Accommodation in the 21st Century

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Council of Canadians with Disabilities
A VOICE OF OUR OWN

Conseil des Canadiens avec déficiences
CETTE VOIX QUI EST LA NOTRE

the POVERTY and HUMAN RIGHTS CENTRE

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Thirty years ago, for people with disabilities living in Canada, concepts of discrimination and equality were new, unformed and relatively untested. The recognition of disability-related barriers as a matter for human rights concern and scrutiny represented a qualitative change in the understanding of the disability experience. Human rights offered people with disabilities the prospect of recognition as equal human beings and redress for their chronic exclusion and social and economic disadvantage. Human rights, it was hoped, could serve as the source of vision and the heartbeat of a transformation.

There was incremental progress in cases like *Canadian Odeon Theatres Ltd. v. Huck*,[1] which clarified that public places, like movie theatres, needed to be modified to make space for people with disabilities. But it is the decisions in *Meiorin* and *Grismer*, issued by the Supreme Court of Canada that ignited a larger aspiration for equality in employment and services and genuine optimism among people with disabilities.

This paper assesses the promise of *Meiorin* and considers how some leading post-*Meiorin* cases have attacked that promise and created troubling legal knots.

Because we believe that *Meiorin* and *Grismer* hold out the possibility of transformative change, and because we see aggressive efforts being made to narrow and diminish that promise, we have had some basic facts about the lives of people with disabilities in Canada in the backs of our minds throughout our work on this project. While the main focus of this paper is on the jurisprudence — what has happened since *Meiorin* and *Grismer*, what new complications and restrictions are being introduced — we do not wish to lose sight of the reality of inequality that human rights law should help to change.

For many human rights commissions, the largest part of their case load is complaints dealing with disability. However, despite a steady increase in disability-based human rights complaints, while access and understanding have improved in some ways, the social and economic conditions of people with disabilities have stubbornly persisted during the period when rights have been more used.

We do not suggest that human rights machinery can, by itself, eliminate all forms of disability-related barriers. But we do believe that if human rights commitments were implemented with seriousness 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.

As the reality of the lives of people with disabilities is the context for our concerns about the jurisprudence, we provide some simple facts.

Poverty

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.[2] They are also more likely to live in poor families: 14.2% compared to 10.1% of adults without disabilities.[3]

Educational Attainment

Similarly, people with disabilities have lower education attainment than people without disabilities. For example, people with disabilities are less likely to have completed a high school education than non-disabled people: 27.4% vs. 18.3% respectively.[4] They are also less likely to have a university degree or certificate (13.2% vs. 20.7%).[5] 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]

Employment

According to Statistics Canada, people with disabilities continue to be less likely to be employed than people without disabilities. For example, in 2006, 51.3% of persons with disabilities were employed compared to 75% of persons without disabilities.[7]

Nor does having employment seem to narrow the income gap. About 11% of people with disabilities who are employed continue to experience low incomes, compared to 7.3% of those without disabilities.[8] 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% and 27% respectively.[9]

Among those persons with disabilities who are working, the rates of poverty are lowest for the 32.4% whose employers who have more than one location and 500 or more employees.[10] This is also true for the 32.1% who work in a unionized workplace or are covered by a collective agreement. Unfortunately, only 18.1% of people with disabilities enjoy this kind of employment.[11]

The many people with disabilities who are not employed are generally reliant on social assistance programs, which are unstable, rule-heavy, and stigmatized. People with disabilities who are not employed do not enjoy the fulfillment of earning an income and the independence that it brings, and they also are not eligible for the much superior and less stigmatized benefits that are attached to work, such as Employment Insurance sick benefits, Canada Pension Plan disability benefits, workers' compensation and private disability plans.

In order to improve these basic conditions of disadvantage for people with disabilities in Canada, we need willingness to discard norms that are based on being able-bodied in fa-

vour of universal norms that accommodate people with disabilities from the outset in the design of standards, practices and institutions.

Canada's recent ratification of the *Convention on the Rights of Persons with Disabilities* (CRDP)[12] reflects a new and conscious commitment by all levels of government to take proactive measures to eliminate disadvantage and achieve full inclusion for persons with disabilities. We believe that the *Convention* and the Supreme Court of Canada's decisions in *Meiorin* and *Grismer* offer different articulations of the same big 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?

The Big Idea: The promise of *Meiorin* and *Grismer*

The decision of the Supreme Court of Canada in *Meiorin* is a landmark in Canadian human rights jurisprudence. The Court's endeavour in *Meiorin* was to develop an interpretive framework that would advance the substantive equality goals of human rights legislation. However, to fully appreciate the significance of *Meiorin*, it is necessary to consider what had preceded it, and the reasons articulated by the Court for why a new approach was required.

Meiorin Untangled Doctrinal Knots and Adopted a Unified Approach to Discrimination Analysis

Untangling doctrinal knots was a primary contribution of *Meiorin*. The Court adopted a new unified approach to discrimination, rejecting a threshold distinction between direct discrimination and adverse effects discrimination, and integrating the concept of accommodation within the *bona fide occupational requirement* (BFOR) defence. Prior to *Meiorin*, the law had bifurcated direct and adverse effects discrimination, and attached different remedial consequences to each. Developing a new approach was important because the conventional analysis had been contradictory and incoherent. Moreover, it had interfered with the substantive equality goals of human rights legislation.[13] Human rights law had been "set on a path that not only seemed destined to become increasingly complex and contradictory, but even more importantly, foreclosed any serious engagement with systemic inequalities."[14]

Under the bifurcated approach, a tribunal was required to decide at the outset whether the case involved direct discrimination or adverse effects discrimination. In the case of direct discrimination, the employer could establish that an impugned standard was a BFOR by showing (1) that the standard was imposed honestly and in good faith and was not designed to undermine the objectives of human rights legislation (the subjective element); and (2) that the standard was reasonably necessary to the safe and efficient performance of the work and did not place an unreasonable burden on those to whom it applied (the objective element). If the employer could not establish that the rule was a BFOR, it would be struck down as a discriminatory rule.

A different analysis applied to adverse effects discrimination. The BFOR defence did not ap-

ply. If *prima facie* discrimination was established, the employer needed only to show (1) that there was a rational connection between the job and the particular standard; and (2) that it could not accommodate the claimant without incurring undue hardship. If the employer could not discharge this burden, then it was said to have failed to establish a defense to the charge of discrimination. In such a case, the claimant would succeed, and an adjudicator could order that she be accommodated, but the standard itself would always remain intact.

In *Meiorin*, the Court claimed that the bifurcated approach had represented a significant step forward in the interpretation of early human rights statutes in that it recognized for the first time the harm of adverse effects discrimination. However, the Court also acknowledged that the bifurcated approach had become problematic and had ill-served the purpose of contemporary human rights legislation. The Court canvassed numerous difficulties with the conventional approach to claims under human rights legislation which, in its view, made a compelling case for revisiting the analysis. The following are highlights of the reasons identified by the Court for moving beyond the conventional approach.

Adverse Effects Discrimination Should Not be Given an Undeserved Cloak of Legitimacy

In *Meiorin*, the Court recognized that the distinction between the standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is artificial, malleable and unrealistic. The Court explained that it is an unrealistic distinction because a modern employer with a discriminatory intention would rarely frame the rule in directly discriminatory terms when the same effect – or even a broader effect – could easily be realized by couching it in neutral language. The Court also recognized that adverse effects discrimination, the "more subtle type of discrimination, which arises in the aggregate to the level of systemic discrimination, is now much more prevalent than the cruder brand of openly direct discrimination."[15] The bifurcated analysis gave employers with a discriminatory intention and the forethought to draft a rule in neutral language "an undeserved cloak of legitimacy."[16]

The Real Question is Whether the Discriminatory Impact Could Have Been Avoided

Prior to *Meiorin*, a distinction had been drawn between the obligation to explore reasonable alternatives, applicable to direct discrimination, and the obligation to consider individual accommodation, applicable to adverse effects discrimination.[17] In *Meiorin*, the Court acknowledged that in practice there may be little difference between the two defenses. Under the bifurcated approach, tribunals and courts had been compelled to frame their arguments and decisions within the confines of definitions that were themselves blurred. The result, the Court explained, may have been that the purpose of human rights legislation was obscured. The Court concluded that, if the ultimate practical question common to both direct

and adverse effects discrimination analysis is whether the employer had shown that it could not have done anything else reasonable or practical to avoid the negative impact on the individual, there is little reason to distinguish between the two analyses or the available remedies.[18]

Human Rights Analysis Should Not Legitimize Systemic Discrimination

Under the bifurcated analysis, if a standard was classified as being neutral at the threshold stage of the inquiry its legitimacy was never questioned. The focus shifted to whether the individual claimant could be accommodated, and the formal standard itself always remained intact. The conventional analysis thus shifted attention away from the substantive norms underlying the standard, to how "different" individuals could fit into the mainstream, represented by the standard.

In *Meiorin*, the Court recognized that although the practical results of the bifurcated analysis may have been that individual claimants were accommodated and the particular discriminatory effect they experienced perhaps alleviated, the larger import of the analysis was to bar courts and tribunals from assessing the legitimacy of the standard itself. Referring to the distinction that the conventional analysis draws between the accepted neutral standards and the duty to accommodate those who are adversely affected by it, McLachlin J., writing for a unanimous Court, adopted the following observations:

> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated".
>
> Accommodation, conceived this way, appears to be rooted in the formal model of equality. As a formula, different treatment for "different" people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness.

> In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made, sometimes, to deal with unequal effects. Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make "different" people fit into existing systems.[19]

McLachlin J. stated, "I agree with the thrust of these observations. Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination, as this Court acknowledged in *Action Travail, supra.*"[20]

Moreover, McLachlin J. expressly acknowledged that in the *Meiorin* case itself the effect of the bifurcated analysis was to shield systemic discrimination from scrutiny, because it precluded a rigorous assessment of a standard that affected women as a group. She stated:

> Although the Government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the "mainstream" can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law's approval. This cannot be right.[21]

Human Rights Legislation Must be Interpreted Liberally and Purposively

In *Meiorin*, the Court reiterated its commitment to liberal and purposive interpretations of human rights legislation, because of its elevated legal status as fundamental law. The Court observed that an interpretation that allows the rule itself to be questioned only if the discrimination can be characterized as direct does not allow human rights statutes to accomplish their purposes as well as they might otherwise do, and commented that there is no presumption that an ostensibly neutral rule is not discriminatory in itself.[22]

In essence, the Court recognized that, under the bifurcated approach, direct discrimination, which was the form of discrimination first recognized in Canadian law, was still being treated as though it was the "real" discrimination, while adverse effects discrimination was some lesser, though problematic form, which did not require the same powerful and definitive remedy, that is the striking down of a rule or practice.

The Focus of Discrimination Analysis Should Be on Adverse Effects

Direct discrimination is usually understood to be overt and is often assumed to be intentional. An often cited example is: "No Catholics or no women or no blacks employed here."[23] However, in *Meiorin*, the Court confirmed that the fact that a discriminatory effect is neither the product of an overt group-based generalization nor intentional should not be determinative of the available remedies.[24] This acknowledgment was not new, but simply an affirmation of well established statutory human rights jurisprudence, in which it had been repeatedly recognized that discrimination may arise from the adverse effects of a seemingly neutral rule, and that negative effects should be the principle concern of discrimination analysis. However, the Court emphasized that care should be taken to ensure that the goal of addressing and remedying adverse effect discrimination is not compromised by an inappropriate method of analyzing claims under human rights legislation.

