

# ***Moore v British Columbia: Supreme Court of Canada Keeps the Duty To Accommodate Strong***<sup>1</sup>

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*Moore v British Columbia (Ministry of Education)*,<sup>2</sup> a landmark decision of the Supreme Court of Canada concerning the rights of students with learning disabilities to meaningful access to public education, is a good-news and bad-news story.<sup>3</sup> There are some things to be concerned about in the *Moore* decision. The Court gave the back of its hand to the systemic remedies granted by the Tribunal against the School Board. The Court also let the province off the hook, despite the fact that the province has the power to prevent and remedy discrimination against students with learning disabilities, in the school system, on a province-wide basis. Those are serious deficiencies that are hard to square with the remedial approach adopted by the Supreme Court of Canada in *Robichaud v Canada (Treasury Board)*.<sup>4</sup> But this case comment is about the good news. It is crucial to understand what the Supreme Court of Canada got right in *Moore* and why it matters: the duty to accommodate persons with disabilities and comparator group analysis.

Unlike the lower courts, which were drawn to the *Hodge/Auton*<sup>5</sup> template for comparator group analysis, the highest court focused on identifying and remedying the harmful effects of failing to accommodate a person with a disability, regardless of whether the sought-after accommodation is being provided to any other group. I will argue that

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<sup>1</sup> I wish to acknowledge that this comment is informed by my work as counsel to the Council of Canadians with Disabilities (CCD), at the British Columbia Court of Appeal and the Supreme Court of Canada, and draws extensively on the factum filed by CCD in the Supreme Court of Canada, which I authored. I acknowledge contributions to the factum by my co-counsel, Yvonne Peters and Melina Buckley; members of CCD's Human Rights Committee; and Maria Sokolova, research assistant to the Poverty and Human Rights Centre. I also thank the SSHRC Community University Research Alliance for financial support provided to the Poverty and Human Rights Centre, which has facilitated my writing of this case comment.

<sup>2</sup> 2012 SCC 61, 351 DLR (4th) 451 [*Moore* SCC], rev'g 2010 BCCA 478, 71 CHRR D/238 [*Moore* BCCA], aff'g 2008 BCSC 624, 62 CHRR D/289 [*Moore* BCSC], rev'g [2005] BCHRT 580, 54 CHRR D/245 [*Moore* BCHRT].

<sup>3</sup> See Shelagh Day, "Moore: The Good News" (2012) 13:8 Human Rights Digest 11, and Shelagh Day, "Moore: The Bad News" (2013) 14:1 Human Rights Digest 9. [1987] 2 SCR 84, 8 CHRR D/2695.

<sup>5</sup> *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 SCC 65, [2004] 3 S.C.R. 357 at paras 23-39 [*Hodge*].

the Supreme Court of Canada rightfully diverged from the *Hodge/Auton* template, and I will explore the jurisprudential significance of it having done so.

For people with disabilities, the duty to accommodate is about creating an inclusive society, and about the positive obligation of service providers and others governed by human rights legislation to make adjustments to rules and practices necessary to achieve the goal of inclusion. For some time, it has been settled law that human rights legislation applies to adverse effects discrimination as well as direct discrimination, and that neither can be legally justified if there is an accommodation available that would not cause undue hardship.<sup>6</sup>

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

Human rights legislation aims to prevent and remedy discrimination. However, the history and present-day reality of many people with disabilities is one of exclusion and marginalization.<sup>12</sup> People with disabilities have been excluded from mainstream society because services have been conceptualized and designed with able-bodied people in mind. For people with disabilities, the duty to accommodate embedded in human rights legislation and jurisprudence is an antidote to the problem of exclusion and marginalization. Its remedial purpose is inclusion.<sup>13</sup>

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<sup>6</sup> *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3 at paras 22, 35 CHRR D/257 [*Meorin*]; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 20, 70 BCLR (3d) 215 [7].

<sup>7</sup> See *Canadian Odeon Theatres Ltd v Huck* (1985), 6 CHRR D/2682, 18 DLR (4th) 93 (Sask CA) [*Huck*].

