S.C.C. Court File Nos.: 34040 & 34041

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

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, BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 44 (NORTH VANCOUVER) FORMERLY KNOWN AS THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 44 (NORTH VANCOUVER)

RESPONDENTS
(Respondents)

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FACTUM OF THE INTERVENER
WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND
(Pursuant to Rules 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. West Coast LEAF adopts the statement of facts as set out in the Appellant's factum.

2. At the center of this case is the decision of the Board of Education of School District No. 44 (North Vancouver) (the "District") to close its Diagnostic Centre 1 (the "DC1") without providing alternative, equally effective, specialized programming to Jeffrey Moore ("Jeffrey") and other students in the District diagnosed with severe learning disabilities.

3. At issue is whether maintaining appropriate specialized programming for Jeffrey or other students with severe learning disabilities would have caused the Respondents, Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Ministry of Education (the "Ministry") and the District, undue hardship.

4. This is a straightforward duty to accommodate case. This case is not about redefining the legal test to be applied in the context of duty to accommodate cases. Nor is it a case in which the test for a *prima facie* case of discrimination ought to be re-examined. The legal framework established in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* provides a simple, straightforward and workable framework for determining accommodation cases in a manner that promotes substantive equality for claimants.

> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3. S.C.R.3, Appellant's Book of Authorities [Appellant's BOA], Vol. I, Tab 7, [***Meiorin***]

5. There is no dispute that Jeffrey has a disability that requires accommodation and he received some accommodations for his disability. In dispute is the sufficiency of the accommodations offered to Jeffrey and whether the Respondents experienced extreme financial hardship to such an extent as to justify discriminating against vulnerable severely learning disabled students.

6. The Respondents deny that there was any discrimination and in doing so attempt to reframe the issue by switching the focus from the Respondents'

obligations to justify their decisions through an undue hardship defence to the Appellant's failure to establish substantive discrimination.

7. This distracts from the real issue in this case – whether the Ministry and District have established an undue hardship defence. Further, by importing the test for discrimination in section 15 of the *Charter* into the *prima facie* test applicable to statutory human rights cases, the Ministry and District are urging this Court to increase the burden for the Appellant at the outset. This effectively ends the inquiry before the Respondents are required to present an undue hardship defence.

Factum of the Ministry at paras. 84-87
Factum of the District at paras. 91-98

PART II – ISSUES

8. West Coast LEAF adopts the issues as stated by the Appellant.

9. West Coast LEAF was granted leave to intervene on two issues: the importation of a comparator group requirement into the *prima facie* test of discrimination in human rights cases; and the application of the relevance of financial restraint to an undue hardship defence in duty to accommodate cases.

PART III – STATEMENT OF ARGUMENT

10. There are distinct legal frameworks for discrimination claims brought under the *Charter* and human rights legislation. This is a human rights case that claims no violations of section 15 of the *Charter*. Therefore, the discrimination analysis must be kept doctrinally distinct from the *Charter*. Statutory human rights claims, even against a public body, differ in important respects from constitutional claims in both function and law.

A. Statutory human rights are distinct in function

11. Human rights legislation applies to a wide range of individual, private sector and governmental actors. The *Charter* forms part of the Constitution and applies only to the actions of government.

12. The purpose of the *Code* is to provide access to justice for claimants to resolve every day human rights issues, with or without counsel, in an efficient manner through direct access to a statutory tribunal. The *Charter* has a different purpose - to ensure that governments are accountable for protecting individual rights and freedoms, which are subject to explicit and strict criteria against which limitations on these rights and freedoms may be justified.

> *Human Rights Code*, RSBC, 1996, c. 20, s.3 Book of Authorities of the Appellant [Appellant's BOA], Vol. II, Tab 37 [***Code***]
>
> *R.* v. *Oakes,* [1986] 1 S.C.R. 103, Book of Authorities of West Coast LEAF [BOA of WCL], Tab 2

13. The remedial options available to claimants in human rights cases reflect the goals of resolving every day issues of discrimination in an accessible and efficient manner. While systemic remedies are available, human rights remedies are, by design, individual, context specific, damages focused, and alterable by statute. *Charter* remedies are not. They are systemic and permanent, and can result in legislative change. Individual damages, while available under the *Charter*, are usually secondary to broad systemic remedial orders.