Towards a Unified Approach

In *Meiorin*, the Court enunciated a three step test for determining whether a *prima facie* discriminatory standard is a BFOR. The Court prescribed that an employer may justify the impugned standard by establishing on the balance of probabilities that:

(1) the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

(3) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[25]

The most significant element of the unified approach is the third step: to show that a *standard* is reasonably necessary, it must be demonstrated that it is impossible to avoid discriminating without imposing undue hardship upon the employer. Previously, in a case of direct discrimination, to establish a BFOR, a respondent was not required to show that making an individual exception or adjustment to a standard of general application would cause difficulties amounting to an undue hardship; if an employer succeeded in establishing a BFOR on an occupation-wide basis, there was no duty to make individual exceptions or adjustments. Further, in a case of adverse effects discrimination, a respondent was not required to justify a standard of general application, but rather was only required to make individual exceptions or adjustments that did not amount to an undue hardship.

In *Meiorin*, the Court identified various questions that can be asked to determine whether a standard is reasonably necessary, which place a heavy onus on employers to make extensive

efforts to actually design workplaces to eliminate discriminatory standards.[26] The Court stated:

> Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. *They must build conceptions of equality into workplace standards.* By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, insofar as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible. A standard that does not allow for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless [emphasis added].[27]

The third step gave the duty to accommodate a central place in human rights analysis. Even more importantly, it pushed the concept of accommodation beyond a duty only to make individual after-the-fact exceptions, to require employers to take an inclusive approach to the design of workplace standards.

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."[28] Similarly, Yvonne Peters said:

> 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.[29]

The following statements capture some of the sense of possibility signaled by *Meiorin*:

Karen Schucher stated:

> This broader approach expands the concept of accommodation to require systemic change to workplace standards. This systemic change extends both to a recognition of the distinctive realities

> among groups and individuals, as well as to more individually focused remedies and exceptions. Systemic accommodation effectively requires transformation of workplace standards…. [30]

Melina Buckley and Alison Brewin stated:

> *Meiorin* introduced profound changes in the legal conception of accommodation….Before this decision, employers had only to consider accommodation of an individual by assisting those who did not fit the existing standard. Now the duty is two-fold. *First, an employer must consider whether the standard itself can be changed so as to be more inclusive and promote substantive equality in the workplace. Second, if this is not possible or if the standard is fully justifiable under the new higher legal threshold, then substantial efforts toward individual accommodation are still required* [emphasis added].[31]

Fudge and Lessard put it this way:

> *Meiorin*, by taking a more stringent and substantive approach to employer justifications for human rights violations, signal[ed] the possibility of a human rights jurisprudence that acknowledges rather than ignores the significant disparities in power, resources, social capital, and normative legitimacy that skew workplace disputes between complainant employees and respondent employers, and hold deeply entrenched inequalities in place.[32]

In the particular case of Tawney Meiorin, the new unified approach was applied to require that the employer return to the drawing board to revisit an exclusionary standard — a requirement to run 2.5 kms in 11 minutes — that the employer had failed to show could not be altered without incurring undue hardship. After four attempts, Ms. Meiorin failed to meet the aerobic standard, running the distance in 11 minutes and 49.4 seconds instead of the required 11 minutes. The employer's failure to even consider possibilities for adjusting the standard to make it more inclusive to women was fatal to the employer's endeavour to defend the legitimacy of the standard itself.

Accommodation is not only tinkering, for individuals; it is systemic. It is not only after-the-fact; it is proactive. Therein lies the big idea of accommodation, and the transformative promise of *Meiorin*.

Proof of *Prima Facie* Discrimination Does Not Require Evidence of Stereotyping

It is important to notice that in *Meiorin*, the Supreme Court of Canada resisted the respondent's efforts to shift the complainant's burden of proof to take in justificatory criteria. In particular, the Court rejected the contention that the challenged standard should not even be considered *prima facie* discrimination since it had not been shown to be based on stereotype.

This is significant because in a case such as *Meiorin* in which the complaint is about a rule that is neutral on its face, not every adjudicator is able and willing to pierce the façade of neutrality to find that the rule, notwithstanding its facially neutral appearance, rests on stereotype.

If the challenged standard had been a rule stating, "men only: women need not apply," a gendered stereotype would have been manifest, that is, only men are capable or worthy firefighters. It may be arguable that the fitness standard challenged in *Meiorin* was based on stereotype. The standard was designed with reference to norms for male fire fighters and without reference to fitness norms for successful women fire fighters, and therefore simply masked a gendered stereotype of the forest fire fighter as male.[33]

However, there is also an argument that the standard at issue in *Meiorin* did not rest on stereotype. There is a rational connection between ensuring a high level of aerobic fitness and safety goals for forest fire fighting, and the challenged standard is a widely recognized measure of aerobic fitness. The fitness test was individually applied. Furthermore, the standard did not categorically exclude women from employment as firefighters. Although women were disproportionately excluded by the standard, some women were able to meet achieve the standard, and some men were not.

This very argument was advanced by the Government of British Columbia in *Meiorin*. The government argued strenuously before the Arbitrator and the Court of Appeal that there was no *prima facie* case of discrimination since the standard was "reasonably necessary given the nature of the job"; the standard had not been shown to be based on stereotype; and the standard was applied through individual testing.[34] A standard that had not been shown to be based on stereotype and that was applied through individual testing, was not discriminatory, by definition.[35] The government's position, although rejected by the Arbitrator was adopted by the Court of Appeal.[36] The Court of Appeal agreed with the respondent that if individual testing is carried out, there is no discrimination. The Court of Appeal decision also appears to have agreed both that stereotyping is "the essence of discrimination,"[37] and that individual testing is its antithesis.

In fact, neither the evidence, nor the Arbitrator's findings, supported the conclusion that the standard had been shown to be necessary to the safe and efficient performance of the job. The Arbitrator described the employer's evidence about risk as "anecdotal" or "not co-

gent" and "impressionistic."[38] The Supreme Court of Canada found that "[t]here was no credible evidence showing that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest firefighter satisfactorily. On the contrary, Ms. Meiorin had in the past performed her work well, without apparent risk to herself, her colleagues or the public."[39] The Supreme Court of Canada concluded that the standard was not necessary because the government had not established that it would experience undue hardship if a different standard were used.[40]

However, the key point here is that in the decision-making venues below, the Employer had sought to defeat the complainant's discrimination claim at the *prima facie* case stage by emphasizing that the fitness test was not based on stereotype as it had been scientifically determined to be related to fitness, and the test was applied to everyone in the same way. Moreover, the argument met with success in the Court of Appeal.[41]

Against this backdrop, the Supreme Court of Canada's approval of the Arbitrator's ruling on *prima facie* case is significant. The Supreme Court of Canada explained:

> Ms. Meiorin has discharged the burden of establishing that, *prima facie*, the aerobic standard discriminates against her as a woman. The arbitrator held that, because of their generally lower aerobic capacity, most women are adversely affected by the high aerobic standard...the arbitrator found that Ms. Meiorin had established a *prima facie* case of adverse effect discrimination by showing that the aerobic standard has a disproportionately negative effect on women as a group...I agree with the arbitrator that a case of *prima facie* adverse effect discrimination was made out... Ms. Meiorin having established a *prima facie* case of discrimination, the burden shifts to the Government to demonstrate that the aerobic standard is a BFOR.[42]

Given the content of the arguments embedded in the decisions below that were placed before the Supreme Court of Canada, it is reasonable to conclude that the Court's decision supports the proposition that stereotype is not an indispensable element of a claim of discrimination. The complainant's burden of establishing *prima facie* discrimination can be discharged through proof of adverse effects, and establishing a link between the adverse effects and a listed ground of discrimination. In *Meiorin*, this was accomplished by showing that most women, because of their lower aerobic capacity, were adversely affected by the aerobic testing standard selected by the government.[43] The Supreme Court of Canada noted that evidence accepted by the Arbitrator demonstrated that: owing to physiological differences, most women have lower aerobic capacity than most men, and even with training, most women cannot increase their aerobic capacity to the level required by the aerobic standard, although training can allow most men to meet it. The Court also noted that the Arbitrator heard evidence that 65 percent to 70 percent of male applicants pass the tests on their initial attempts, while only 35 percent of female applicants have similar success; and

that of the 800 to 900 Initial Attack Crew members employed by the Government in 1995, only 100 to 150 were female.[44]

In *Meiorin*, the evidence before the Supreme Court of Canada went well beyond showing the exclusionary effects of the particular fitness standard, based on a statistical and physiological analysis. The Court was, appropriately, provided with secondary sources describing the historical context of women's exclusion from non-traditional employment such as fire fighting, and the way in which fitness standards based on male norms had been used to perpetuate the disadvantaged position of women in the workforce. In other words, the Court was provided with a substantive analysis of the way in which this challenged fitness standard restricted and reinforced historical patterns of exclusion. The Court did not have before it a case of mere differential treatment.

However, the Court did not accede to the employer's view that stereotyping is the "essence of discrimination" or the only evil sought to be addressed by human rights legislation.[45]

Meiorin was a ringing endorsement of the understanding that human rights legislation is intended to address adverse effects discrimination, which is not necessarily grounded in, or easily shown to be grounded in, a stereotype or inaccurate generalization about a group.

We are concerned that more recently there is a trend towards reinstituting stereotyping as an indispensable element of a claim of discrimination. We explain this concern further below.

Meiorin was Applied in *Grismer*

In *Grismer*,[46] the Supreme Court of Canada applied the unified approach to discrimination analysis developed in *Meiorin* to the disability rights context and to services. The Court declared that the distinction between direct and adverse effects discrimination had been erased, making everyone governed by human rights legislation subject to a requirement "in all cases" to accommodate the characteristics of affected groups in their standards, rather than maintaining discriminatory standards and accommodating those who cannot meet them. The Court explained that accommodation refers to "what is required in the circumstances to end discrimination. Standards must be as inclusive as possible."[47]

At issue in *Grismer* was a blanket refusal by the Superintendant of Motor Vehicles to grant drivers' licences to persons with the visual condition called homonymous hemianopia (H.H.).

The complainant, Terry Grismer, was a man who had been employed for many years as a professional driver at a mine. Mr. Grismer had a stroke in 1984 at age 40. As a result of the stroke, he suffered H.H., which eliminated most of his left side peripheral vision in both eyes. Persons with H.H. always have less than 120 degrees of peripheral vision and no person with H.H. is issued a driver's licence in B.C. The Motor Vehicle Branch cancelled Grismer's licence. Grismer claimed that through the use of glasses with prisms, extra mir-

rors on his truck, and regular movement of his head, he could compensate for his disability and drive safely.

The British Columbia Human Rights Council found that Mr. Grismer had made out a *prima facie* case of direct discrimination, and that the Superintendent had failed to show that applying the visual field standard inflexibly, without individualized assessments, was reasonably necessary. The Superintendent was ordered to assess Mr. Grismer individually, not simply by determining whether he personally had a 120 degree field of vision, but by testing his ability to drive safely using his prism glasses.

It should be noted that in *Grismer*, the approach of the Court to the question of what constitutes a *prima facie* case of discrimination paralled the approach in *Meiorin*. Mr. Grismer established a *prima facie* case of discrimination by showing that he was denied a license that was available to others, and that the denial of the license was based on a protected ground of discrimination, namely disability. At this point the onus shifted to the Superintendent to prove, on a balance of probabilities that the standard was a *bona fide* requirement. To meet the next step of the analysis, the Superintendent had to show that the standard was reasonably necessary to the goal of road safety, in the sense that accommodation of the complainant was impossible without undue hardship.

In the end, the Supreme Court of Canada endorsed the remedy granted by the trier of fact, namely, that the complainant be individually assessed. However, *Grismer* is not merely a case about an individual after-the-fact adjustment that left the standard unscathed. Although the remedy was individual, its implications are systemic. *Grismer*, like *Meiorin*, challenged discrimination within a standard. It was discriminatory to simply apply the test of running 2.5 kilometres in 11 minutes to women firefighters as well as men. Similarly, it was discriminatory to simply apply the test of 120 degrees of peripheral vision to each applicant for a driver's license. In both cases, the ultimate issue was whether a standard was unnecessarily exclusive.

