malley: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the Charter" in Fay Faraday, Margaret Denike & Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 373; Karen Schucher & Judith Keene, *Statutory Human Rights and Substantive Equality - Why and How to Avoid the Injury of the Law Approach* (Toronto: LEAF, 2007) (scholars have expressed concerns about the negative implications for complainants of importing the *Law* contextual factors into the analysis of discrimination in statutory human rights context. Reaume, Schucher, and Keene all agree that the *Law* contextual factors "test" should only be imported into a human rights case when doing so furthers substantive equality – the purpose of human rights statutes. At the same time, both argue that allowing *Law* to dominate the adjudication of complaints is inappropriate for several reasons. Central concerns identified by Reaume, Schucher, and Keene include, undermining the Codes' purpose of facilitating access to justice by rigidly applying overly complicated tests, elevating the claimant's evidentiary burden, and shifting the evidentiary burden to require complainants to disprove respondent defences at the *prima facie* case stage of a complaint. See Denise Réaume, "Defending the Human Rights Codes from the *Charter*" 9 JL & Equality 67 (the author against the importation of *Law*'s contextual factors into statutory human rights adjudication).

[38] *Law*, above note 25 at para 62.

[39] See above note 26.

post-*Law* cases of *Kapp*[40] and *Withler*,[41] the Supreme Court confirmed that the contextual factors in *Law* are not to be rigidly applied as a *legal test*. In *Kapp* and *Withler*, the Court also confirmed that discrimination may result not only from stereotyping, but also from the perpetuation of pre-existing group-based disadvantage.[42]

It is to be hoped that the post-*Law* pronouncements by the Supreme Court will diminish respondent claims that there can be no discrimination without proof of stereotyping. Recently, particularly since *Kapp* and *Withler*, courts and tribunals have begun to demonstrate confidence that, in statutory human rights cases, it is neither necessary to make stereotyping an indispensable element of *prima facie* discrimination, nor to apply the contextual factors in *Law* as though they constituted a rigid legal test.[43] In

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[40] *Kapp*, above note 35.

[41] *Withler v Canada (AG)*, 2011 SCC 12 [*Withler*].

[42] *Kapp*, above note 35 at paras 22-24; *Withler*, *ibid* at paras 35-37 (in *Kapp*, the Court cites Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006) 5 JL & Equality 81; Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor YB Access Just 111 [Gilbert & Majury, "Critical Comparisons"]; Beverley Baines, "Equality, Comparison, Discrimination, Status" in Fay Faraday, Margaret Denike & Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 73; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis, 2006) 135. See also Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37; Bruce Ryder, Cidalia Faria & Emily Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 SCLR (2d) 103; Mayo Moran, "Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis, 2006) 71; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis, 2006) 95.)

[43] *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 [*Tranchemontagne* ONCA] (in this regard, the decision of the Ontario Court of Appeal is significant. The challenge in *Tranchemontagne* was to a statutory human rights complaint concerning the exclusion from Ontario's Disability Support Program of people suffering from drug or alcohol dependency as their sole disability. The question of what is required to establish a *prima facie* case of discrimination was hotly contested.

Although the Court of Appeal cited Justice Abella's minority decision in *McGill* with approval, the Court did not actually apply Justice Abella's approach in *McGill*. Rather than adopting an exclusive focus on stereotyping, the Ontario Court of Appeal recognized that discrimination consists of a grounds-based distinction that

most cases of alleged disability discrimination, it *will* be self-evident that adverse treatment or adverse effects, based on the ground of disability, constitutes substantive discrimination. It is incontestable that people with disabilities are a disadvantaged group. It should not be necessary to prove this in each and every case. Measures that have the effect of disadvantaging persons with disabilities, based on the ground disability, will as a general rule offend the principle of substantive equality that human rights legislation and section 15 of the *Charter* are intended to promote.