14. This difference in function is reflected in the distinct analyses and standards applied to determine whether discrimination is established under the two regimes. Proving an infringement of the *Code* places a lower burden on claimants than that required to establish a breach of section 15(1) of the *Charter* because the potential for remedial redress in the *Code* is limited. Importing *Charter* standards into the *prima facie* test increases the burden on claimants by effectively reversing the onus and requiring them to prove substantive discrimination at the outset of the case. This disrupts the balance developed in the *Meiorin* test. There is no reason to depart from twenty-seven years of precedent since *O'Malley*, as to do so risks defining discrimination in terms of formal rather than substantive equality.

> Benjamin Oliphant, "*Prima Facie Discrimination: Is Tranchemontagne consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence*", forthcoming (2012) Journal of Law and Equality, p.1-2, BOA of WCL, Tab 4 [**Oliphant**]
>
> Gwen Brodsky, Shelagh Day, and 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, see p. 10-16, 23-32 BOA of WCL, Tab 3 [**Day et. al.**]

15. Finally, human rights legislation is much broader than the *Charter* in its application to individual, corporate and government respondents. It only applies to certain prescribed circumstances such as the provision of services. Further, human rights legislation identifies fixed grounds, which are not open to expansion, upon which claims of discrimination are founded. The *Charter* is more expansive and allows claims for discrimination based on enumerated and analogous grounds. Thus, while government actors or bodies may be caught by human rights legislation, the scope extends well beyond such respondents. Any changes to the human rights test will ease the burden on governmental and non-governmental respondents alike by shifting the onus to complainants to prove substantive discrimination.

16. When respondents seek to avoid their human rights obligations by altering the well-established requirements of the *prima facie* case, they frustrate the purposes of the *Code*. Such changes, if they are to be instituted, must come from the legislature, not from the "seepage" of *Charter* requirements into human rights jurisprudence.

B. Statutory human rights cases are distinct in law

17. Under statutory human rights regimes it is well established that there is a two-step process for proving discrimination. First, the onus is on the claimant to establish a *prima facie* case of discrimination, after which the onus shifts to the respondent to provide a defence or justification.

Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.,[1985] 2.S.C.R. 536 at para.28, Appellant's BOA, Vol. I, Tab 29 [***O'Malley***]

Meiorin, supra at para.70, Appellant's BOA, Vol. I, Tab 7

British Columbia (Superintendent of Motor Vehicles) v British Columbia, [1993] 3 S.C.R. 868 at para.20, Appellant's BOA, Vol. I, Tab 8 [***Grismer***]

18. A *prima facie* case was defined by this Court in *O'Malley* as "one which covers the allegations made, and which, if believed, is complete and sufficient to justify a

verdict in the complainant's favour in the absence of an answer from the respondent." This Court has not departed from this test in the twenty-seven years since *O'Malley* was decided.

> *O'Malley, supra* at para. 28, Appellant's BOA, Vol. I, Tab 29
>
> Oliphant, supra at p.17-18, BOA of WCL, Tab 4

19. In "adverse effects" cases, like the case at bar, claimants must establish the basis for the claim that a "neutral" decision had an adverse effect on them by virtue of their membership in a group identified by the grounds in the *Code*. These cases do not rely on a formal comparative analysis or identification of a mirror comparator group. A *prima face* case will be met if the link between the grounds and the adverse effects are established. This is a low threshold and can be met through logic, common sense or through factual evidence.

> Denise Réaume, "*Defending the Human Rights Codes for the Charter*", forthcoming (2012) Journal of Law and Equality, p.3-5, BOA of WCL, Tab 5

20. Notwithstanding this Court's clarity on the legal framework to be applied to human rights cases, there has been a tendency in administrative tribunals and the lower courts to require claimants to prove some form of substantive and non-justifiable discrimination as part of establishing a *prima facie* case of discrimination. This is achieved by importing the requirements of section 15 jurisprudence into the *prima facie* test.