The Court stated at para. 22:

> Accommodation refers to what is required in the circumstance to avoid discrimination. Standards must be as inclusive as possible.

As in *Meiorin*, it was the third stage of the analysis that was fatal to the government's defence in *Grismer*. To discharge its burden, the Superintendent had to show that its non-accommodating standard was reasonably necessary to the achievement of highway safety. The Court found that there were at least two ways in which the Superintendent could have done this. He could have attempted to show either that departing from the minimum in the case of applicants with H.H. would be an undue hardship because no one with H.H. can drive safely, or he could have shown that assessing driving safety in another way would be impossible without undue hardship. Both alternatives, the Court recognized, are types of accommodation.[48]

The Court found that the evidence fell short of establishing that no one with H.H. could meet the standard of reasonable safety. The evidence, from other jurisdictions with different standards, was to the contrary. Nor did the evidence establish that using another means of assessing the complainant's ability to drive safely was impossible. On this point, the evidence showed that there were other ways of obtaining an assessment, including, for example, a test that allowed the complainant to use his prism glasses. The Superintendent offered no evidence that he had considered any of the alternative options that might have allowed the complainant to be assessed in a way that would give him the opportunity to demonstrate his ability to drive safely.

To appreciate the significance of *Grismer*, it is critical to recognize that its effect is identical to *Meiorin*. The maintenance of a discriminatory standard, in this case a 120 degree visual field requirement applied categorically and inflexibly to persons with H.H., was found to be unjustified. Although, as in *Meiorin*, the remedy technically applied to only one individual, the logic of the Court's decision challenged the necessity for the underlying standard. The remedy of an individualized assessment secured by Mr. Grismer is not the same thing as the "individual testing" (same standard applied one person a time) that the government advanced as a defence in *Meiorin*. Mr. Grismer secured the right to be demonstrate his driving proficiency using a different test.

In *Grismer*, the Court also confirmed that the complainant does not bear the onus of proving that eliminating the discrimination would not cause undue hardship. Although the complainant may counter the respondent's justificatory evidence with its own evidence of arbitrariness in setting the standard, or unreasonableness in refusing to provide accommodation, the onus of proving that it would be an undue hardship to depart from an exclusionary standard rests with the respondent, the Court held.[49]

Conclusion

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 than and worthy of remediation than direct discrimination;
- Avoid reducing the duty to accommodate to only after-the-fact, individual tinkering on the edges 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.

As Dianne Pothier has explained, a systemic approach to accommodation challenges able-bodied norms by contemplating diversity from the start. Systemic accommodation is founded on "inclusive thought." She says, "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."[50] *Meiorin*, which makes the first line of inquiry whether the norm can be disregarded altogether without any need to consider exceptions, followed by *Grismer*, represented the beginnings of a systemic approach to the duty to accommodate.

The promise under attack

Meiorin's promise that human rights legislation would take adverse effects discrimination seriously, and engage with systemic obstacles to equality, is under attack. In the post-*Meiorin* and *Grismer* period of human rights litigation, respondent efforts to prevent complainants from advancing beyond the *prima facie* discrimination stage of a case have intensified. There has been increased pressure to complicate the test for a *prima facie* case of discrimination. Perhaps this is because *Meiorin* and *Grismer* tightened up the law on respondent justifications by integrating the duty to accommodate up to the point of undue hardship within the BFOR defence, and by making the BFOR defence applicable regardless of the form of discrimination (direct or adverse effects). It is not easy for a respondent to demonstrate that it is reasonably necessary to maintain a discriminatory practice or policy. The result is new conflict 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.

A Divisive Question: Can Discrimination Exist Without Stereotypes?

The most significant question that has emerged 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[51] — 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).*[52] At issue in *McGill* was an automatic termination clause applied to persons absent from work for three years. The grievor had taken a leave of absence from her job at a hospital because of mental health problems. For more than two years, following her doctor's orders, she tried unsuccessfully to return to work. After the expiry of the rehabilitation period provided for under the collective agreement had been extended by the employer, the grievor was ready to return to work, but had a car accident which precluded her from returning to work for a further indeterminate period. The Employer gave notice of termination. The union filed a grievance, contesting

the termination, and requesting reasonable accommodation. The Arbitrator dismissed the grievance, noting that the employer had already accommodated by providing rehabilitation periods more generous than provided for in the collective agreement, that the grievor was unfit for work at the end of the three year period, and that the grievor continued to be unfit for work.

The Quebec Superior Court dismissed the union's application for judicial review.[53] The Court of Appeal remitted the case to the Arbitrator to assess the accommodation issue on an individualized basis.[54] The respondent hospital was granted leave to appeal to the Supreme Court of Canada.[55]

In the Supreme Court of Canada, the majority addressed the issue as a question of undue hardship. Deschamps J. explained, "The 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."[56] This was, then, the majority's version of *prima facie* discrimination. Deschamps J. then proceeded to apply the three steps established in *Meiorin*, to determining whether the termination was "reasonably necessary," in other words, whether further accommodation would cause undue hardship for the employer. In the end, 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 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 C.J. and Bastarache J. concurring, would have allowed the appeal on the basis that there was no *prima facie* case of discrimination. A review of the minority opinion reveals that Abella J. imported into the definition of *prima facie* case, a requirement that the claimant prove that the impugned standard was based on stereotype.

In *McGill*, Abella J. reviews a description of discrimination contained in *Andrews v. Law Society of British Columbia*,[57] and a prescription for proving discrimination under the *Quebec Charter* set out in *Commission scolaire régionale de Chambly v. Bergevin*,[58] and states:

> At the heart of these definitions is the understanding that a workplace practice, standard, or requirement cannot disadvantage an individual by attributing *stereotypical or arbitrary* characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based not on their actual abilities, but on attributed ones. The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness

> of the barriers imposed, whether intentionally or unwittingly [emphasis added].
>
> What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is *the link* between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden [emphasis added].[59]

For Abella J., the issue in the *McGill* appeal was not whether the employer had made out the justification of having accommodated the claimant enough, but whether the claimant had satisfied the threshold onus of demonstrating that there was *prima facie* discrimination, namely, that she had 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. Notice that the terms stereotypical and arbitrary are apparently interchangeable. On the approach of Abella J. the employer was not required to justify the very termination that the majority found to be a discriminatory termination because of disability-related absence from work. Abella J. says:

> 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].[60]

In defence of automatic termination clauses in general, Abella J. says, "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*."[61]

The approach of the majority in *McGill* to what constitutes a *prima facie* case of discrimination is consistent with *Meiorin* and *Grismer*, and what is known as the traditional or *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.

Some decision-makers have declined to apply the minority decision in *McGill*. For example, in *Coast Mountain Bus Company Ltd.*,[62] the British Columbia Court of Appeal applied the *O'Malley* approach. The Court specifically considered the minority opinion in *McGill*, and found that the claim at issue in *Coast Mountain* was distinguishable on the facts because the challenged attendance management program had been unilaterally imposed by the employer, rather than negotiated by the parties to a collective agreement.

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 or 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?

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. The central objection to making stereotyping an essential element of a *prima facie* case of discrimination is that stereotyping is grounded in an insufficient definition of discrimination. In particular, discrimination as stereotyping doesn't 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. This insight is captured by the words of Sopinka J. in *Eaton*[63]:

> 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].[64]

Let us pause to consider the definition of stereotype. What is a stereotype, in the context of human rights? Although the case law does not really define stereotype, it can be inferred that quite often what decision makers have in mind is a generalization about a group, based on characteristics related to human rights grounds such as disability or sex, which may be inaccurate when applied to an individual. The following are hypothetical (and manifestly offensive) examples of stereotypes: people who have been treated for psychological disorders cannot be good lawyers; women do not make good fire fighters. Such stereotypes are antithetical to human rights because they are false, and because they are used as barriers to equality of opportunity. Individuals can be good lawyers, regardless of their disabilities. Individuals can also be good firefighters, regardless of their sex.

Although discrimination as stereotyping, so defined, works for cases of direct discrimination in which the generalization about the group is made explicit (for example: "No Catholics or no women or no blacks employed here"), 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.

Discrimination 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 needed, whether it be individual or systemic.

Accommodation, rather than ignoring disability, requires 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. We note that human rights jurisprudence does not consider the absence of stereotyping to be a defence to a *prima facie* case of discrimination. In this sense, then, the issue of stereotyping is not strictly speaking a question of where to draw the line between *prima facie* case and justificatory considerations. 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. Not only is there a complete absence of reference in *Meiorin* to a requirement on the complainant to prove stereotyping, it is clear from the reasons of McLachlin J. that the Court was not operating on an understanding that the case was about protecting people from stereotype.

As discussed above, *Meiorin* reveals another understanding of the purpose of human rights legislation, namely the elimination of the "systemic discrimination"[65] which occurs through the application of 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.[66]

We can conclude from *Meiorin* that addressing discrimination is not only about the avoidance of differential treatment based on stereotypes, with possibly a bit of affordable,[67] individual after-the-fact accommodation added on. Addressing discrimination also entails

dealing with "the effects of systemic discrimination,"[68] "rigorously assessing" standards that have adverse effects on groups protected by human rights grounds,[69] 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.[70] It is crucial to people with disabilities 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.

The Analytical Distinction Between *Prima Facie* Case and the BFOR Defence Must Be Maintained

As noted, 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* raises the issue of reversing the burden of proof for making out a justificatory defence. A requirement for proof of stereotyping can slide into a requirement that the complainant prove, in order to make out a *prima facie* case, that the 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 (corresponding to steps one and two of the BFOR analysis).[71] 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 the responsibility of proving that the discrimination is arbitrary to the claimant's burden.

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.

It may not be readily apparent from *McGill* what difference the allocation of the burden of proof can make, because the Court was unanimous in its conclusion, though divided on its reasons. However, when we consider a case like *Gooding*,[72] a 2008 decision of the British Columbia Court of Appeal, we see how requiring the claimant to prove arbitrariness can produce a very different outcome. *Gooding* also exemplifies how, in practice, a requirement for stereotyping or arbitrariness can easily mutate into a requirement for proof of an intention to discriminate.

The grievor, a liquor store manager, suffered from an addiction to alcohol. He was dismissed from his employment as a result of his theft of alcohol at work, which the medical evidence

showed, and the Arbitrator held, was a result of his addiction. The Arbitrator found *prima facie* discrimination, applying the *O'Malley* framework.[73] Further, applying the third step of the *Meiorin* BFOR test, the Arbitrator found that the employer could have accommodated Mr. Gooding short of terminating his employment. The employer, found the Arbitrator, had failed to canvass what other positions may have been available or under what conditions he could have returned to work in an alternative position.

However, the majority of the Court quoting from Abella J. in *McGill* to the effect that arbitrary or stereotypical assumptions are necessary to establish *prima facie* discrimination, found that the complainant had failed to establish a *prima facie* case of discrimination. Huddart J.A. stated:

> I can find no suggestion that Mr. Gooding's alcohol dependency played any role in the employer's decision to terminate him or in its refusal to accede to his subsequent request for the imposition of a lesser penalty. He was terminated, like any other employee would have been on the same facts, for theft. The fact that alcohol dependent persons may demonstrate "deterioration in ethical or moral behaviour," and may have a greater temptation to steal alcohol from their workplace if exposed to it, does not permit an inference that the employer's conduct in terminating the employee was based on or influenced by his alcohol dependency.[74]
>
> …
>
> I can find no suggestion in the evidence that Mr. Gooding's termination was arbitrary and based on preconceived ideas concerning his alcohol dependency. It was based on misconduct that rose to the level of crime. That his conduct may have been influenced by his alcohol dependency is irrelevant if that admitted dependency played no part in the employer's decision to terminate his employment and he suffered no impact for his misconduct greater than that another employee would have suffered for the same misconduct.[75]

Thus, in *Gooding*, even though the majority agreed that alcoholism may have played a part in the theft of alcohol, since this factor played no part in the respondent's state of mind, there was no *prima facie* case of discrimination. Although the Arbitrator found that the employer could have accommodated Mr. Gooding short of terminating his employment without incurring undue hardship, under the Court of Appeal's analysis, the respondent's duty to show that it had accommodated to the point of undue hardship did not even arise.