<sup>8</sup> *Grismer*, *supra* note 6 at paras 42-44.

<sup>9</sup> *Meiorin*, *supra* note 6 at para 73.

<sup>10</sup> *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 at paras 80, 94, 151 DLR (4th) 577 [*Eldridge*].

<sup>11</sup> *Council of Canadians with Disabilities v Via Rail Canada Inc*, 2007 SCC 15, [2007] 1 SCR 650 [*Via Rail*].

<sup>12</sup> *Eldridge*, *supra* note 10 at para 56.

<sup>13</sup> Fiona Sampson, "*Granovsky v. Canada (Minister of Employment and Immigration): Adding Insult to Injury*" (2005) 17 CJWL 71 at 72 explains:

Prior to *Moore*, leading Supreme Court of Canada decisions in the cases of *Meiorin*<sup>14</sup> and *Grismer*<sup>15</sup> offered the promise that human rights legislation would take adverse effects discrimination seriously and that the duty to accommodate would engage with systemic obstacles to equality.<sup>16</sup> In other areas of law concerning access to services, the Supreme Court of Canada had also given effect to the duty to accommodate persons with disabilities. In *Eldridge*, a section 15 *Charter*<sup>17</sup> case, the Supreme Court of Canada 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)."<sup>18</sup> Similarly, in *Via Rail*, a case under transportation legislation,<sup>19</sup> the Supreme Court of Canada recognized that the right to reasonable accommodation requires that positive steps be taken to make transportation services accessible.<sup>20</sup>

However, in the post-*Meiorin* and post-*Grismer* period there has been intensified respondent push-back. In particular, governments have pushed back with regard to the elements that a complainant must prove in a case about discrimination in the provision of services, and the content of the comparator group analysis. This resistance is reflected in

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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.

See also Dianne Pothier, "Tackling Disability Discrimination at Work: A Systemic Approach" (2010) 4:1 McGill JL & Health 17 at 21, 22, 27, 37.

<sup>14</sup> *Meiorin*, *supra* note 6.

<sup>15</sup> *Grismer*, *supra* note 6.

<sup>16</sup> For an analysis of the promise of *Meiorin* and *Grismer*, see Gwen Brodsky, Shelagh Day & Yvonne Peters, *Accommodation in the 21st Century*, (March 2012), online: Canadian Human Rights Commission <[http://www.chrc-ccdp.gc.ca/proactive\\_initiatives/default-eng.aspx](http://www.chrc-ccdp.gc.ca/proactive_initiatives/default-eng.aspx)>.

<sup>17</sup> *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>18</sup> *Eldridge*, *supra* note 10 at paras 73, 79.

<sup>19</sup> *Canada Transportation Act*, SC 1996, c 10.

<sup>20</sup> In *Via Rail*, *supra* note 11 at para 121, the Court stated: "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."

post-*Meiorin* and post-*Grismer* human rights case law,<sup>21</sup> including the lower courts in *Moore*.

In *Moore*, the Supreme Court of Canada swept aside a faulty comparator group analysis, holding the line on the content of the duty to accommodate persons with disabilities and on how the analysis of a claim for accommodation is to be conducted. It is a big relief that in *Moore*, the Supreme Court of Canada held that the service in question was general education, not special education, and that Jeffrey Moore was not confined to comparing the treatment accorded to him with the treatment accorded to other students with disabilities. To understand why it is a big relief, it is necessary to consider what happened in *Moore* in the lower courts, to be cognizant of the backdrop of resistance in service discrimination cases, and to recognize how badly those lower decisions augured for the future strength of the legal duty to accommodate persons with disabilities.