In recent decisions under human rights legislation, involving various grounds, courts and tribunals in British Columbia have found the *O'Malley* framework to be adequate. For example, in *Armstrong*, the British Columbia Court of Appeal held that it was not necessary for a complainant to prove stereotyping as a free-standing requirement.[44] Similarly, in *Moore*, the British Columbia Court of Appeal, though divided on other points, was unanimous in its agreement that *O'Malley* is the framework for determining whether there is *prima facie* discrimination.[45] We agree that the *O'Malley* framework is adequate and appropriate for the analysis of statutory human rights cases. It must be remembered that there are important differences between human rights legislation and the *Charter*. Granted, human rights legislation rights legislation is intended to address the same general wrong as section 15 of the *Charter*. However, human rights legislation has its own scheme of defences, exceptions, and interpretive provisions. There are also differences between various human rights statutes, which the Supreme Court of Canada has indicated must be taken into account when interpreting them.[46]

We also agree with the British Columbia Human Rights Tribunal, which observed in *Kelly* that the traditional *O'Malley* framework applies, and that it provides enough room to conduct a purposive analysis.[47] The point is not that human rights adjudicators should never consider the social legal and historical context for a complaint—that may be part of the richness of what a complainant has to tell and what is necessary to really understand the extent and the nature of the harm that an individual case exemplifies. The *Kelly* case

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"creates disadvantage by stereotyping, *or* perpetuating disadvantage or prejudice." Further, instead of holding that the complainant must prove either of these things as a free-standing requirement in the analysis of *prima facie* case, the Court found that in most cases "an inference of stereotyping, or perpetuating disadvantage or prejudice" will arise based on the claimant's evidence showing that a distinction based on a prohibited ground creates a disadvantage, at para 121).

[44] *Armstrong v British Columbia (Ministry of Health)*, 2010 BCCA 56, leave to appeal to SCC refused, [2010] SCCA No 128 (QL) [*Armstrong*].

[45] *Moore* BCCA, above note 1.

[46] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 38 [*Andrews*].

[47] *Kelly v BC (Ministry of Public Safety and Solicitor General) (No 3)*, 2011 BCHRT 183 at paras 277-78 [*Kelly*].

is a good example. Mr. Kelly was an Aboriginal inmate who claimed he had been discriminated against because he was not provided with access to an Aboriginal spiritual advisor while in segregation. Mr. Kelly argued that historical disadvantage is a factor that is properly considered in assessing treatment on the basis of a prohibited ground, and in particular that historical discrimination against Aboriginal people in the criminal justice system is a factor that should influence a purposive approach to the analysis of discrimination in this case. Against this background, the Tribunal agreed to take into account evidence of the historical treatment and experience of Aboriginal people in the Canadian criminal justice system.[48] This evidence helped the Tribunal to understand Mr. Kelly's vulnerability as an Aboriginal prisoner and, it can be inferred, to reach its conclusion that the denial of access to an Aboriginal spiritual advisor was connected to the complainant's religion and ancestry and was not, as the respondent had contended, based exclusively on his security classification.

Furthermore, a recurring issue in the jurisprudence under statutory human rights legislation and section 15 of the *Charter* is whether affirmative action or targeted initiatives should be regarded as presumptively discriminatory. There is a valid concern that a decontextualized approach to discrimination analysis in statutory human rights cases may result in such initiatives being struck down.[49] In the wake of section 67 being removed from

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[48] *Ibid* at para 7 (the Tribunal accepts that Mr. Kelly, as an Aboriginal inmate, was in a particularly vulnerable position).

[49] See for example, *Tomen v OTF (No 3)* (1989), 11 CHRR D/223, cited in *Tomen v OTF (No 4)* (1994), 20 CHRR D/257 (Ont BdInq) a successful human rights complaint was brought against the Ontario Women's Teachers Federation of Ontario (FWTAO), ostensibly because female teachers were compelled to be members of the women's teachers' union. The case is complicated in part because the complainants were women. In reality it was a successful union raiding strategy, in which the female complainants were visible and behind them, though invisible, was another union that wished to increase its membership. The Tribunal found that the complainants had established a *prima facie* case, based on a very low burden of proof and a decontextualized analysis of adverse effects. The FWTAO argued that the FWTAO was an affirmative action program and presented extensive evidence supporting the need for initiatives targeted to women teachers. However the Tribunal found that the FWTAO was unable to qualify as an affirmative action program since it was an organization and not a "program." The result was that FWTAO, an organization very important to women teachers because they had always been disadvantaged in comparison to men, was merged with a "gender neutral" teachers' union that had always been dominated by men. See *Keyes v Pandora Publishing Assn (No 2)* (1992), 16 CHRR D/148 (a challenge to the policy of a newspaper produced by, for and about women to print letters and articles only from women. The Court decided that Nova Scotia's human rights legislation should be read as though it included a provision analogous to section 15(2) of the *Charter*. See for example *Stopps v Just Ladies Fitness (Metrotown) and D (No 3)*, 2006 BCHRT 557 (a challenge to a women's only gym and fitness facility; *Nixon*, above note 33, (a challenge to a service provided by