The union sought leave to appeal to the Supreme Court of Canada in *Gooding*, but leave was refused. This is very disturbing since *Gooding*, understood in this way, 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.

When the minority decision in *McGill* and the unanimous decision of the British Columbia Court of Appeal in *Gooding* are considered together, it seems that the ambit of statutory human rights jurisprudence is in danger of being reduced to provide protection only against instances of blatant bigotry.[76]

Proof of Stereotyping or Arbitrariness is not Mandated by the *Charter*

It has been argued by respondents that s. 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.[77,78] 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 s. 15 *Charter* case, altered the jurisprudence with regard to interpretation of human rights legislation.

Furthermore, a closer look at s. 15 *Charter* jurisprudence reveals that this is not an accurate account even of what s. 15 analysis requires. Proof of an underlying stereotype is not a requirement imposed by s. 15 *Charter* jurisprudence. Understanding where we are on this question requires actually going back to the *Law* case.

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

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.

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.[79] Our concern lies with the emphasis that respondents in statutory human rights cases have sought to place on the correspondence factor set out in *Law.* The correspondence factor 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 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 be manifest without regard to any of the contextual factors to which the Court referred.[80] *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. Therefore, taking what the Court said in *Law* at face value, the presence of a stereotype is not a necessary condition for a finding of discrimination. Support for the proposition that stereotype is not a prerequisite to a finding of discrimination can be found throughout the Court's s. 15 equality jurisprudence.[81]

When considering the question of what *Law* means today, account must also be taken of the fact that a lot has transpired in s. 15 jurisprudence since *Law*. In the post-*Law* cases of *Kapp*[82] and *Withler*[83] the Supreme Court of Canada has made it clear that the list of factors in *Law* are not to be rigidly applied as a *legal test*. *Kapp* and *Withler* also confirmed that discrimination may result not only from stereotyping, but also from the perpetuation of pre-existing group-based disadvantage. In *Kapp* the Court explained as follows:

> …[H]uman dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather the philosophical enhancement it was intended to be.[84] Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focused on treating likes alike.[85]
>
> The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. *The four factors cited in Law are based on and relate to the identification in Andrews of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in Law) go to perpetuation of disadvantage and prejudice, while the second factor [correspondence] deals with stereotyping.* The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage) [emphasis added].
>
> Viewed in this way, *Law does not impose a new and distinctive test*

> *for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in Andrews and developed in numerous subsequent decisions. The factors cited in Law should not be read literally as if they were legislative dispositions, but as a way of focusing on the central concern of s. 15 identified in Andrews — combating discrimination, defined in terms of perpetuating disadvantage and stereotyping* [emphasis added].[86]

Thus, it may be concluded from *Law* that a finding of substantive discrimination may be made because governmental conduct has *either* perpetuated the situation of a historically disadvantaged group *or* because it stereotypes.

More recently, in *Withler* the Court confirmed that discrimination may arise because a law exacerbates the disadvantage of a historically disadvantaged group *or* through stereotyping. The Court stated:

> The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice or disadvantage to members of a group on the basis of personal characteristics within s. 15(1). Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Thus judges have noted that historic disadvantage is often linked to s. 15 discrimination. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, for example, Wilson J. identified the purposes of s. 15 as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society" (p. 1333). See also *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at pp. 1043-44; *Andrews*, at pp. 151-53, *per* Wilson J.; *Law*, at paras. 40-51.
>
> The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. Typically, such stereotyping results in perpetuation of prejudice and disadvantage. However, it is conceivable that a group that has not historically experienced disadvantage may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group. If it is shown that the impugned law imposes a disadvantage by stereotyping members of the group, s. 15 may be found to be violated even in the absence of proof of historic disadvantage.
>
> Whether the s. 15 analysis focuses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances

> of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.[87]

It is to be hoped that the post-*Law* pronouncements by the Supreme Court of Canada 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 necessary to apply the contextual factors in *Law* as though they constituted a rigid legal test. In this regard, the decision of the Ontario Court of Appeal in *Tranchemontagne* is significant.[88] The challenge in *Tranchemontagne* was to a statutory human rights complaint concerning the exclusion from Ontario's Disability Support Program[89] 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 "creates disadvantage by stereotyping, *or* perpetuating disadvantage or prejudice."[90] 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.[91]

Considering the facts in *Tranchemontagne*, the Court of Appeal found that the claimants had led sufficient evidence to support a finding of discrimination merely by showing that they were deprived of the same level of income support available to other disabled claimants based on the nature of their disability. The Court reasoned that it is well known that addicts and welfare recipients have been and continue to be the subjects of stigma and prejudice, and that an examination of the legislation fails to reveal any obvious explanation for why those whose sole impairment was alcohol or drug dependency were excluded. These factors, finds the Court, were sufficient to create an inference that the legislation discriminates by "perpetuating prejudice and disadvantage and by stereotyping through depriving the respondents of benefits available to other people because of their specific disability."[92]

The recognition by the Ontario Court of Appeal that substantive discrimination may exist because of the perpetuation of group based disadvantage (not only because of stereotyping) is positive from the perspective of disability rights. Similarly, the recognition that in most statutory human rights cases substantive discrimination may be inferred from the fact that

there is adverse treatment based on a prohibited ground of discrimination is positive from a disability rights perspective. In most cases of alleged disability discrimination, it *will* be self-evident that that adverse treatment or adverse effects based on the ground of disability constitutes substantive discrimination. This is because it is uncontestable 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 s. 15 of the *Charter* are intended to promote.

In recent decisions, 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.[93] 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.[94] In our view, the decision of Justice Rowles, dissenting, but not on this point, is particularly insightful, and represents an advance in the judicial discourse on this issue.

In *Moore*, Justice Rowles notes there has been debate about the applicability of the *Law* "test" to claims of discrimination brought under provincial human rights statutes. She acknowledges both that there has been considerable interplay between statutory human rights cases and equality cases decided under the *Charte*r, and that the Supreme Court of Canada imported human rights principles into s.15 jurisprudence in *Andrews v. Law Society of British Columbia.*[95] She also acknowledges that some of the principles developed in the *Charter* context are appropriately considered in the adjudication of human rights complaints, since human rights legislation is aimed at the same general wrong as s. 15(1) of the *Charter* and both are intended to protect analogous values. However, she observes that even while importing human rights principles into a *Charter* analysis, McIntyre J. in *Andrews* was careful to acknowledge differences between human rights legislation and the *Charter* and stated that these differences must be considered.[96]

Rowles J. A. concludes in *Moore*, that the proper approach to claims of discrimination under the *BC Human Rights Code* is the traditional framework set out in *O'Malley* and subsequently developed by statutory human rights jurisprudence. She does not treat *Charter* jurisprudence as categorically irrelevant to statutory human rights analysis. Rather she agrees that "borrowing from the *Charter* context is appropriate so long as the exercise enriches the substantive equality analysis, is consistent with the limits of statutory interpretation and advances the purpose and quasi-constitutional status of the enabling statute."[97]

Rowles J.A. also observes, correctly, in our view, that the difference between the *Law* framework and the analysis developed from *O'Malley* is diminishing because the requirement to establish harm to the complainant's human dignity as a free standing element of a *prima facie* case of discrimination is losing force. In that regard she notes, again correctly, in our view, that in the s. 15 *Charter* case of *Kapp*, referred to above, the Supreme Court of Canada

departed from *Law's* focus on human dignity, as a free standing test, and signaled a shift back to the approach to discrimination outlined in *Andrews* SCC.

> In *Andrews,* McIntyre J. viewed discriminatory impact through the lens of *two* concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics…[emphasis added].[98]

The majority decision in *Moore* also endorses the *O'Malley* framework.[99]

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 s. 15 of the *Charter*. However, human rights legislation does have 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.[100]

We agree with the observation of the British Columbia Human Rights Tribunal in *Kelly* that the traditional *O'Malley* framework applies, and that it provides enough room to conduct a purposive analysis.[101] The Tribunal explained at paras. 277-278 that in its view:

> …the three-part test for assessing whether a *prima facie* case of discrimination has been proven already involves a contextual and purposive approach, and assesses whether there has been discrimination in a substantive sense: *Doige*, para. 43; *Hutchinson*, para. 84. It is flexible enough for the Tribunal to have regard to all relevant factors, including a consideration of disadvantage, stereotyping, prejudice, vulnerability, the purpose or effect of a rule, policy or law, and any connection between a prohibited ground of discrimination and adverse or differential treatment.

We do not say 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 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.[102] 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.

A recurring issue in the jurisprudence under statutory human rights legislation and s. 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 may result in such initiatives being struck down.[103] In the wake of s. 67 being removed from 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 s. 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 s. 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.

We agree with Justice Rowles that 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. Also, 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, it will be self-evident that adverse treatment or adverse effect discrimination based on a protected ground amounts to discrimination.

One of the reasons that complainants' counsel have become wary about the importation of s. 15 *Charter* principles into statutory human rights jurisprudence is that the Supreme Court of Canada has issued numerous s. 15 *Charter* decisions that are widely regarded as failing to deliver on the promise of substantive equality. There are many instances in which the Court has taken an approach to the analysis of s. 15 challenges to legislation that is extremely deferential to government and highly formalistic, for which it has been justly criticized. This makes it important to prevent the influence of the negative features of s. 15 *Charter* jurisprudence from growing.

However, problems in s. 15 *Charter* jurisprudence, inevitably, must be confronted. It is not possible for human rights jurisprudence to be walled off from s. 15 *Charter* jurisprudence. The two areas of law — statutory human rights law and s. 15 constitutional law — have too much in common to be completely separated and compartmentalized. Overall, statutory human rights jurisprudence has more to offer s. 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.

Two more knots

A. Comparator Group Analysis

Something that is absent from *Meiorin* and *Grismer* is the highly formalistic comparator group analysis that can be seen in the courts' s. 15 *Charter* equality jurisprudence.[104] But since *Meiorin* and *Grismer*, paralleling problematic developments in the s. 15 jurisprudence, comparator group analysis has also become a problem in the human rights jurisprudence.

In the cases alleging discrimination in the provision of a service, the choice of comparator group is integrally linked to the way the service is defined. For example, in the complaint of Jeffrey Moore against the North Vancouver School District, if the service at issue is understood to be 'general education', Jeffrey Moore, who has severe dyslexia, can compare himself to non-disabled students and he can claim that he should receive the intensive remediation that would provide meaningful access for him to a general education.[105]

However, if the service at issue is understood to be 'special education', Jeffrey Moore can only compare himself to other children with disabilities, and he can make a claim only if he is not receiving what is available to them. Even so, Jeffrey Moore did not seek to compare the *treatment* he received to the treatment of non-disabled students. As a seeker of accommodation, he sought to compare the outcome or benefit he could receive from the service with that received by non-disabled students.

There are cases in which comparison of the treatment of groups with different disabilities is useful because it clarifies that a group with a particular disability is being left out by a policy or program for reasons that are discriminatory.

This was the situation in *Gibbs v. Battlefords and Dist. Co-operative Ltd.*, *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, and in *Ontario (Disability Support Program) v. Tranchemontagne*.[106] In these cases, the groups excluded from the program or benefit were people with mental disabilities, people with chronic pain and soft tissue injuries, and people with alcoholism. Each of these sub-groups of people with disabilities has been treated historically with suspicion and fear. Or they are not perceived to be disabled at all, but either dishonest about their condition or morally culpable. Comparing their treatment to the treatment of other groups with disabilities clarifies the nature of their exclusion.

