File: 34040
File: 34041

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

Between

Frederick Moore on behalf of Jeffrey P. Moore

Appellant
(appellant)

And

Her Majesty the Queen in right of the Province of British Columbia as represented by The Ministry of Education and The Board of Education School District 44 (North Vancouver), formerly known as The Board of School Trustees School Division No. 44 (North Vancouver)

Respondents
(respondents)

And

The Attorney General of Ontario, Justice For Children and Youth, The British Columbia Teachers' Federation, The Council of Canadians With Disabilities, The Ontario Human Rights Commission, The Saskatchewan Human Rights Commission, The Alberta Human Rights Commission, The International Dyslexia Association, Ontario Branch, The Manitoba Human Rights Commission, The Learning Disabilities Association of Canada, The Canadian Constitution Foundation, The Canadian Association of Community Living, The Canadian Human Rights Commission, The Commission Des Droits De La Personne et Des Droits De La Jeunesse, The West Coast Women's Legal Education and Action Fund, The First Nations Child and Family Caring Society and The British Columbia Human Rights Tribunal

Interveners

FACTUM OF THE INTERVENER COUNCIL OF CANADIANS WITH DISABILITIES

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c/o CAMP FIORANTE MATTHEWS MOGERMAN
400 – 856 Homer Street
Vancouver, BC V6B 2W5
Tel: (604) 689-7555
Fax: (604) 689-7554
Email: service@cfmlawyers.ca

GWEN BRODSKY, YVONNE PETERS and MELINA BUCKLEY
Counsel for the Interveners,
Council of Canadians with Disabilities (CCD)

OSLER, HOSKIN & HARCOURT LLP
Suite 1900-340 Albert Street
Ottawa, ON K1R 7Y6
Tel: (613) 235-7234-1781
Fax: (613) 235-2867
Email: pwilson@osler.com

PATRICIA J. WILSON
Ottawa Agent for Counsel for the Interveners CCD

TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

AND TO:

COMMUNITY LEGAL ASSISTANCE SOCIETY
300-1140 West Pender Street
Vancouver BC V6E 4GI
Tel: (604) 685-3425
Fax: (604) 685-7611
Email: tkelly@c1asbc.net /
dcousineau@clasbc.net

FRANCES KELLY and DEVYN COUSINEAU
Counsel for the Appellant Jeffrey P. Moore

OSLER, HOSKIN & HARCOURT LLP
Suite 1900-340 Albert Street
Ottawa, ON K1R 7Y6
Tel: (613) 235-7234-1781
Fax: (613) 235-2867
Email: pwilson@osler.com

PATRICIA J. WILSON
Ottawa Agent for Counsel for the Appellant Jeffrey P. Moore

ATTORNEY GENERAL OF BRITISH COLUMBIA LEGAL SERVICES BRANCH
P.O. Box 9280 Stn. Prov. Govt.
Victoria, B.C. V8W 9J7
Tel: (250) 356-8892
Fax: (250) 356-9154
Email: Leah.Greathead@gov.bc.ca
Heidi.Hughes@gov.bc.ca

LEAH GREATHEAD, and E.W. (HEIDI) HUGHES
Counsel for the Respondent Her Majesty the Queen in right of the Province of British Columbia as represented by the Ministry of Education

BURKE-ROBERTSON BARRISTERS & SOLICITORS
70 Gloucester Street
Ottawa, ON K2P OA2
Tel: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

ROBERT E. HOUSTON, Q.C.
Ottawa Agent for the Respondent Her Majesty the Queen in right of the Province of British Columbia as represented by the Ministry of Education

GUILD YULE LLP
2100-1075 West Georgia Street
Vancouver BC V 6E 4G1
Tel: (604) 688-1221
Fax: (604) 688-1315
Email: lnb@guildyule.com / djb@guildyule.com

LAURA N. BAKAN, Q.C.
and DAVID J. BELL
Counsel for the Respondent
The Board of Education Of School District No. 44 (North Vancouver)

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL
1170-605 Robson Street
Vancouver BC V6B 5J3
Tel: (604) 775-2021
Fax: (604) 775-2020
Email: denise.paluck@gov.bc.ca

DENISE PALUCK
Counsel for the Intervener British Columbia Human Rights Tribunal

BENNETT JONES LLP
3400 One First Canadian Place
Toronto ON M5X IA4
Tel: (416) 863-1200
Fax: (416) 863-1716
Email: AgarwaIR@bennettjones.com