the *Indian Act*, some worry about the potential for race-based attacks by non-Aboriginal complainants against initiatives targeted to on-reserve Aboriginal people. Although the *Charter* has section 15(2) as a response to such challenges, human rights legislation provides various, inconsistent, and in some instances incomplete responses, depending on the jurisdiction. To ensure that affirmative action and targeted initiatives are not overly vulnerable to being struck down, it seems appropriate to read human rights legislation as implicitly including the equivalent of a section 15(2) *Charter* provision. Although such a provision could operate as a defence, assigning it the role of interpretive clause is more consistent with treating the prohibition against discrimination as a mandate for substantive, not just formal, equality.

Complainants' counsel have become wary about the importation of section 15 *Charter* principles into statutory human rights jurisprudence because the Supreme Court has issued numerous section 15 *Charter* decisions that are widely regarded as failing to deliver on the promise of substantive equality. However, problems in section 15 *Charter* jurisprudence must inevitably be confronted. It is not possible for human rights jurisprudence to be walled off from section 15 *Charter* jurisprudence. The two areas of law—statutory human rights law and sections 15 constitutional law—have too much in common to be completely separated and compartmentalized.

As Rowles J explained in *Moore*, borrowing from *Charter* jurisprudence can be appropriate, provided that the exercise enriches the substantive equality analysis, is consistent with the limits of statutory interpretation and advances the purpose and quasi-constitutional status of human rights legislation. However, care must be taken to ensure that meritorious human rights complaints do not get derailed because complainants are being required to contend with an insufficient definition of discrimination or are being required to assume an onus of proof that properly belongs with the respondent. The majority of statutory human rights cases do not involve complaints that affirmative action and targeted initiatives are discriminatory, by definition. In most cases, regardless of the ground of discrimination, it will be self-evident that adverse treatment or adverse effects based on a protected ground amounts to substantive discrimination.

Overall, statutory human rights jurisprudence has more to offer section 15 *Charter* jurisprudence than the other way around. In our view, it is time for the Supreme Court of Canada to be recalled to its commitments to eliminating discrimination, which are reflected in more than three decades of statutory human rights decisions.

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and for women fleeing male violence); *Armstrong*, above note 44 (a challenge to government failure to fund a particular screening test for cancer in men although it provided funding for testing for breast cancer in women. These two cases were ultimately unsuccessful challenges to targeted initiatives and diverse analytical approaches to them).

E. Two More Knots

1) Comparator Group Analysis

Absent from *Meiorin* and *Grismer*, and most statutory human rights decisions, is the highly formalistic comparator group analysis that can be seen in the courts' section 15 *Charter* equality jurisprudence.[50] But since *Meiorin* and *Grismer*, comparator group analysis in human rights jurisprudence has also become a problem, affected by the *Charter* jurisprudence. A glaring example is provided by the lower court decisions in *Moore*,[51] which held that Jeffrey Moore a student with severe dyslexia, was not entitled to any greater accommodation than that accorded to his comparator group: other students with severe learning disabilities.

Comparator group analysis as understood and applied by the lower courts in *Moore* and the Supreme Court of Canada in *Auton*[52] and *Hodge v Canada (Minister of Human Resources Development)*,[53] requires the claimant to establish differential treatment in comparison with a mirror comparator group to whom a sought-after benefit is provided. This model of comparator group analysis is designed to determine whether a benefit scheme treats similarly situated people differently. Such differential treatment is taken to be synonymous with stereotyping.