However, as the Council of Canadians with Disabilities argued in the B.C. Court of Appeal

in *Moore*,[107] in accommodation cases like Jeffrey Moore's, comparator group analysis can be conducted in a way that is wrong-headed and unfairly defeating.[108] It is not necessary to apply a detailed comparator group analysis in such a case. This does not mean that accommodation entails no comparison between groups. Underlying the remedial purpose of overcoming a history of exclusion, and making society's structures and services equally accessible to persons with disabilities is an inherent comparison. That comparison is between persons with disabilities and persons without disabilities with regard to the relatively disadvantageous *effects on persons 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. That is why it is unnecessary to conduct a detailed comparator group analysis in a disability accommodation case.

Some courts and tribunals interpreting and applying the duty to accommodate have recognized this. For example, the Ontario Divisional Court judicially reviewed a decision of the Ontario Human Rights Tribunal, *Lane v. ADGA Group Consultants Inc.*,[109] which had found that the employer discriminated against a probationary employee, Mr. Lane, and failed to take reasonable steps to accommodate him. Mr. Lane suffered from bipolar disorder. He did not disclose his disability at the time of hiring. A few days after he began work he exhibited manic behaviour and was terminated. He filed a human rights complaint. The Tribunal found in his favour, and the Divisional Court dismissed ADGA's application for judicial review. On judicial review, ADGA took the position that the Tribunal's decision must fail because Lane and the Commission failed to establish or identify a comparator group against which to measure the treatment of Mr. Lane.

The Court affirmed there was no need for the Tribunal to determine whether Mr. Lane had established a *prima facie* case of discrimination with reference to a comparator group. The Court stated that accommodation is a dynamic, individualized process. 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.[110]

The Court accepted the Commission's distinction between disability cases where accommodation is sought because of the adverse effects of a facially neutral rule and cases where a person with a disability seeks identical treatment in the form of equal access to a benefits scheme. The Court stated, "It is the latter cases that may be conducive to a comparator

group analysis because the person with a disability is seeking equal access to the same benefit provided to persons with different disabilities."[111]

Comparator group analysis as understood and applied in *Hodge v. Canada (Minister of Human Resources Development)*,[112] and in the cases cited above – *Gibbs*, *Nova Scotia v. Martin*, and *Tranchemontagne* — is designed to determine whether a benefit scheme treats similarly situated people differently. Such differential treatment is taken to be synonymous with stereotyping.

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.[113] However as mentioned above, in *Eaton v. Brant County Board of Education*,[114] Justice Sopinka explained that preventing differences from being taken into account is only one objective of protections from disability discrimination:

> The principal object of certain of the prohibited grounds [referring to s. 15 of the *Charter*] is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them.[115]

This other "equally important objective," accommodation of difference, is not served by a model of comparator group analysis, which, for simplicity, may be referred to as a same treatment model of comparator group analysis.

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 was compromised. The fact that some groups may have received identical treatment is irrelevant.

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*,[116] 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 commitment 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.[117]

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.[118] The Supreme Court of Canada has never applied a comparator group analysis to an accommodation case. Cases in which the Supreme Court of Canada has applied a comparator group analysis are clearly distinguishable. They are all cases in which what was being sought was same treatment.

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.[119] As McIntyre J. explained in *Andrews*, the "accommodation of differences . . . is the true essence of equality."[120]

B. The Definition of A Service

In addition to the issues already raised about what is required to prove a *prima facie* case of discrimination, a significant issue has emerged in the jurisprudence regarding how a service is defined.

Human rights legislation in every jurisdiction prohibits discrimination in the provision of services customarily available to the public.[121] The first step in most service cases is to define the "service customarily available to the public." How the service is defined has become an issue of crucial importance. Reflecting the tension between the s. 15 decisions of the Supreme Court of Canada in *Eldridge* SCC,[122] and *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*,[123] 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*, 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 s. 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. 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." 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.

In *Auton*, the plaintiffs alleged that their s. 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." Rather, it provided core funding for services delivered by medical practitioners, and funding, or partial funding, for some non-core services. 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, applied behavourial therapy was not a part of the service, and there could be no discrimination in the failure to provide it.

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 B.C. Court of Appeal decided that *Moore* is a case like *Auton.* The service that Jeffrey Moore, a boy with severe learning disabilities, 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. The majority of the B.C. Court of Appeal then found 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. 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 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 respondents in *Moore* effectively shielded themselves from a probing consideration of whether their education system allows for equal participation by all children.

In many post-*Auton* service cases, including the majority decision in *Moore*, 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 government. The British Columbia Court of Appeal decision in *Moore*,[124] the New Brunswick Court of Appeal decision in *New Brunswick (Social Development)*,[125] and the Prince Edward Island Human Rights Panel decision in Wonnacott[126] offer examples of this pattern. In some cases, like *Benson*,[127] adjudicators dismiss complaints because the service was not designed to serve those who are complaining about it, and provide little further rationale.

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. For example, if there is an existing program that funds treatment broadly but not a specific treatment, as in the B.C. Human Rights Tribunal's decision in *Cucek v. British Columbia (Ministry of Children and Family Development) (No. 3)*,[128] or if funding levels for programs or supports targeted to people with disabilities are alleged to be inadequate, as in *Ehrler v. British Columbia (Ministry of Employment and Income Assistance) (No. 3)*,[129] *Benson*,[130] *and Wonnacott*,[131] does this mean that there is no benefit or service, or does this mean that the existing program is potentially discriminatory and a further analysis of the discrimination claim is warranted?

The issue of inadequacy of funding for targeted benefit schemes has arisen in various disability cases, but the issue of whether funding is a service in itself is raised squarely in some recent non-disability cases, notably in *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General) (No.3)*.[132] As noted earlier, the First Nations Child and Family Caring Society and the Assembly of First Nations sought funding from INAC for child welfare and protection services on reserves at similar levels to that provided by provinces and territories for child welfare and protection services provided off-reserve.

INAC asked the Tribunal to dismiss the complaint on the grounds that funding is not a "service" within the meaning of the *Canadian Human Rights Act*. This complaint challenges INAC's funding across Canada, across all provinces and one territory, across all funding recipients and First Nations communities. The Tribunal determined that "the epicenter of the dispute involves whether INAC has the authority to tell First Nation Service Providers

how to deliver child welfare services, and whether, through the terms and conditions of the funding programs, it does so." The Tribunal decided that even though the evidence was voluminous, it was not sufficient to allow the Tribunal to decide the issue of whether funding is a service on a preliminary motion. Therefore, on the service question, the preliminary motion failed.[133]

We note that the FNCFCS Tribunal decision was judicially reviewed by the Federal Court in February 2012. Therefore, the question of whether funding in this case is a service may be revisited.

Funding, in the form of income support, was also an issue in *British Columbia (Children and Family Development) v. McGrath*.[134] The British Columbia Supreme Court ruled that, as in *Auton*, the complainants were seeking something that was not offered by the province. The complainants in this case were grandmothers who assumed care of their grandchildren because the parents were incapable of looking after them. The grandmothers had legal custody of their grandchildren. Subsequently, they filed human rights complaints alleging that they, and their grandchildren, were discriminated against on the grounds of family status because the province refused to pay them the same amounts it pays to foster parents of children who are in the custody of the province. The grandmothers receive about $271 per month from the Ministry of Employment and Income Assistance under the Child in the Residence of a Relative program. This is approximately $500 per month less than the roughly $800 that is paid by the Ministry of Children and Family Development to foster parents who look after children taken into care under the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46 ("CFCSA").

The British Columbia Supreme Court cited McLachlin C.J. in *Auton*, in which she pointed out that the Supreme Court of Canada had repeatedly held that the legislature is under no obligation to create a particular benefit.[135] McLachlin C.J. stated, "It [the government] is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner (*Auton* SCC, para. 41)." She then stated:

> A statutory scheme may discriminate either directly, by adopting a discriminatory policy or purpose, or indirectly, by effect. Direct discrimination on the face of a statute or in its policy is readily identifiable and poses little difficulty. Discrimination by effect is more difficult to identify... assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an arbitrary exclusion of a particular

> group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. *Thus, the question is whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address* [emphasis added].[136]

The B.C. Human Rights Tribunal that ruled in *McGrath* characterized the service at issue as "services to vulnerable children" and concluded that custodial parents were entitled to be paid the same amounts as foster parents.[137] However, the B.C. Supreme Court rejected this definition of the service as too broad. The Tribunal erred "in placing incorrect emphasis on guiding principles and broad policy statements instead of the legislation itself, the benefits it confers and the specific public the services are directed towards."[138]

The B.C. Supreme Court in *McGrath* concluded, "As in *Auton***,** [the grandmothers] seek something not contemplated by the legislative scheme: full custodial rights, plus the same payments paid to foster parents — who have no custodial rights."[139] Most of the discrimination claims made by the grandmothers were dismissed.

It is difficult to blame the grandmothers for failing to comprehend why foster parents should receive $500 dollars a month more than they do for providing care for vulnerable children. Unfortunately, the decision of the B.C. Supreme Court does not make it any clearer. The answer seems to be: the government intended to pay foster parents more, and the legislative scheme is constructed to do that. The deference to the legislated *status quo* that is inherent in this analysis, and the lack of grounding in the goals of human rights legislation, or any real analysis, is disturbing.

The *Eldridge/Auton* dichotomy now presents a serious problem in human rights jurisprudence. Determining how the reasoning in *Auton* and *Eldridge* should apply in disability cases is important. Earlier decisions regarding the interpretation of "services customarily available to the public" like *University of British Columbia v. Berg* [140] and *Gould v. Yukon Order of Pioneers*[141] were decided before *Auton* and *Eldridge* and they no longer provide adequate guidance.

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 social world in order to enable a person with a disability to participate fully....[142]

The enthusiasm of both government respondents and courts for the *Auton* analysis threatens 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.

At the time of writing the *Moore* case is under appeal to the Supreme Court of Canada. *Moore* provides the Court with an opportunity to turn 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.

The way forward

We see disturbing trends in the jurisprudence. Employers are making efforts to narrow their obligations under human rights legislation by pushing the definition of discrimination away from adverse effects and back to stereotype. At the same time, governments and public agencies are resisting fiercely the challenges from people with disabilities to make services more inclusive and more responsive to the realities of their lives.

As we write, we see major knots and confusions in the jurisprudence that demand untangling and clarification if we are to hold on to, and build on, the gains made in *Meiorin* and *Grismer*. For many people with disabilities, the duty to accommodate as it is being applied today, simply does not go far enough to ensure their equality and inclusion in the world they live in. The big idea of accommodation is not only individual, but systemic, and not only after-the-fact, but pro-active.

In *Meiorin*, the Supreme Court of Canada rejected the notion that accommodation means we do not change procedures or services, we simply "accommodate" those who do not quite fit. They rejected the idea that it is enough to simply make some concessions to those who are "different", to accommodate them on the margins, rather than working for genuine inclusiveness.

However, in the post-*Meiorin* and *Grismer* case law, efforts are being 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, which defeat legitimate claims and distort accommodation analysis; and adopting too narrow definitions of services.

Once more, it is essential to slice through knots. In our view, stereotype can be only one part of a definition of discrimination, sometimes illuminating, never necessary. Formalistic versions of comparator group analysis have plagued the interpretation of the right to equality and non-discrimination for decades. We have to keep escaping from them, and they clearly do not belong in accommodation cases, where, as noted, there is an underlying, always present comparison being made between access and outcomes for disabled persons and non-disabled persons.

The question of whether a case is more like *Auton* or more like *Eldridge* is, at once, too small and too open to manipulation. There are some institutions and services — and general education is one of them — access to which is simply fundamental to the equality of people

with disabilities, regardless of whether a specific benefit, can, through a process of rhetorical manipulation, be characterized as non-existent.