RANJAN K. AGARWAL
and DANIEL HOLDEN
Counsel for Canadian Constitution Foundation

SUPREME ADVOCACY LLP
5397 Gladstone Ave. Suite I
Ottawa ON K2P OY9
Tel: (613) 695-8855
Fax (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

MARIE-FRANCE MAJOR
Ottawa Agent for the Respondent
The Board of Education Of School District No. 44 (North Vancouver)

MACLAREN CORLETT
50 O'Connor Street, Suite 1625
Ottawa ON KIP 6L2
Tel: (613) 233-1146
Fax: (613) 233-7190
Email: mchambers@macorlaw.com

MICHAEL A. CHAMBERS
Ottawa Agents for the Intervener British Columbia Human Rights Tribunal

BENNETT JONES LLP
World Exchange Plaza
1900-45 O'Connor Street
Ottawa ON K1P 1A4
Tel: (613) 683-2300
Fax: (613) 683-2323
Email: scotts@bennettjones.com

SHERIDAN SCOTT
Ottawa Agents for
Canadian Constitution Foundation

ARCH DISABILITY LAW CENTRE
425 Bloor Street East, Suite 110
Toronto ON M4W 23R4
Tel: (416) 482-8255
Fax: (416) 482-1254
Email: lattanr@lao.on.ca / letherel@lao.on.ca

ROBERT LATTANZIO and LAURIE LETHEREN
Counsel for the Canadian Association for Community Living

B.C. TEACHERS FEDERATION
100-550 West 6th Avenue
Vancouver BC V5Z 4P2
Tel: (604) 871-1902
Fax: (604) 871-2288
Email: dmacdonald@bctf.ca / rtrask@bctf.ca

DIANE MACDONALD and ROBYN TRASK
Counsel for the B.C. Teachers Federation

PUBLIC INTEREST INQUIRIES BRANCH
180 Dundas Street West, 9th Floor
Toronto, ON M7 A 2R9
Tel: (416) 326-9870
Fax: (416) 326-9867

REEMA KHAWJA and ANTHONY GRIFFIN
Counsel for Ontario Human Rights Commission, Saskatchewan Human Rights Commission, Alberta Human Rights Commission

VIZKELETY DRAPEAU BOURDEAU
360 rue Saint-Jacques Ouest 2e étage
Montreal QC H2Y 1 P5
Tel: (514) 873-5146
Fax: (514) 864-7982
Email: athanassia.bitzakidis@cdpdj.qc.ca

ATHANASSIA BITZAKIDIS
Counsel for La Commission Des droits de la personne et des droits de la jeunesse

COMMUNITY LEGAL SERVICES OTTAWA CENTRE
1 Rue Nicholas Street, Suite 422
Ottawa ON KIN 7B7
Tel: (613) 241-7008
Fax: (613) 241-8680
Email: bossinm@lao.on.ca

MICHAEL BOSSIN
Ottawa Agents for Canadian Association for Community Living

MICHAEL SOBKIN
2-90 Boulevard de Lucerne
Catineau, QC J9H 7K8
Tel: (819) 778-7794
Fax: (819) 778-1740
Email: msobkin@syml.atico.ca

MICHAEL SOBKIN
Ottawa Agent for the B.C. Teachers Federation

GOWLING LAFLEUR HENDERSON LLP
2600-160 Elgin Street
Ottawa, ON KIP lC3
Tel: (613) 786-0212
Fax: (613) 788-3500

BRIAN A. CRANE, Q.C.
Ottawa Agent for Ontario Human Rights Commission, Saskatchewan Human Rights Commission, Alberta Human Rights Commission

NORTON ROSE OR LLP
Royal Bank Plaza South Tower
200 Bay Street Suite 3800
Toronto ON M5J 2Z4
Tel: (416) 216-3943
Fax: (416) 216-3920
Email: rhool.agarwal@nortonrose.com

RAHOOL P. AGARWAL
Counsel for International Dyslexia Association, Ontario Branch

JUSTICE FOR CHILDREN AND YOUTH
425 Yonge Street, Suite 1203
Toronto, Ontario M5B 2E7
Tel: (416) 920-1633
Fax: (416) 920-5855
Email lueya@lao.on.ca / mackinnm@lao.on.ca