Jeffrey Moore was a student with serious dyslexia who, in the wake of provincial funding cuts and targeted program cuts by the school board, was denied adequate assistance to learn to read. The school board had closed the centre that was capable of providing the intensive remediation that the district's own experts had prescribed for Jeffrey. The suggestion made to his parents was that they place Jeffrey in private school, which they did, under protest, at unaffordable personal expense. The discrimination complaint was successful before the British Columbia Human Rights Tribunal, which held that there had been discrimination against Jeffrey and students with learning disabilities in general.<sup>22</sup> However, two levels of reviewing courts disagreed,<sup>23</sup> reasoning that the service in question was special education, not general education. Since it had not been shown that Jeffrey received worse treatment than other children with learning disabilities, the lower courts found there was no discrimination.

In *Moore*, the comparator group analysis applied by the lower courts dealt with the duty to accommodate as though it were merely an injunction against differential treatment. The courts applied the *Hodge/Auton* 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 lower courts defined the benefit in issue as the specific accommodation sought, and then asked whether other special-needs students had received the specific accommodation requested.

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<sup>21</sup> For a discussion of this case law, see Brodsky, Day & Peters, *supra* note 16 at 17.

<sup>22</sup> *Moore* BCHRT, *supra* note 2.

<sup>23</sup> See *Moore* BCCA, *supra* note 2, and *Moore* BCSC, *supra* note 2.

Because they had not, the lower courts concluded there was no differential treatment and, therefore, no discrimination.<sup>24</sup>

The *Hodge/Auton* template 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. The idea is that such a search will further the goal of preventing decision-making based on what is variously referred to as irrelevant difference, untrue characteristics, and stereotype. However, ignoring irrelevant difference and avoidance of stereotyping is only one objective of protections against disability discrimination. As the Supreme Court of Canada recognized in *Eaton v Brant County Board of Education*, another “equally important objective” is accommodation of difference.<sup>25</sup>

The complaint in most disability accommodation cases 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 the same treatment is irrelevant. 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. The goal of accommodating persons with disabilities is not to address different treatment. 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.

It bears emphasizing that the determination by the lower courts in *Moore* that the appellant had not proven discrimination was not only the result of identifying the service as special education and requiring that Jeffrey Moore be compared with other students with disabilities. It was also the inevitable result of applying a model of comparator group analysis that requires the sought-after accommodation to be a *benefit that others receive*. The comparator group analysis in this case was not only faulty because of *who* it required be compared, but because of *what* it required be compared. In an accommodation case, if “the benefit” or “the service” is narrowly defined as the specific 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. And

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<sup>24</sup> See *Moore BCSC*, *supra* note 2 at paras 145-150; and *Moore BCCA*, *supra* note 2, at paras 178-185. At para 89 of her dissent in the Court of Appeal, Justice Anne Rowles identified the service in issue as general public education.

<sup>25</sup> [1997] 1 SCR 241 at para 67, 142 DLR (4th) 385.

if, as in the lower courts in *Moore*, differential treatment is understood to be an essential element of a discrimination claim, the claim is doomed.

The accommodation sought by Jeffrey Moore, and indeed prescribed by the school board's experts—intensive remediation of the kind that had previously been provided by the district—after the cuts, was no longer provided to *any* other students. Therefore, the same defeating result would have been obtained had Jeffrey Moore attempted to compare the treatment accorded to him with the treatment accorded to typical students.

Fundamentally, the *Hodge/Auton* template is not a fit for disability accommodation cases such as this, which are concerned not with differential treatment, but rather with adverse *effects*. Where, as in *Moore*, a complaint is about a failure to provide a prescribed accommodation and the institutional capacity to provide that accommodation has been structurally eliminated, it is 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 simply isn't that there has been differential treatment.

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 of services such as general public education truly accessible to, and inclusive of, persons with disabilities. 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 just adds insult to injury. As Justice Rosalie Abella explained in *Moore SCC*:

Comparing Jeffrey only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination....

If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to. This, as Rowles J.A. noted, “risks perpetuating the very disadvantage and exclusion the Code is intended to remedy.”<sup>26</sup>

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<sup>26</sup> *Moore SCC*, *supra* note 2 at paras 30-31.