In disability cases about access to government programs, *Auton* has created a practically impenetrable shield. There is a 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*.

Much more promising is the approach of the Supreme Court of Canada in *VIA Rail*, in which, as noted, the Supreme Court of Canada reconfirmed that human rights legislation imposes positive obligations on service providers to implement inclusive standards in the design of services.[143] If access to an institution or service is fundamental to the equality of people with disabilities and the sought-after accommodation is integral to it, denial of the accommodation should be understood as *prima facie* discrimination. If there is a question about whether providing the accommodation would cause undue hardship, that question should be openly and transparently disputed, rather than being preempted by defining a service or benefit as non-existent.

The *Auton* assertion that the right to equality applies only to benefits that already exist, in combination with the tendency to define the benefit very narrowly, is inimical to the human rights of people with disabilities. It is time that the Supreme Court of Canada moved beyond *Auton*. It is not furthering the values underlying s. 15 of the *Charter* or human rights legislation.

Since *Meiorin* and *Grismer* were handed down, 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*"),[144] which Canada ratified in 2010.[145] The *Convention* restates and reinforces the promise of transformation and inclusion that the two landmark Supreme Court of Canada decisions in *Meiorin* and *Grismer* hold out.[146]

Canadian human rights law must now be interpreted in light of the *CRDP*, which guarantees rights to accessibility,[147] access to justice,[148] independent living and community inclusion,[149] education,[150] employment,[151] and an adequate standard of living.[152]

The *CRDP* sets out key concepts and principles that must inform the interpretation of disability rights. First and foremost, it understands the experience and definition of disability as being constructed by societal structures like the built environment, work force arrangements and social programs, which exclude people with disabilities because of their reliance on able-bodied norms. To overcome barriers imposed by an "able-bodied only" approach, the *CRDP* promotes the concept of "universal design", which it defines as "the design of

products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design."[153]

The *CRDP* enunciates a set of principles specific to disability, which can add force and clarity to Canadian human rights law:

a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
b. Non-discrimination;
c. Full and effective participation and inclusion in society;
d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
e. Equality of opportunity;
f. Accessibility;
g. Equality between men and women;
h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.[154]

Drawing on various international human rights instruments, the Preamble of the *CRDP* contains twenty-five clauses dealing with the various dimensions of equality including dignity, autonomy, and inclusion. Oddny Arnardóttir writes that the *CRDP* showcases the "depth and complexities involved in the principle of equality" and the need to apply this deeper understanding of equality to the legal interpretation of disability rights.[155]

Of utmost importance, however, is that the *Convention*, like other international human rights treaties, is not just an articulation of the substance of rights, but of the obligations of States Parties to fulfill those rights. So, for example, Article 5.3 specifies that: "In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided." This clause imposes a positive obligation on Canada to take proactive steps to remove barriers and guarantee equality to people with disabilities.

Other provisions also underscore the proactive requirement of the *CRDP*. For example, unlike most other international human rights instruments, Article 33.2 of the *CRDP* requires State Parties to establish a national framework and a mechanism for pro-active monitoring of implementation.

Additionally, in the *Convention*, as in the *International Covenant on Economic, Social and Cultural Rights*,[156] economic, social and cultural rights, such as the right to work and the right to education, are to be progressively realized. The Committee on Economic, Social and Cultural Rights interprets the principle of progressive realization, when applied to persons with disabilities, to mean that "States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages…flowing from their disability."[157]

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. The Supreme Court of Canada should be in step. *Meiorin* established the duty to accommodate as a critical component of substantive equality for persons with disabilities. But a renewed recognition from the Court is needed that the fulfillment of the rights of persons with disabilities requires far-reaching, deliberate and systemic change to workplaces and services. In the 21st century, adjudicators and governments should be striving to move us, with all speed, towards the goal of full inclusion.

Endnotes

1 *Canadian Odeon Theatres Ltd. v. Huck* (1985), 6 C.H.R.R. D/2682 (S.K.C.A.) leave to appeal to SCC refused, (1985) 60 N.R. 240. Some jurisdictions, notably Ontario and British Columbia, recognized adverse effect discrimination in early cases. Ontario named it "constructive discrimination" and remedial orders in some cases required reasonable accommodation.

2 Cam Crawford, "Personally Speaking: Poverty and Disability in Canada", (Council of Canadians with Disabilities). Online: http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/demographic-profile/personally-speaking . Cam Crawford is the Senior Research Advisor to Canadian Association for Community Living.

3 *2010 Federal Disability Report: The Government of Canada's Annual Report in Disability Issues*, (Human Resources and Skills Development Canada, 2010), ch 1. Online: http://www.hrsdc.gc.ca/eng/disability_issues/reports/fdr/2010/page00.shtml.

4 Cam Crawford, "Trying to 'Make the Grade': Education, Work-Related Training", (Council of Canadians with Disabilities). Online: http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/demographic-profile/trying-to-make-the-grade.

5 Ibid.

6 Ibid.

7 Cam Crawford, "Low Household Income and Disability: Income Sources, Employment and Employment Discrimination", (Council of Canadians with Disabilities). Online: http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/demographic-profile/low-household-income-and-disability.

8 Ibid.

9 *Supra*, note 4.

10 Ibid.

11 Ibid.

12 *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 U.N.T.S. 3, G.A. Res 61/106, (entered into force 3 May 2008). [*CRPD*]. Online: http://www.un.org/disabilities/convention/conventionfull.shtml .

13 For a critique of the pre-*Meiorin* problems see: Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996), 75 Can. Bar Rev. 433.

14 Judy Fudge & Hester Lessard, "Challenging Norms and Creating Precedents: The Tale of a Woman Firefighter in the Forests of British Columbia", in Judy Fudge & Eric Tucker, eds., *Work on Trial: Canadian Labour Law Struggles* (Irwin Publisher and Osgoode Legal History Society, 2010), 315, at 344.

15 *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union*, [1999] 3 S.C.R. 3, at para. 29 [*Meiorin* SCC], citing Dickson C.J. in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at 931.

16 *Meiorin* SCC at para. 29.

17 *Large v. Stratford (City of),* [1995] 3 S.C.R. 733 at paras. 30-34 per Sopinka J.

18 *Meiorin* SCC at para. 38.

19 At para. 41 citing Day & Brodsky, "The Duty to Accommodate: Who Will Benefit?", *supra*, note 13.

20 *Meiorin* SCC at para. 41, citing *Action travail des femmes v. C.N.R*, [1987] 1 S.C.R. 1114.

21 *Meiorin* SCC at para. 42.

22 The Court referred to the stated purposes of the British Columbia Human Rights Code: *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 3

a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

c) to prevent discrimination prohibited by this Code;

d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

23 *Ontario (Human Rights Commission) v. Simpsons Sears*, [1985] 2 S.C.R. 536, [*O'Malley* SCC].

24 In support of this proposition the Court cited both its leading statutory human rights decisions such as *O'Malley* SCC and *Bhinder v. Canadian National Railway Co.,* [1985] 2 S.C.R. 561 and its early s. 15 *Charter* decisions.

25 *Meiorin* SCC at para. 54.

26 The Court states at para. 65: Some of the important questions that may be asked in the course of the analysis include:

(a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

(b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

(c) Is it necessary to have <u>all</u> employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud* (*Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970), *supra* at 992–96 [D/436–D/439], the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.

27 *Meiorin* SCC at para. 68.

28 Although Pothier described *Meiorin* as a significant turning point, she also cautioned that the *Meiorin* judgement 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. F. 19.

29 Yvonne Peters, "From Tinkering to Transformation: Meiorin Breathes New Hope into Reasonable Accommodation", (Paper presented by F. Kelly, Y. Peters and S. O'Donnell on "The Duty to Accommodate: the promise, the reality, the limitations," delivered at a conference on

"Transforming Women's Equality: Equality Rights in the New Century," sponsored by West Coast LEAF, in Vancouver 4-7 November 1999), at 4 cited by Pothier, *supra*, note 28, at 25 .

30 Karen Schucher, "Weaving Together the Threads: A New Framework for Achieving Equality in Workplace Standards" (2000), 8 C.L.E.L.J. 325, at 338.

31 Melina Buckley & Alison Brewin, *Transforming Women's Future: A 2004 Guide to Equality Rights Theory and Law*, (Vancouver: West Coast Legal Education and Action Fund, 2004), at 22.

32 Fudge & Lessard, *supra*, note 14, at 346; See also: Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*", Case Comment, (2000-2001), 46 McGill L. J. 533. At 558 she notes: "*Meiorin* …reinforces the importance of redressing systemic inequalities that result in exclusion and prejudice through institutional transformation and not merely by individual special treatment."

33 Fudge and Lessard suggest that *Meiorin* is actually a case of direct discrimination because the fitness standard was developed without taking women's physiological norms into account. See Fudge & Lessard, *supra*, note 14, at 345.

34 *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union* (1996), 58 L.A.C. (4th) 159, at 196 [*Meiorin* LAC].

35 *Meiorin* LAC at 191, 196.

36 *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union*, [1997] 30 C.H.R.R. D/83 (BCCA).

37 *Meiorin* SCC, (Factum of Respondent at para. 65).

38 *Meiorin* LAC at para. 180.

39 *Meiorin* SCC at para. 12.

40 *Meiorin* SCC at paras. 72-79.

41 Although the government did not press this argument through oral submissions to the Supreme Court of Canada, it reiterated them in its factum in the Supreme Court of Canada.

42 *Meiorin* SCC at paras. 13, 23, 69, 70.

43 *Meiorin* SCC at paras. 13, 69.

44 *Meiorin* SCC at para. 11.

45 *Meiorin* SCC, (Factum of Respondent at para. 65).

46 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [*Grismer* SCC].

47 *Grismer* SCC at para. 22.

48 *Grismer* SCC at para. 33.

49 *Grismer* SCC at para. 23.

50 Dianne Pothier, "Tackling Disability Discrimination at Work: A Systemic Approach" (2010), 4:1 M.J.L.H. 17, at 22, 27.

51 If stereotyping is an essential element of discrimination, a lot of cases have been silently over-ruled, including *O'Malley* SCC, *supra*, note 23 and *Eldridge v. British Columbia Attorney General)*, [1997] 3 S.C.R. 624 [*Eldridge* SCC]. To find that the facts of these cases demonstrate any stereotyping would require an incredible stretch. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 72 the Court expressly stated, "it is not *only* through the 'stereotypical application of presumed group or personal characteristics' that discrimination can occur…."

52 *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161 [*McGill* SCC].

53 *Syndicat des employés de l'Hôpital Général de Montréal c. Sexton*, [2004] J.Q. no 7555 (QL).

54 *Syndicat des employés de l'Hôpital général de Montréal c. Centre universitaire de santé McGill (Hôpital général de Montréal)*, 2005 QCCA 277.

55 *Syndicat des employés de l'Hôpital général de Montréal c. Centre universitaire de santé McGill, Hôpital général de Montréal*, [2005] C.S.S.R. no 233 (QL).

56 *McGill* SCC at para. 11.

57 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [*Andrews* SCC].

58 *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, at 538.

59 *McGill* SCC at paras. 48-49.

60 *McGill* SCC at para. 53.

61 *McGill* SCC at para. 56.