MARTHA MACKINNON and ANDREA LUEY
Counsel for Justice for Children and Youth

CANADIAN HUMAN RIGHTS COMMISSION
LITIGATION SERVICES DIVISION
344 Slater Street, 8th Floor
Ottawa, ON KIA I E I
Tel: (613) 943-9162
Fax: (613) 993-3089
Email: brian.smith@chrc-ccdp.gc.ca

BRIAN SMITH
Counsel For Canadian Human Rights Commission

MANITOBA HUMAN RIGHTS COMMISSION
7th Floor - 175 Hargrave Street
Winnipeg, MB R3C 3R8
Tel: (204) 945-3016 / Fax: (204) 945-1292
Email: isha.khan@gov.mb.ca

ISHA KHAN
Counsel for Manitoba Human Rights Commission

NORTON ROSE OR, LLP
45 O'Connor Street, Suite 1600
Ottawa ON KIP lA4
Tel: (613) 780-8604
Fax: (613) 230-5459
Email: sally.gomery@nortonrose.com

SALLY A. GOMERY
Ottawa Agent for International Dyslexia Association, Ontario Branch

GARY STEIN
1355 Bank Street, Suite 406
Ottawa, Ontario KlH 8K7
Tel: (613) 733-0140
Fax: (613) 733-0410

GARY STEIN
Ottawa Agent for Counsel for Justice for Children and Youth

PITBLADO LLP
2500-360 Main Street
Winnipeg, MB R3C 4H6
Tel: (204) 956-0506
Fax: (204) 957-0227
Email: retie@pitblado.com /
henteleff@pitblado.com

YUDE M. HENTELEFF, C.M.Q.C. and DARLA L. RETTIE
Counsel for Learning Disabilities Association of Canada

BERNARD AND PARTNERS
1500-570 Granville Street
Vancouver BC V6C 3PI
Tel: (604) 61-1700
Fax: (604) 681-1788
Email: Beasley@bernardpartners.com

THOMAS BEASLEY
Counsel for Learning Disabilities Association of Canada

ATTORNEY GENERAL OF ONTARIO
4th - 720 Bay Street
Toronto, ON M5G 2K I
Tel: (416) 326-4452
Fax: (416) 326-4015

ROBERT E. CHARNEY and SARAH KRAICER
Counsel for the Attorney General of Ontario

WEST COAST LEAF
555-409 Granville Street
Vancouver B C V6C IT2
Tel: (604) 684-8772
Fax (604) 684-1543
Email: exec@westcoastleaf.org

KASARI GOVENDER
Counsel for West Coast LEAF

NELLIGAN O'BRIEN PAYNE LLP
50 O'Connor Street, Suite 1500
Ottawa, ON KIP 6L2
Tel: (613) 231-8220
Fax: (613) 788-3698
Email: Christopher.Rootham@nelligan.ca

CHRISTOPHER ROOTHAM
Ottawa Agent for Learning Disabilities Association of Canada

BURKE-ROBERTSON BARRISTERS & SOLICITORS
70 Gloucester Street
Ottawa, ON K2P OA2
Tel: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

ROBERT E. HOUSTON, Q.C.
Ottawa Agent for the Attorney General of Ontario

RAVEN, CAMERON, BALLANTYNE & YAZBECK
1600-220 Laurier Avenue West
Ottawa, ON KIP 5Z9
Tel: (613) 567-2901
Fax: (613) 567-2921
Email: adewar@ravenlaw.com

ALISON DEWAR
Ottawa Agent for West Coast LEAF

STIKEMAN ELLIOTT LLP
50 O'Connor Street Suite 1600
Ottawa ON KIP 6L2
Tel: (613) 566-0546
Fax: (613) 230-8877
Email: nmchaffie@stikeman.com
sclarke@stikeman.com

NICHOLAS MCHAFFIE and SARAH CLARKE
Counsel for First Nations Child and Family Caring Society of Canada

STIKEMAN ELLIOTT LLP
50 O'Connor Street Suite 1600
Ottawa ON KIP 6L2
Tel: (613) 566-0546
Fax: (613) 230-8877
Email: nmchaffie@stikeman.com
sclarke@stikeman.com

NICHOLAS MCHAFFIE and SARAH CLARKE
Ottawa Agent for Counsel for First Nations Child and Family Caring Society of Canada

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PART 1 - OVERVIEW

*Members of the public who are disabled **are** members of the public. This is not a fight between able-bodied and disabled persons....*[1]

1. The Council of Canadians with Disabilities ("CCD") represents people with diverse disabilities, and is committed to securing their right to substantive equality. For people with disabilities, the duty to accommodate embedded in human rights legislation, is a crucial tool for achieving substantive equality.