However, applying a model of comparator group analysis that is intended to determine whether there has been differential treatment of similarly situated groups is antithetical to the duty to accommodate. It is guaranteed to result in defeat for the claimant and to render the duty to accommodate meaningless. Comparator group analysis, with its focus on finding differential treatment, is intended to serve a very particular objective of anti-discrimination and equality guarantees, that of preventing difference, or untrue characteristics, from being taken into account.[54] However, another

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50 See Gilbert & Majury, "Critical Comparisons", above note 42 at 138 (over the last decade, the courts have come under intense scholarly criticism because of the way they have applied a form of comparator group analysis to defeat meritorious s. 15 claims. See for example *Withler* SCC, above note 41 (the Supreme Court of Canada canvassed concerns that have been raised about the use of comparator group analysis and warned that "care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the 'proper' comparator group" at para 2).

51 *Moore* BCCA, above note 1.

52 *Auton (Guardian ad litem of) v British Columbia (AG)*, 2004 SCC 78 [*Auton*].

53 2004 SCC 65.

54 Andrea Wright, "Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate" in Fay Faraday, Margaret Denike & Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter*

objective—that of taking difference into account in order to remove barriers to equality—must not be overlooked.[55]

In an accommodation case, it makes no sense to engage in a search for differential treatment. The claim of Jeffrey Moore, and of disability accommodation complainants generally, is not that the complainant was treated differently from members of another group based on disability, but rather that there was a failure to take disability into account with the result that the complainant's access to a service (or employment or housing) was compromised. The fact that some other groups may have received similar treatment is irrelevant.

In the *Moore* case the lower courts rejected the accommodation claim of Jeffrey Moore—a student with a severe learning disability—because there was a lack of evidence that he had been treated any worse than other students with disabilities. Requiring a person seeking an accommodation to compare him or herself to other persons with disabilities, who, incidentally, may also be suffering from a lack of accommodation, risks reducing the duty to accommodate to a 'race to the bottom.' It perpetuates the very exclusion from the mainstream that is at the heart of an accommodation claim.

It is wrong-headed and defeating to require a person seeking accommodation because of disability to demonstrate that they have been treated differently from anyone else. Quite simply, the goal of accommodating persons with disabilities is not to address different treatment at all. Rather, it is to render services accessible to persons with disabilities, taking account of disability-related difference, and making such adjustments to norms and practices as are possible, short of undue hardship. As the Supreme Court of Canada explained in *VIA Rail*,[56] the goal of the duty to accommodate is to render services equally accessible to persons with and without disabilities. Significantly, in *VIA Rail*, the Court renewed its commitment to *Meiorin* and *Grismer*. The Court specifically reiterated its adherence to an understanding of accommodation as a positive duty to remove barriers to equal access to services and to implement inclusive standards in the design of services.[57]

It is simply not necessary to apply a detailed comparator group analysis in such a case.[58] This does not mean that accommodation entails no

(Toronto: Irwin Law, 2006) 409 at 410 (the author argued that although comparative evidence may, in some cases, assist in illuminating adverse treatment, its use should not be elevated to a conclusory status).

55 See *Eaton*, above note 24 at para 66.

56 *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at para 162.

57 *Ibid* at paras 118 – 29.

58 See for example Ontario Human Rights Tribunal in *Lane v ADGA Group Consultants Inc* (2008), 64 CHRR D/132 (Ont Div Ct), reviewing 2007 HRTO 34

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 with disabilities of dominant norms designed for persons without disabilities.* The comparison is a constant. It is a defining component of the concept of the duty to accommodate. Because in accommodation cases the comparison is constant, it is unnecessary to discover afresh what the comparator group is on a case-by-case basis.

The appropriate analytical framework for an accommodation case is clearly discernible from a large body of well-established human rights jurisprudence. Typically the complainant must show that a facially neutral rule has adverse effects on them based on a protected ground as compared with others for whom the effects of the rule are not adverse.[59] 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.[60] As McIntyre J explained in *Andrews*, the "accommodation of differences ... is the true essence of equality."[61]

2) The Definition of A Service

Another significant issue that has emerged in the jurisprudence is how a service is defined.