Underlying the approach of the lower courts in *Moore*, both to the characterization of the service in question and to the specific accommodation sought, is 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, what Abella J refers to in *Moore SCC*, as “meaningful access.”<sup>27</sup>

In the *Moore* litigation, the government of British Columbia emphasized that there is no “free-standing” duty to accommodate. This is consistent with the *Auton* (benefit must be a benefit received by others) template for discrimination analysis. However, the reasoning of the Supreme Court of Canada in *Moore* reflects the Court’s recognition that 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. Abella J says, “[i]t is not a question of who else is or is not experiencing similar barriers.”<sup>28</sup> This is important. The point of the Court’s acknowledgement 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 to persons with disabilities.

It is logically correct that the analytical focus *should* be on the effects on the claimant deprived of an effective accommodation, and not on whether the claimant has shown differential treatment in relation to others who received (or did not receive) the sought-after accommodation. The requirement for comparison should be understood to be 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.

The decision of the Supreme Court of Canada in *Moore* is a relief because it does not embrace the *Hodge/Auton* comparator group analysis, as understood and applied in the decisions of the lower courts.

The Supreme Court of Canada decision in *Moore* will not stop respondents from arguing that certain cases are more like *Auton*<sup>29</sup> than *Eldridge*;<sup>30</sup> however, it throws cold water on efforts to return human

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<sup>27</sup> See *Moore SCC*, *supra* note 2 at paras 28, 34, 26, 38. See also *Via Rail*, *supra* note 11; *Huck*, *supra* note 7; *Meiorin*, *supra* note 6; *Grismer*, *supra* note 6; and *Eldridge*, *supra* note 10.

<sup>28</sup> *Moore SCC*, *supra* note 2, at para 30.

<sup>29</sup> *Supra* note 5.

<sup>30</sup> *Supra* note 10.

rights jurisprudence to the dark days when anti-discrimination protections were understood to apply only to acts of blatant bigotry.<sup>31</sup>

Rather than going backwards, *Moore* continues a line of important equality-promoting decisions that includes *Meiorin*, *Grismer*, *Eldridge*, and *Via Rail*. Through *Moore*, the Supreme Court of Canada has renewed its commitment to interpretations of human rights legislation that advance the goal of social inclusion. *Moore* confirms that service providers have positive duties to make public services accessible; that discrimination analysis must be responsive to complaints about the disparate effects of seemingly neutral rules and practices on persons with disabilities; that when cuts to budgets and programs are being made, the human rights of people with disabilities must be taken into account; and that the framework for a *bona fide* and reasonable justification defence,<sup>32</sup> established in *Meiorin* and *Grismer*, should be rigorously observed and applied. *Moore* SCC keeps the duty to accommodate strong.

The alternative the Court did not choose was to accept the reasoning of the lower courts, which threatened to make the duty to accommodate meaningless, thereby profoundly eroding the human rights of persons with disabilities in a wide variety of settings.

On the ground, a challenge for parents of students with disabilities will be to persuade school boards to take a proactive approach to budgeting and programming, to ensure that the rights of students with disabilities to meaningful access to public education are upheld. Good-faith budgeting by provincial governments, who for the most part control the purse strings, will be crucial. School boards would do well to get alongside families of students with disabilities in supporting implementation of the systemic measures that were proposed by the Moores.<sup>33</sup> Without doubt, the decision in *Moore* will assist parents who are forced to undertake further human rights litigation. But, as CCD has said, “It took the Moores fifteen years to get a positive decision from the Supreme Court of Canada. Other children and families should not have to repeat their battle.”<sup>34</sup>

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<sup>31</sup> For a discussion of this assertion, see Brodsky, Day & Peters, *supra* note 16.

<sup>32</sup> See *Moore* SCC, *supra* note 2 at paras 49-52.

<sup>33</sup> *Ibid* at para 57.

<sup>34</sup> CCD Chairperson’s Update, “*Moore v. 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 No. 44 (North Vancouver)*” online: Council of Canadians with Disabilities <<http://www.ccdonline.ca/en/publications/chairpersons-update/2012/Special>>.