2. CCD has intervened in this appeal because it is deeply concerned about the template for comparator group analysis adopted by the lower courts, reducing the right to accommodation to a right to the same treatment or same accommodation that others receive. The reasoning of the lower courts, if accepted by this Court, threatens to make the duty to accommodate meaningless, thereby profoundly eroding the human rights of persons with disabilities in a wide variety of settings.

3. The imposition of a formal equality template on a disability accommodation case ignores a central accomplishment of human rights jurisprudence in Canada. Through more than two decades of statutory human rights decisions dating back to *Huck v. Odeon Theatres*,[2] tribunals and courts have developed the principle that the right to non-discrimination encompasses a positive duty, known as the duty to accommodate. It requires service providers to make such adjustments as are required to remove barriers to access by persons with disabilities to services customarily provided to the public,[3] subject only to the defence of undue hardship, proof of which is not easily discharged.

4. The question in this case is this: Does the legal duty to accommodate persons with disabilities still exist, or has it been supplanted by a template for comparator group analysis that is intended to address *differential treatment* of similarly situated individuals (direct

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[1] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650 at para. 221 [*VIA Rail*].
[2] *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 [*Huck*].
[3] Hereinafter referred to as services.

discrimination), but that is not designed to remedy the *adverse effects* on persons with disabilities of exclusionary rules and practices that are neutral on their face?

5. From the perspective of CCD this appeal is about ensuring that the duty to accommodate continues to be interpreted and applied in a manner consistent with its remedial purpose of social inclusion rather than being thwarted by formal equality thinking.

6. Only if the legal duty to accommodate remains strong can it fulfill its remedial purpose. Keeping the duty to accommodate strong requires that: (a) disability be taken into account to the full extent necessary to remove barriers to equality; (b) service providers be understood to have positive duties *to act* to make public services accessible; (c) discrimination analysis be responsive to complaints about the disparate effects of seemingly neutral rules and practices on people with disabilities; and (d) the framework for a *bona fide* and reasonable justification defence to inadequate accommodation, established by this Court in *Meiorin*[4] and *Grismer*,[5] be rigorously observed and applied.

7. CCD offers no comments on the facts outlined by the appellant and the respondents.

PART 2 - POINTS IN ISSUE

8. CCD submits that the courts below erred in employing a model of comparator group analysis that is completely ill-suited to the adjudication of a disability accommodation complaint. In particular, the courts erred in determining that to prove discrimination, a disabled student seeking accommodation in relation to general public education must establish differential treatment by showing that the specific accommodation sought is provided to others.

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[4] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 54 [*Meiorin*].

[5] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at paras. 12, 16-17, 20-22 [*Grismer*].

PART 3 - STATEMENT OF ARGUMENT

The Remedial Purpose Of The Duty To Accommodate Creates Positive Obligations

9. This Court has held that human rights legislation has a unique quasi-constitutional nature, and that it is to be given a large, purposive and liberal interpretation to advance the broad remedial policy considerations underlying it.[6]

10. Accommodation can take various forms. Leading cases on accommodation reveal something of the range: allowing a wheel chair user to place his chair in the seating area of the theatre;[7] adapting driving licence testing procedures;[8] making standards for employment fitness testing inclusive;[9] making health care services accessible to deaf and hard of hearing persons;[10] and making the design of newly purchased railway cars capable of accommodating wheel chairs.[11] All such accommodations are important to people with disabilities because they promote inclusion, and draw people with disabilities into the mainstream of society.

11. All human rights legislation has the twin goals of preventing and remedying discrimination. As this Court has acknowledged, the history and present day reality of many people with disabilities is one of exclusion and marginalization.[12]

12. People with disabilities have been excluded from the mainstream of society because services have been conceptualized and designed with able-bodied people in mind. For people with disabilities the duty to accommodate is an antidote to the problem of exclusion and marginalization. Its remedial purpose is full inclusion.