Human rights legislation in every jurisdiction prohibits discrimination in the provision of "services customarily available to the public."[62] How the

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[*Lane* Ont Div Ct] (this has been recognized by some courts and tribunals. The Court agreed with the Commission's submissions that:

> …the comparator group analysis is inappropriate because a person with a disability who seeks accommodation of his or her needs does not seek to be treated the same way that others are treated. Avoiding discrimination on the basis of disability requires distinctions to be made taking into account the actual personal characteristics of people with disabilities, at para 88).[58]

59 See for example *O'Malley* v. *Simpsons-Sears Ltd*., [1985] 2 SCR 536; *Meiorin*, above note 11.

60 *Eaton*, above note 24 at para 66.

61 *Andrews*, above note 46 at para 31.

62 *Human Rights Code*, RSBC 1996, c 210 s 8(1) (the language use in British Columbia is: "Services customarily available to the public." Human Rights legislation in other jurisdictions contains similar language.

service is defined has become an issue of crucial importance. Reflecting the tension between the section 15 decisions of the Supreme Court of Canada in *Eldridge*,[63] and *Auton (Guardian ad litem of) v British Columbia (Attorney General)*,[64] statutory human rights decisions now show a conflict between respondents (usually governments) who deny that there is a public service being offered or define the service narrowly, and complainants who define the service more broadly, and allege discrimination in access to it.

In *Eldridge*,[65] the plaintiffs claimed that the failure of hospitals in British Columbia and the Medical Services Commission to provide interpreter services for deaf users of health care services violated their right to equality under section 15 of the *Charter*. The Supreme Court of Canada accepted that "effective communication is an indispensable component of the delivery of a medical service" and found that the deaf plaintiffs were adversely affected because the hospitals in British Columbia and the Medical Services Commission, by not providing interpreter services, did not ensure that they received the same benefit from the public health care system as members of the general population.[66] It was held that "[t]he failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons."[67] The Court defined the service as the public health care system that is provided to the general population and held that deaf persons were entitled to the sign language interpretation necessary for them to have the equal benefit of that service.[68]

In *Auton*,[69] the plaintiffs alleged that their section 15 right to equality was violated because the British Columbia health care system failed to provide applied behavioural therapy for young autistic children. The Court ruled that the health care system did not provide "funding for all medically required treatment."[70] Rather, it provided core funding for services delivered by medical practitioners, and funding, or partial funding, for some non-core services.[71] Applied behavioural therapy for autistic children was not a listed non-core therapy provided by health practitioners. The Court concluded that the exclusion of a particular non-core service cannot be viewed as an adverse distinction based on disability that amounts to discrimination. In short,

63 *Eldrige*, above note 26.
64 *Auton*, above note 52.
65 *Eldrige*, above note 26.
66 *Ibid* at paras 72 & 78.
67 *Ibid* at para 80.
68 *Ibid* at para 94.
69 *Auton*, above note 52.
70 *Ibid* at para 35.
71 *Ibid* at paras 32-33 & 36.

applied behavourial therapy was not a part of the service and there could be no discrimination in the failure to provide it.[72]

The answer given to the question 'is this case like *Eldridge* or is it like *Auton*?' is now a key determiner of whether a claim of discrimination in a service will be successful. Put differently, that question is: is there discrimination in a service that is already provided because a person with a disability cannot access it or enjoy it fully (*Eldridge*), or is there no service being offered that a disabled person can claim access to (*Auton*).

A majority of the BC Court of Appeal decided that *Moore*[73] is a case like *Auton.*[74] The service that Jeffrey Moore, who as noted, had a severe learning disability, sought was defined by the majority not as general education, including the opportunity to learn to read, but, more narrowly, as the special education services that were provided by the school district.[75] The majority of the BC Court of Appeal then went on to find that Jeffrey Moore was not discriminated against because he received the special education services that were available at the time, although they did not include the intensive remediation he required in order to become literate.[76] According to this analysis, the service is only what is already provided to other students with disabilities and the duty to accommodate requires nothing more than providing the same special education services to Jeffrey Moore.