62 *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111*, 2010 BCCA 447, 71 C.H.R.R. D/134. It should be noted that the decision-maker of first instance, the B.C. Human Rights Tribunal, (*National Automobile, Aerospace, Transportation and General Workers of Canada (CAW - Canada) Local 111 v. Coast Mountain Bus Company (No. 9)*, 2008 BCHRT 52, 62 C.H.R.R. D/201 explicitly relying on *Eaton* SCC (*infra*, note 63) 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 (at paras. 472-473). The 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. On judicial review of the Tribunal's decision the B.C. Supreme Court found that the Tribunal erred in finding systemic discrimination because its reasoning was contrary to the opinion of Abella J. in *McGill* (*supra*, note 52) and the Program was not based on stereotypical or arbitrary assumptions. The Court did, however, uphold some of the individual complaints in the case (*Coast Mountain Bus v. CAW Canada,* 2009 BCSC 396 at paras. 97-99, 66 C.H.R.R. D/428).

63 *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [*Eaton* SCC].

64 *Eaton* SCC at para. 67.

65 *Meiorin* SCC at para. 41.

66 *Meiorin* SCC at para. 68.

67 *Meiorin* SCC at para. 41.

68 *Meiorin* SCC at paras. 41-42.

69 *Meiorin* SCC at para. 42.

70 *Meiorin* SCC at para. 41.

71 *Meiorin* SCC at para. 54, *Grismer* SCC at para. 20.

72 *British Columbia (Public Service Agency) v. BCGSEU*, 2008 BCCA 357, 63 C.H.R.R. D/1 leave to appeal to SCC refused, [2008] S.C.C.A. No. 460 (QL) [*Gooding* BCCA].

73 *British Columbia v. British Columbia Government and Service Employees' Union (Gooding Grievance)* (2007), 158 L.A.C. (4th) 402.

74 *Gooding* BCCA at para. 11.

75 *Gooding* BCCA at para. 15.

76 Below we consider more closely recent decisions of the Ontario and British Columbia Courts of Appeal in statutory human rights cases that circumvent the minority decision in *McGill* SCC. It should be noted that there are numerous cases in which courts and tribunals have referred to the

minority decision in *McGill* including: *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 71 per Bastarache J.; *International Forest Products Ltd v. Sandhu*, 2008 BCCA 204, CHRR Doc. 08-519 [*International Forest Products*]; *Mortillaro v. Ontario (Minister of Transportation)*, 2011 HRTO 310, CHRR Doc. 11-0810; *Dufferin-Peel Catholic District School Board v. OECTA* (2008), 177 L.A.C. (4th) 362*; Baum v. City of Calgary*, 2008 ABQB 791, 65 C.H.R.R. D/392; *Goode v. Interior Health Authority*, 2010 BCHRT 95, 70 C.H.R.R. D/71; *Boehringer Ingelheim (Canada) Ltd./Ltée. v. Kerr*, 2010 BCSC 427, 68 C.H.R.R. D/118, aff'd 2011 BCCA 266; *Cassidy v. Emergency Health and Services Commission and others (No. 2)*, 2008 BCHRT 125, 62 C.H.R.R. D/459, judicial review allowed, 2011 BCSC 1003; *U.S.W., Local 1-423 v. Weyerhaeuser*, 2009 BCHRT 328, 68 C.H.R.R. D/145 [*Weyerhaeuser*]; *C.S.W.U. Local 1611 v. SELI Canada and others (No. 8)*, 2008 BCHRT 436, 65 C.H.R.R. D/277, judicial review by BCSC requested, Vancouver Registry, S-090740. 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 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.

77 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law* SCC].

78 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, [2008] 2 S.C.R. 483 [*Kapp* SCC], discussed below. Leading pre-*Kapp* cases concerning the application of *Law* SCC include: *Gwinner v. Alberta (Human Resources and Employment),* 2002 ABQB 685, 44 C.H.R.R. D/52, aff'd 2004 ABCA 210, leave to appeal to SCC refused [2004] S.C.C.A. No. 342 (QL); *B.C.G.E.U. v. British Columbia (Public Service Employee Relations Comm.)*, 2002 BCCA 476, CHRR Doc. 02-234 [*Reaney*]; *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, 2003 BCCA 323, 15 B.C.L.R. (4th) 58, [*The Teachers' Case*]; *Vancouver Rape Relief Society v. Nixon (No. 2)*, 2005 BCCA 601, 55 C.H.R.R. D/67, leave to appeal to SCC refused, [2006] S.C.C.A. No. 365 (QL) [*Nixon*]; *Health Employers Assn. of British Columbia v. B.C.N.U.*, 2006 BCCA 57, CHRR Doc. 06-905, leave to appeal to SCC refused, [2006] S.C.C.A No. 139 (QL); *Kemess Mines Ltd. v. I.U.O.E., Local 115*, 2006 BCCA 58, CHRR Doc. 06-906, leave to appeal to SCC refused, [2006] S.C.C.A No. 140 (QL).

79 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: Leslie A. Reaume, "Postcards from O'Malley: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the Charter", in F. Faraday, M. Denike, M.K. 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). Reaume, and Schucher and Keene 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, and 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; shifting the evidentiary burden to require complainants to disprove respondent defences at the *prima facie* case stage of a complaint. Denise Réaume argues against the importation of *Law*'s contextual factors into statutory human rights adjudication, in "Defending the Human Rights Codes from the *Charter,*" 9 J.L. & Equality [forthcoming in 2012].

80 *Law* SCC at para. 62.

81 *Law* SCC at para. 51.

82 *Kapp* SCC, *supra*, note 78.

83 *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396 [*Withler* SCC].

84 At note 1 in *Kapp* SCC, the Court cites: Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001), 27 Queen's L.J. 299; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001), 80 Can. Bar Rev. 299; Donna Greschner, "The Purpose of Canadian Equality Rights" (2002), 6 Rev. Const. Stud. 291; Debra M. McAllister, "Section 15 — The Unpredictability of the *Law* Test" (2003-2004), 15 N.J.C.L. 3; Christopher D. Bredt & Adam M. Dodek, "Breaking the *Law*'s Grip on Equality: A New Paradigm for Section 15" (2003), 20 S.C.L.R. (2d) 33; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003), 48 McGill L.J. 627; Daniel Proulx, "Le concept de dignité et son usage en contexte de discrimination: deux Chartes, deux modèles", [2003] R. du B. (numéro spécial) 485; Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 Windsor Y.B. Access Just. 111; Christian Brunelle, "La dignité dans la *Charte des droits et libertés de la personne*: de l'ubiquité à l'ambiguïté d'une notion fondamentale", in *La Charte québécoise: origines, enjeux et perspectives*, [2006] R. du B. (numéro thématique) 143; R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007), 70 Sask. L. Rev. 1; Peter W. Hogg, *Constitutional Law of Canada* 5th ed., loose-leaf, (Carswell, 2007), Supp. 2007, vol. 2, at 55-28 and 55-29; Alexandre Morin, *Le droit à l'égalité au Canada*, (LexisNexis, 2008), at 80-82.

85 At note 2 in *Kapp* SCC, the Court cites Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 J.L. & Equality 81; Gilbert & Majury, *supra*, note 84; Beverley Baines, "Equality, Comparison, Discrimination, Status", in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real*, *supra*, note 79, 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 C.J.W.L. 37; Bruce Ryder, Cidalia C. Faria & Emily Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 S.C.L.R. (2d) 103; Mayo Moran, "Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee", in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns*, *supra*, 71; Sheila McIntyre, "Deference and Dominance: Equality Without Substance", in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns*, *supra*, 95.

86 *Kapp* SCC at paras. 22-24.

87 *Withler* SCC at paras. 35-37. It is somewhat confusing that in *Withler*, Abella J. uses different wording at different points. At para. 30 of the judgment, she sets out a test for establishing discrimination, which suggests that showing prejudice or stereotyping is an essential element. This is not supported by the analysis in paras. 35 and 37 which clearly recognizes that perpetuating disadvantage is enough by itself.

88 *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, 71 C.H.R.R. D/1 [*Tranchemontagne* ONCA].

89 *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B.

90 *Tranchemontagne* ONCA at para. 90.

91 Ibid. at para. 121.

92 Ibid.

93 *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56, 67 C.H.R.R. D/332, leave to appeal to SCC refused, [2010] S.C.C.A No. 128 (QL) [*Armstrong*].

94 *British Columbia (Ministry of Education) v. Moore*, 2010 BCCA 478, 71 C.H.R.R. D/238, aff'g 2008 BCSC 264, leave to appeal to SCC granted, [2011] S.C.C.A. No. 9 (QL) [*Moore* BCCA]. At issue in the *Moore* case is a claim that the B.C. 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 which provide special assistance to students with severe learning 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 students with severe learning disabilities. The claim was successful before the B.C. Human Rights Tribunal, (2005 BCHRT 580, 54 C.H.R.R. D/245). But the well reasoned judgment of the Tribunal was overturned on judicial review, based on the B.C. 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. Rowles J.A. dissented.

95 Rowles J.A. notes further that in numerous statutory human rights cases, the definition of discrimination articulated in *Andrews* has been cited, including: *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, at para. 20 [*Gibbs* SCC]; *McGill* SCC at para. 47, Abella J. concurring**;** *International Forest Products*, *supra*, note 76, at paras. 24–32.

96 *Moore* BCCA at para. 46.

97 *Moore* BCCA at para. 51. Rowles J.A. expresses agreement with Leslie Reaume, *supra*, note 79, at 375, that *Charter* principles and the *Law* analysis should appropriately inform, but not dominate, the statutory analysis.

98 *Moore* BCCA at para. 52.

99 *Moore* BCCA at para. 164.

100 *Andrews* SCC at para. 38

101 *Kelly v. B.C. (Ministry of Public Safety and Solicitor General) (No. 3)*, 2011 BCHRT 183, CHRR Doc. 11-0183.

102 At paragraph 7 the Tribunal says that it accepts that Mr. Kelly, as an Aboriginal inmate, was in a particularly vulnerable position.

103 The case of *Tomen v. O.T.F. (No. 3)* (1989), 11 C.H.R.R. D/223, cited in *Tomen v. O.T.F. (No. 4)* (1994), 20 C.H.R.R. D/257 (Ont. Bd.Inq.) is illustrative. In that case a successful human rights complaint was brought against the Ontario Women's Teachers Federation of Ontario, ostensibly because women 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 light 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. In contrast, the Tribunal in *Keyes v. Pandora Publishing Assn. (No. 2)* (1992), 16 C.H.R.R. D/148 (a challenge to the policy of a newspaper produced by, for and about women to print letters and articles only from women) decided that Nova Scotia's human rights legislation should be read as though it included a provision analogous to s. 15(2) of the *Charter.* For examples of other ultimately unsuccessful challenges to targeted initiatives and diverse analytical approaches to them, regard may be had to: *Stopps v. Just Ladies Fitness (Metrotown) and D. (No. 3)*, 2006 BCHRT 557, 58 C.H.R.R. D/240 (a challenge to a women's only gym and fitness facility; *Nixon*, *supra*, note 78, (a challenge to a service provided by and for women fleeing male violence); *Armstrong*, *supra*, note 93 (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.

104 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: Gilbert & Majury, *supra*, note 84, at 138. In *Withler* SCC, *supra*, note 83, the Supreme Court of Canada canvassed concerns that have been raised about the use of comparator group analysis and warned at para. 2 that "care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the 'proper' comparator group."

105 *Moore* BCCA, *supra*, note 94; *British Columbia (Ministry of Education) v. Moore*, 2008 BCSC 264, 62 C.H.R.R. D/289; *Moore v. B. C. (Ministry of Education, 2nd School District No. 44)*, 2005 BCHRT 580, 54 C.H.R.R. D/245.

106 *Gibbs* SCC, *supra*, note 95; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Tranchemontagne v. Ontario (Dir., Disability Support Program)*, *supra*, note 88.

107 See the Factum of the Council of Canadians with Disabilities filed in *Moore* in the B.C. Court of Appeal, online: http://www.ccdonline.ca/en/humanrights/litigation/moore-factum. This factum provides a more extensive analysis of the problems with applying comparator group analysis in accommodation cases.