13. Contemporary legal literature drives home the point that the inequality problem that human rights law must contend with is not that people with disabilities are abnormal, flawed, or characterized by functional limitations created by impairment.[13] Rather, it is that ableist norms

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[6] *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 13; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 at paras. 25-26; *Meiorin*, *supra,* note 4 at para. 44.
[7] *Huck*, *supra*, note 2.
[8] *Grismer*, *supra*, note 5.
[9] *Meiorin*, *supra*, note 4.
[10] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [*Eldridge*].
[11] *VIA Rail*, *supra*, note 1.
[12] *Eldridge, supra*, note 10 at para. 56.
[13] Factum of Respondent Board of Education at para. 92.

are dominant, and assumed to be deservedly so. Because the reality of diversity and the value of equality are not sufficiently contemplated from the start, access to services which other people take for granted is often not available to people with disabilities. Fiona Sampson explains:

> Historically, society has understood the experience of disability as rooted in the individual and has analyzed his/her difference in bio-medical terms. This traditional social construction of disability places the emphasis on the individual's lack of conformity with the non-disabled norm. The traditional social construction of disability has been identified by many authors and academics as the greatest source of disability discrimination in society. [14]

14. This Court has long recognized that the right of people with disabilities to accommodation in relation to services is not merely a right to be free from differential treatment. In *Eldridge*, this Court rejected the respondent's argument that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits, as bespeaking a "thin and impoverished vision of s. 15(1)."[15]

15. Similarly, in *VIA Rail*, this Court recognized that the right to reasonable accommodation requires that positive steps be taken to make services accessible:

> The concept of reasonable accommodation recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right.[16]

16. In this appeal, the respondents' argument that the right to accommodation is merely a right to receive the same treatment or level of accommodation that others receive rests on a thin and impoverished vision of human rights legislation. Such an approach cannot fulfill the duty to accommodate remedial purpose of achieving full inclusion of persons with disabilities. Giving effect to the remedial purpose of the duty to accommodate necessarily requires recognizing that

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[14] Fiona Sampson, "*Granovsky v. Canada (Minister of Employment and Immigration): Adding Insult to Injury*" (2005), 17 C.J.W.L. 72 at para. 72; 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 YB Access Just.73, at 74, 76, 80; Dianne Pothier, "Tackling Disability Discrimination at Work: A Systemic Approach" (2010), 4:1 M.J.L.H. 17at 21,22, 27,37.

[15] *Eldridge*, *supra*, note 10 at paras. 73, 79.

[16] *Supra*, note 1 at para. 121.

the duty to accommodate requires service providers to *actively remove* barriers to equality that may be the result of seemingly neutral rules and practices.

The Decisions Of The Courts Below Fail To Give Effect To the Remedial Purpose of The Duty To Accommodate

17. The comparator group analysis applied by the courts below deals with the duty to accommodate as though it were merely an injunction against differential treatment.

18. Applying the *Hodge/Auton*[17] template for a comparative discrimination analysis, pursuant to which the complainant must establish differential treatment in comparison with a mirror comparator group to whom a sought after benefit is provided, the courts below defined the benefit in issue as the specific accommodation sought, and then asked whether other special needs students had received the specific accommodation requested. Because they had not, the courts below concluded there was no differential treatment and, therefore, no discrimination.

19. CCD submits that the Human Rights Tribunal and Rowles J.A. in dissent correctly identified the service in issue as general public education. However, the determination by the courts below that the appellant had not proven discrimination is not only the result of defining the service in question as special education. It is also the inevitable result of applying a model of comparator group analysis to the prescribed accommodation that requires the accommodation to be a benefit that others receive. If the benefit is defined as the accommodation sought, and there is no one else who receives it, the entire comparator group analysis unravels. There is no comparability. There is no differential treatment. The claim is doomed.

20. This Court has warned against formalistic approaches to comparator group analysis.[18] Fundamentally, the *Hodge/Auton* template is not a fit for disability accommodation cases such as this, which are not concerned with differential treatment, but rather adverse *effects*. In a disability accommodation case, to establish *prima facie* discrimination it must be sufficient for the complainant to show that they have been adversely *affected* by a rule or practice that may be

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[17] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657 at paras. 51-59 [*Auton*]; *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357 at paras. 23-39 [*Hodge*].