The reasoning of the Court of Appeal in *Moore* illustrates how the definition of the service can be used to artificially narrow the scope, and predetermine the outcome of the discrimination analysis. By conflating the "service" with the "accommodation," and circumscribing the type of education that children with disabilities are entitled to, the Province of British Columbia and the North Vancouver School District, the respondents in *Moore*, effectively shielded themselves from a probing consideration of whether their education system allows for equal participation by all children. The respondents were also able to avoid having to show what the undue hardship would have been in providing the sought after accommodation.

In many post-*Auton* service cases, the judges and adjudicators do not undertake a substantive, contextual analysis of the service in issue that is grounded in the goals of human rights legislation. They simply state that *Auton* dictates that there is no obligation on the legislature to provide a benefit or a service. Many then go on to assert that the case before them is like *Auton* because claimants are seeking a benefit or service that is not provided by the

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72 *Ibid* at para 43.
73 *Moore* BCCA, above note 1.
74 *Auton*, above note 52.
75 *Moore* BCCA, above note 1 at para 182.
76 *Ibid* at paras 186-87.

government. The British Columbia Court of Appeal decision in *Moore*[77] is illustrative.[78]

Although decision-makers purport to characterize cases as either more like *Auton* (the service or benefit does not exist) or more like *Eldridge* (the service or benefit does exist), understandably there is confusion about what constitutes an existing service or benefit, particularly in cases where there is an existing program that funds treatment broadly, but does not fund a specific treatment, or in cases where funding levels for targeted benefits and supports are alleged to be inadequate, even to fulfill the objectives of the scheme.[79]

There is, however, another reason that the eyes of adjudicators and lower court judges glaze over whenever the *Auton* case is mentioned. If we are honest, we must admit that *Eldridge* and *Auton* are not different, at least not in any way that is convincing. The outcome of *Eldridge* could have been identical to the outcome in *Auton*. One need only observe that the sought-after interpreter services in *Eldridge* were a non-existent benefit, and *Eldridge* becomes *Auton.*

For people with disabilities, the *Auton* analysis can present an absolute wall. If challenges are only permitted to discrimination in services that are already provided, human rights protections cannot be used to compel governments to design or implement different or additional services that may be necessary for persons with disabilities. As Isabel Grant and Judith Mosoff have written:

> A true understanding of participation and access to the social world will require some accommodations that are individualized and may make persons with disabilities much like the able-bodied norm, or "like us" [as in *Eldridge* where the plaintiffs required only a modicum of accommodation to access health services on the same bases as the "able" consumer]. However, other accommodations may require more far reaching modifications to the mainstream physical and

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77 *Moore* BCCA, above note 1.

78 See also *New Brunswick (Social Development) v New Brunswick (Human Rights Comm)*, 2010 NBCA 40, leave to appeal to SCC refused, [2010] SCCA No 313 (QL).

79 See for example, *Wonnacott v Prince Edward Island (Dept of Social Services and Seniors)* (2007), 61 CHRR D/49 (PEIHRP); *Benson v Saskatchewan (Dept of Health)* (2005), CHRR Doc 05-772 (SKHRT) and *Benson v Saskatoon School Div No 13* (2006), CHRR Doc 06-212 (SKHRT); *Cucek v British Columbia (Ministry of Children and Family Development) (No 3)*, 2005 BCHRT 247; *Ehrler v British Columbia (Ministry of Employment and Income Assistance) (No 3)*, 2006 BCHRT 184; *First Nations Child and Family Caring Society of Canada v Canada (Attorney General) (No 3)*, 2011 CHRT 4, judicial review by FC requested, Ottawa Registry T-630-11; *British Columbia (Children and Family Development) v McGrath*, 2009 BCSC 180.

> social world in order to enable a person with a disability to participate fully….[80]

The enthusiasm of both government respondents and courts for the *Auton* analysis has threatened to gut the meaning of the duty to accommodate because it is a way of relieving governments of any obligation to alter the substance of the services they already provide in order to make a more inclusive, functioning society for people with disabilities.

In the *Moore* case the Supreme Court of Canada was presented with an opportunity to move away from *Auton* and to clarify that the identification of the service must be made substantively and contextually with a view to ensuring that public services are adapted to create an inclusive society. Fortunately, the Court, in a unanimous decision authored by Abella J, swept away the faulty analysis of the majority of the B.C. Court of Appeal. The Supreme Court agreed with the dissenter in the lower court, Madam Justice Anne Rowles: the service was, in fact, general education, and special education was the accommodation necessary for Jeffrey and other students with learning disabilities to obtain access to the benefits of general education..