108 The Tribunal decision in *First Nations Child and Family Caring Society*, *(First Nations Child and Family Caring Society of Canada v. Canada (Attorney General) (No. 3)*, 2011 CHRT 4, CHRR Doc. 11-3017, judicial review by FC requested, Ottawa Registry, T-630-11 [*FNCFCS*]) is another example of comparator group analysis being used to derail a claim, but here it works in a quite different way. The Tribunal dismissed a complaint filed by the First Nations Child and Family Caring Society ("FNCFCS") and the Assembly of First Nations ("AFN") against Indian and Northern Affairs Canada ("INAC"). The complainants sought funding from INAC for child welfare and protection services on reserves at similar levels to that provided by provinces and territories for child welfare and protection services provided off-reserve. INAC brought an application to dismiss the complaint prior to the hearing on the merits, and was successful.

INAC provides funding to First Nations service providers in approximately 447 of 663 First Nations. The FNCFCS alleges that a First Nation child residing on a reserve receives less child welfare and protection services than another Canadian child, possibly living across the highway, not on reserve. They allege that the provinces fund child welfare to a significantly greater extent than INAC does and that INAC's under-funding of child welfare services has a systemic discriminatory impact on the lives of Aboriginal children residing on reserves.

INAC argued that the complaint must be dismissed because it rested on a comparison between two different service providers, the federal government and the provincial government. The Tribunal found that it was required to find that "adverse differentiation" exists between the alleged victim and someone else receiving the same services from the same service provider. Since in this case, the recipients (children on reserve vs. children off-reserve) and the service providers are different, the Tribunal concluded that in this case the comparator group requirements were not satisfied.

The problem with this application of comparator group analysis is that it means that the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 cannot address the discrimination inherent in systems that are targeted to particular groups but provide inferior services, as long as those services are provided by different entities. The analysis in *FNCFCS*, for example, would appear to make it impossible to use human rights legislation to dismantle the system of residential schools, if they still existed, because no comparison would be permitted between the treatment, or kinds of education provided or funded by the federal government in residential schools for Aboriginal children and the treatment and kinds of education provided by the provinces principally for non-Aboriginal children. If the Tribunal is correct in its interpretation of the *Canadian Human Rights Act*, it is a poor instrument for tackling problems of inferior quality in targeted programs.

This interpretation also has implications for groups protected by other grounds. Human rights

legislation can help girls who want to play with boys, and demand access to their sports teams. However, it may not help girls improve the notoriously inferior funding, or access to ice time for girls-only hockey, if the girls' and boys' hockey teams are organized by different associations.

When groups want to retain the targeting (as FNCFCS does because it wants a First Nations-run child welfare system for on-reserve children) but also wants to eliminate discrimination in the form of poorer funding and inferior supports, that, apparently, cannot be addressed.

Disability cases may also run into a dead-end. For example, in the transportation field, segregated and specialized transportation services are often provided for persons with disabilities by charities, or non-governmental organizations. The levels of service they provide are often poor, requiring booking in advance and long wait times. Challenging the difference in treatment of disabled and non-disabled transportation users is extremely difficult if the *FNCFCS* analysis holds, because it renders it impossible to compare levels of service, even where the funder is public, where the service provider is different.

This seems to indicate that basic questions need to be asked about comparator group analysis: what is it for? It should illuminate how a policy or practice works. But if comparator group analysis leads to the conclusion that there is no discrimination in a case like *FNCFCS*, where logic and historical awareness indicate there is a genuine human rights issue, it should not be allowed to close the door.

109 The Ontario Divisional Court judicially reviewed the decision of the Ontario Human Rights Tribunal in *Lane v. ADGA Group Consultants Inc*. (2008), 64 C.H.R.R. D/132 (Ont. Div. Ct.), reviewing 2007 HRTO 34, 61 C.H.R.R. D/307 [*Lane* Ont. Div. Ct.].

110 *Lane* Ont. Div. Ct. at para. 88.

111 *Lane* Ont. Div. Ct. at para. 91.

112 2004 SCC 65, [2004] 3 S.C.R. 357.

113 Andrea Wright has argued that although comparative evidence may, in some cases, assist in illuminating adverse treatment, its use should not be elevated to a conclusory status, in "Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate", in F. Faraday M. Denike & M. K. Stephenson, eds, *Making Equality Rights Real*, *supra*, note 79, 409, at 410.

114 *Eaton* SCC, *supra*, note 63.

115 *Eaton* SCC at para. 67.

116 *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15, [2007] 1 S.C.R. 650 [*VIA Rail* SCC] at para. 162.

117 *VIA Rail* SCC at paras. 118 – 129.

118 See, for example, *O'Malley* SCC and *Meiorin* SCC.

119 *Eaton* SCC at para. 66.

120 *Andrews* SCC at para. 31.

121 "Services customarily available to the public" is the language of the *British Columbia Human Rights Code*, s. 8(1). Human rights legislation in other jurisdictions contains similar language.

122 *Supra*, note 51.

123 2004 SCC 78, [2004] 3 S.C.R. 657 [*Auton* SCC].

124 *Moore* BCCA, *supra,* note 94.

125 *New Brunswick (Social Development) v. New Brunswick (Human Rights Comm.)*, 2010 NBCA 40, 71 C.H.R.R. D/6 leave to appeal to SCC refused, [2010] S.C.C.A No. 313 (QL). In this case, parents of a mentally disabled adult son (W.A.) claimed that his placement by the province in a home in Maine, hundreds of miles away, constituted discrimination because he should be provided with care in his own community. Because the Government of New Brunswick objected

to this case going forward, the New Brunswick Court of Appeal addressed the threshold question of whether there was an arguable case to be heard. The Court ruled that there was not. It followed the reasoning of the Supreme Court of Canada in *Auton*, and determined that there was no service provided by the Province that was denied or provided in a discriminatory fashion. The only relevant service was the Level IV-Long Term Care Program, and W.A. was not denied access to a Level IV residential facility in New Brunswick. Those facilities simply could not provide appropriate care. This was a case in which there was no facility in the Fredericton area, or in the Province, that provided the level of care needed by W.A. The Court of Appeal ruled that there was no arguable case that the complainant was denied access to a service that was available to the public.

126 *Wonnacott v. Prince Edward Island (Dept. of Social Services and Seniors)* (2007), 61 C.H.R.R. D/49 (P.E.I.H.R.P.). In this case, parents of disabled children filed complaints alleging that three different aspects of the Prince Edward Island Disability Support Program ("DSP"), which provides supports, technical aids, and financial support to disabled children and youth and their parents, were discriminatory. The Prince Edward Island Human Rights Panel agreed that the screening tool used to determine eligibility was weighted in favour of those with physical disabilities rather than mental disabilities, and also that the income testing discriminated against parents with children under 18. However, the Panel dismissed the allegation that overall monthly caps on the amount of financial support available and lifetime caps on home and vehicle modifications are discriminatory. Relying on *Auton*, the Panel reasoned that the DSP does not promise that all needs will be met, stating, "Although this Panel is not examining a legislative scheme [as in *Auton*], we would apply a similar type of reasoning to our assessment of the capping of services under the DSP Policy. We do not find on the face of it that the Policy promises to cover all needs for disabled Islanders who qualify. Failure to provide for all unmet needs is not discriminatory. Legislators, and in this case public officials responsible to them, are entitled to deference in allotting finite resources among vulnerable groups (see *Auton, supra,* at § 14)." The Panel ruled that the complainants had not been singled out discriminatorily by the application of caps to their financial support, and could not show differential treatment.

127 In two troubling decisions, *Benson v. Saskatchewan (Dept. of Health)* (2005), CHRR Doc. 05-772 (S.K.H.R.T.) and *Benson v. Saskatoon School Div. No. 13* (2006), CHRR Doc. 06-212 (S.K.H.R.T.), the Saskatchewan Human Rights Tribunal upheld decisions of the Saskatchewan Human Rights Commission to dismiss complaints filed by Tammy Lynn Benson on behalf of her son Adam who was diagnosed as profoundly hearing impaired at the age of 26 months, and who could not benefit from available services: hearing aides, cochlear implants or oral/aural learning programs. What is noteworthy in both cases is the acceptance by the Commission and the Tribunal of the rationale that it is not discriminatory to provide programs that do not provide equal benefits to children or adults with particular disabilities for the simple reason that the programs were not designed for them.

128 *Cucek v. British Columbia (Ministry of Children and Family Development) (No. 3)*, 2005 BCHRT 247, 53 C.H.R.R. D/123.

129 *Ehrler v. British Columbia (Ministry of Employment and Income Assistance) (No. 3)*, 2006 BCHRT 184, 55 C.H.R.R. D/418. Paula Ehrler filed a complaint alleging that social assistance benefits for persons with disabilities were inadequate and that she and her husband were not informed of the availability of crisis grants, extra nutritional supplements, help returning to work, travel for medical appointments, or extra dental and optical coverage. The Tribunal ruled that Ms. Ehrler had no reasonable prospect of success in proving that the benefits provided, the information required of recipients, or the consequences of overpayments, discriminated against them on the basis of physical or mental disability.

130 *Supra*, note 127.

131 *Supra*, note 126.

132 *Supra*, note 108.

133 Instead, the Tribunal dismissed the complaint on the grounds that there was no proper

comparator. The Tribunal stated at para. 4, "… even if I were to find that INAC is a service provider as asserted by the complainants, the *CHRA* does not allow INAC as a service provider to be compared to the provinces as service providers."

134 2009 BCSC 180, 66 C.H.R.R. D/376 [*McGrath* BCSC].

135 *McGrath* BCSC, at para. 103.

136 *Auton* SCC at para. 42.

137 *McGrath v. British Columbia (Ministry of Children and Family Development),* 2006 BCHRT 484, CHRR Doc. 6-649.

138 *McGrath* BCSC, *supra*, note 134, at para. 154.

139 Ibid. at para. 153.

140 *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

141 *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571.

142 Isabel Grant & Judith Mosoff, "Hearing Claims of Inequality: *Eldridge v. British Columbia (A.G.)*" (1998), 10:1 C.J.W.L. 229, at 231.

143 *Supra*, note 116, at paras. 118 – 129.

144 *CRPD*, *supra*, note 12.

145 Council of Canadians with Disabilities, News Release, "Canada Ratifies United Nations Convention on the Rights of Persons with Disabilities", (11 March 2010). Online: http://www.ccdonline.ca/en/international/un/canada/crpd-pressrelease-11March2010.

146 Writing about the right to education and Article 24 of the *CRDP*, R. Malhotra and R. Hansen 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. R. Malhotra & R. 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 Y.B. Access Just.73.

147 *Supra*, note 12, Article 9.

148 Ibid. Article 13.

149 Ibid. Article 19.

150 Ibid. Article 24.

151 Ibid. Article 27.

152 Ibid. Article 28.

153 Ibid. Article 2.

154 Ibid. Article 3.

155 Oddný Mjöll Arnardóttir, "A Future of Multidimensional Disadvantage Equality?" in Oddný Mjöll Arnardóttir & Gerrard Quinn, eds., *The UN Convention on the Rights of Persons with Disabilities* (Martinus Nijhoff Publishers, 2009), 41, at 46.

156 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 368, (entered into force 3 January 1976).

157 Committee on Economic, Social and Cultural Rights, *General Comment Number 5: Persons with disabilities*, UN Doc. E/1995/22, (9 December 1994), at para. 9. Since the Committee on Economic, Social and Cultural Rights determined in its 2006 review of Canada that "there are no factors or difficulties preventing the effective implementation" of economic, social and cultural rights in Canada, the Committee is clearly of the view that Canada does not lack resources to fully implement economic, social and cultural rights, and there is no legal or practical justification for delay. See *Concluding observations of the Committee on Economic, Social and Cultural Rights, Canada*, E/C.12/CAN/CO/4, E/C.12/CAN/CO/5, (22 May 2006), at para. 10.

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