[18] *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 22; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 at paras. 2, 40, 43.

neutral on its face. Otherwise, adverse effect discrimination is rendered inactionable, and the question of whether the accommodation was sufficient (the third step in the *bona fide* and reasonable justification analysis) is inappropriately pre-empted.

21. CCD submits that there should be no requirement on the disabled complainant seeking accommodation to present evidence showing that: (a) the accommodation they need is provided to others; or (b) they have been treated differently compared to others, as distinct from being adversely affected.

22. Where, as in this appeal, the complaint is about a failure to provide a prescribed accommodation, and that the institutional capacity to provide that accommodation has been structurally eliminated, it would be perverse to require the complainant to show that the accommodation they seek has been provided to others. The whole point of the complaint is that the methods of service delivery that are provided have differentially beneficial effects, depending on whether a student has dyslexia or not. The complaint isn't that there has been differential treatment.

23. The effect of imposing a legal requirement that the accommodating measure must be a service or a benefit *that others receive* is to eviscerate the right to accommodation. It is intrinsic to the duty to accommodate that positive measures may be required to make the benefits services such as general public education truly accessible to, and inclusive of, persons with disabilities.

24. Requiring a person with a disability seeking an accommodation to compare him or herself to other persons with disabilities who may also be suffering from a lack of accommodation, adds insult to injury. It risks reducing the duty to accommodate to a 'race to the bottom.' Such reasoning exemplifies and is likely to perpetuate the very exclusion from the mainstream that is at the heart of an accommodation claim.[19]

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[19] An example of this race to the bottom may be found in *Hewko v. British Columbia,* 2006 BCSC 1638. In that case, the BC Supreme Court held that, while the supports required to allow the autistic plaintiff to access an education were well understood, his s. 15 equality claim failed because there was no evidence that other children with sight or hearing impairments (comparator groups relied on by the plaintiffs) received the supports that *they* needed to access an education (see paras. 337-339). In the result, there will be no discrimination against a child with disabilities so long as all children with disabilities are denied access to an education equally.

25. The decisions of the courts below are predicated on the faulty assumption that the duty to accommodate is either merely a duty to find the best accommodation within customarily available special education services or a duty to refrain from treating students with disabilities differently from "typical students."[20]

26. Underlying the courts' approach both to the characterization of the service in question, and the specific accommodation sought, is a crucial problem: a failure to recognize that the duty to accommodate persons with disabilities is not merely a negative obligation to refrain from differential treatment between similarly situated people. Nor is it merely a duty to find the best accommodation within a range of existing accommodating measures. Rather, the duty to accommodate is a positive obligation to ensure full access to persons with disabilities, to the point of undue hardship.[21]

27. This Court has held that: the burden of proving that further accommodation is not possible without incurring undue hardship rests with the respondent; accommodation is a right; it is part of the right of non-discrimination; undue hardship is a defence.[22] It is crucial that this clear analytical distinction be maintained between *prima facie* discrimination which may be the result of a failure to accommodate, and justificatory considerations that may arise as part of a *bona fide* and reasonable justification defence.

28. The duty to accommodate is a free-standing duty in the sense that it is not contingent on similar, or any, accommodation being provided to anyone else. The implication of this observation is not that the duty to accommodate exists independently from the concept of discrimination, but rather that discrimination can result from a failure to adequately remove barriers. The focus should be on the effects on the claimant of not being provided with the accommodation. The requirement for comparison is satisfied if the effect of not being provided with the accommodation is to deny the complainant the equal benefit of a service, by reason of disability.

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[20] The terminology "typical students" appears in the Factum of Respondent HMTQ in Right of the Province of British Columbia at paras. 27 and 32.

[21] *VIA Rail*, *supra*, note 1; *Huck*, *supra*, note 2; *Meiorin*, *supra*, note 4; *Grismer, supra*, note 5; *Eldridge*, *supra*, note 10.

[22] *Meiorin*, *supra*, note 4 at paras. 54-55; *Grismer*, *supra* note 5 at paras. 20-22.

Applying A Model Of Comparator Group Analysis Designed To Remedy Differential Treatment Is Antithetical To The Duty To Accommodate

29. Comparator group analysis, as understood and applied in the decisions of the courts below and by this Court in *Hodge and Auton*, is intended to determine whether a legislative regime treats similarly situated people differently. The template entails a search for evidence of differential treatment of a similarly situated comparator group.