F. Conclusion: The Way Forward

In the post-*Meiorin* and *Grismer* case law, efforts have been made to return to a minimalist version of accommodation. As we have discussed this has involved three moves: 1) narrowing the definition of discrimination and returning to an emphasis on stereotype; 2) applying formalistic versions of comparator group analysis that defeat legitimate claims and distort accommodation analysis; and 3) adopting too narrow definitions of services.

In its decision in *Moore*, the Supreme Court provides some relief on two of these issues — comparator group analysis and the definition of services. The Court rejected the findings of the BC Supreme Court and the majority in the BC Court of Appeal, that Jeffrey Moore could only be compared to other students with special needs. Justice Abella wrote:

> Comparing Jeffrey only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396. If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to.[81]

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[80] Isabel Grant & Judith Mosoff, "Hearing Claims of Inequality: *Eldridge v. British Columbia (AG)*" (1998) 10:1 CJWL 229 at 231.

[81] *Moore* SCC, above note 1 at paras 30-31.

Abella also rejected the finding of the lower courts that the service in question was special education, not general education:

> I agree with Rowles J.A. that for students with learning disabilities like Jeffrey's, special education is not the service, it is the *means* by which those students get meaningful access to the general education services available to all of British Columbia's students… [82]

She also wrote: "Adequate special education…is not a dispensable luxury. For those with severe learning disabilities, it is the ramp that provides access to the statutory commitment to education made to *all* children in British Columbia." [83]

For people with disabilities, and especially for the parents of children with learning disabilities, *Moore* is a ground-breaking victory. The Court unanimously swept away the faulty analysis of the lower courts on comparator group analysis and the definition of the service.

However, while the *Moore* decision is an advance, we do not conclude that employers and governments will now relinquish their efforts to move us back to a minimalist version of the duty to accommodate. Especially when what is in issue is the positive obligation of employers and service-providers to give life, through human rights law, to the rights to work and education, social security, and an adequate standard of living, resistance is fierce.

Nonetheless, we hope for a shift towards a more inclusive approach. Recently the United Nations General Assembly adopted a new international articulation of the right to equality for people with disabilities in the form of the *Convention on the Rights of People with Disabilities* ("*CRDP*"),[84] which Canada ratified in 2010.[85] The *Convention* restates and reinforces the promise of transformation and inclusion that the landmark Supreme Court of Canada decisions in *Meiorin and Grismer* hold out.[86]

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82 *Ibid*, at para 28.

83 *Ibid*, at para 5.

84 *CRPD*, above note 8.

85 Council of Canadians with Disabilities, News Release, "Canada Ratifies United Nations Convention on the Rights of Persons with Disabilities" (11 March 2010), online: Council of Canadians with Disabilities www.ccdonline.ca.

86 Ravi Malhotra & Robin Hansen, "The United Nations Convention on the Rights of Persons with Disabilities and its Implication for the Equality Rights of Canadians with Disabilities: The Case of Education" (2011) 29:1 Windsor YB Access Just 73 (writing about the right to education and Article 24 of the *CRDP*, the authors argue that at a time when the Supreme Court of Canada has taken a troubling turn towards more formalistic reasoning, the *CRDP* can provide a new foundation of support for social justice for persons with disabilities.)

The *CRDP* establishes the principle of inclusion as the key to equality for people with disabilities and imposes positive obligations on governments to take steps to achieve it. *Meiorin* established the duty to accommodate as a critical component of substantive equality for persons with disabilities. In *Moore*, the Court recognized that the fulfillment of the rights of persons with disabilities requires accommodation that is adequate to achieve genuine inclusion. Both the ratification of the *Convention* and the Supreme Court's decision in *Moore* should give adjudicators and courts new courage to require employers and service
-providers to realize the right to substantive equality, and to meet the goal of full inclusion for persons with disabilities. Out domestic and international human rights commitments mandate nothing less.