30. 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. In a case of adverse effect discrimination, the search for differential treatment, as distinct from adverse effects, will always be futile, and there may or may not be a similarly situated group.

31. This model of comparator group analysis, with its focus on finding differential treatment and a similarly situated group, is intended to serve a very particular objective of anti-discrimination and equality guarantees that of preventing difference, and untrue characteristics, from being taken into account. However, avoidance of stereotyping is only one objective of protections against disability discrimination. As this Court recognized in *Eaton*, another "equally important objective" is accommodation of difference.[23]

32. The complaint at issue in this appeal, and of disability accommodation complaints generally, is not that the complainant was treated differently from members of another group, but rather that there has been a failure to take disability into account *and* effectively remove a barrier to inclusion. The fact that there may have been same treatment is irrelevant.

33. It is illogical and counter-productive 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 seeks to render services, including general public education, accessible to persons with disabilities, taking account of disability-related difference, and making such adjustments to norms and practices as are reasonably possible.

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[23] *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 67.

34. Although there are other cases in which people with disabilities have been compared with other people with disabilities, they are not accommodation cases. They are cases in which disabled claimants have sought to be treated the same as other people with disabilities, within the terms of targeted social benefit schemes. Such cases are clearly distinguishable.[24]

35. The Ontario Divisional Court has recognized that in a disability accommodation case it is inappropriate to engage in a comparator group analysis that requires evidence of differential treatment.[25]

36. Furthermore, in such cases, it is neither necessary nor appropriate to conduct a detailed comparator group analysis. The comparison is necessarily between persons with disabilities who require accommodation and persons with disabilities who do not require accommodation, having 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.

37. As this Court explained in *VIA Rail*, the goal of the duty to accommodate is to render services and facilities equally accessible to people with and without disabilities.[26]

38. The proper analytical framework for an accommodation case is supplied by *O'Malley* and *Grismer*.[27] Applied in this case, the analysis requires not merely a determination that the complainant was accorded *some* accommodation, but consideration of whether the complainant was nonetheless adversely affected in the provision of a service, and, if so, accommodation was made to the point of undue hardship.[28] This crucial stage of analysis was side-stepped by the courts below.

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[24] *Gibbs v. Battlefords and Dist. Co-operative Ltd.*, [1996] 3 S.C.R. 566; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504.

[25] *Lane v. ADGA Group Consultants Inc.* (2007) , 61 C.H.R.R. D/307 (O.H.R.T.) varied in part, (2008), 64 C.H.R.R. D/132 (Ont. Div. Ct.).

[26] *VIA Rail*, *supra*, note 1 at 162.

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

[28] *O'Malle, supra* at para. 23; *Meiorin, supra* at paras. 54-55.

39. A proper analysis of any discrimination claim is also a contextual analysis. In this appeal, a contextual analysis would look at the impact of exclusion from the benefits of general public education, not by reference to whether other groups on the margins may also be excluded, but by reference to whether children with disabilities are, because of their disability, excluded from the benefit of a fundamentally important institution that children without disabilities take for granted.[29]

PART 4 - SUBMISSIONS REGARDING COSTS

40. CCD requests that there be no order as to costs.

PART 5 - NATURE OF ORDER SOUGHT

41. CCD takes no position on the ultimate disposition of the appeal. CCD seeks leave to make oral submissions at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 5TH DAY OF MARCH, 2012.

GWEN BRODSKY
Counsel for the Intervener
Council of Canadians with Disabilities

MELINA BUCKLEY
Counsel for the Intervener
Council of Canadians with Disabilities

YVONNE PETERS
Counsel for the Intervener
Council of Canadians with Disabilities

PATRICIA J. WILSON
Ottawa Agent for Counsel for the Intervener
Council of Canadians with Disabilities

[29] Fay Faraday, "Access to Social Programs: Substantive Equality Under the Charter of Rights" (2006/2007), 21 N.J.C.L. 111, at 124-125. *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), Article 24.

TABLE OF AUTHORITIES

SCHEDULE "A" – RELEVANT STATUTES

1. *Human Rights Code*, R.S.B.C. 1996, c. 210.

2. *School Act*, S.B.C. 1989, c. 61

3. *School Act*, R.S.B.C. 1996, c. 412

4. UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 2515 U.N.T.S. 3, G.A. Res 61/106, (entered into force 3 May 2008)