> Oliphant, *supra* at pages 18-19, BOA of WCL, Tab 4
>
> Day et. al., *supra*, p. 11-13, BOA of WCL, Tab 3
>
> Reasons for judgment of the British Columbia Court of Appeal (Low and Saunders JJ.A.; Rowles J.A. dissenting)(29 October 2010) at paras. 174-185, Appellant's Record [A.R.], Vol. III, Tab 7 [**BCCA Reasons**]
>
> See for example, *Peel Law Association v. Pieters*, [2012], ONSC 1048 at paras.11-17, BOA of WCL, Tab 1

21. Commonly, the importation of the *Charter* requirements into the *prima facie* test takes the form of a reframing of the *prima facie* test to include proof of factors that traditionally form part of the respondent's defence. This front-end loads the analysis, which effectively removes the requirement for respondents to show that

their discriminatory conduct was necessary and therefore justifiable. Oliphant's extensive review of this Court's human rights jurisprudence reveals that:

> [t]he leading cases have not required the claimant to prove substantive discrimination at the *prima facie* stage; any normative considerations relating to whether or not the rule truly created a 'disadvantage', was 'substantively discriminatory', arbitrary or unreasonable, or based on or perpetuating stereotyping or prejudice have been left to the defences stage of the analysis.
>
> Oliphant, supra, p. 3, see also p.1-3, BOA of WCL, Tab 4

22. In this case, the Ministry attempts to reframe the *prima facie* test by arguing that Jeffrey cannot establish that his disability, rather than a finite pool of resources, was a factor in the differential treatment. This increases the burden on Jeffrey by importing the issue of cost into the *prima face* case. There is a reason for the balance between the *prima facie* case and the defences in the *Meiorin* test. That is, to ensure that the unique function of the *Code* is fulfilled by identifying and eliminating persistent patterns of inequality associated with the discrimination the *Code* prohibits. The importation of the *Charter* test into the *prima facie* case upsets this balance.

> Ministry factum at para.84
>
> BCCA Reasons at para,92, A.R., Vol. III, Tab 7

23. The importation of the *Charter* into human rights cases may also include the requirement that claimants undertake a formal comparator group analysis at the *prima facie* stage of the analysis. This shift is occurring at the time when comparator group analysis has been substantially diminished under the *Charter*.

> *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 241, Appellant's BOA, Vol. I, Tab 34

24. Importing a formal comparator group requirement into human rights claims distorts, confuses and undermines the purposes of the *Code*. When applied in a formalistic and restrictive manner, it fundamentally alters the legal requirements of a *prima facie* case by focusing attention on comparisons with analogous groups where no such requirement exists in the *Code*.

Code, *supra*, Applellant's BOA, Vol. II, Tab 37

25. For example, in this case the comparative framework required to satisfy a *prima facie* case can be implied from the facts as there is no dispute that Jeffrey has a disability that requires accommodation. Despite this, the Respondents argue for a mirror comparator group to assert that there is no discrimination. Justice Rowles, in her dissenting reasons, explains the dangers of imposing this kind of comparator analysis on the human rights context:

> [r]equiring a comparison with another disability group, who may also be suffering from a lack of accommodation, risks perpetuating the very disadvantage and exclusion from mainstream society the *Code* is intended to remedy. The fact that there may have been the same treatment of some groups is irrelevant if the end result is that the complainant receives unequal access to the benefit or service.
>
> BCCA Reasons, *supra*, para.121, A.R. Vol. III, Tab 7

26. Importing both the necessity defence and formal comparator group requirement into the *prima facie* test is contrary to law and undermines the very purpose and function of the *Code*.

C. The Respondents failed to establish undue hardship

27. When the onus shifts to respondents to establish a defence, they must demonstrate that they cannot accommodate the claimant without suffering undue hardship. In explaining the concept of "reasonable necessity" or "undue hardship", this Court has repeatedly stated that "[t]he use of the term 'undue' implies that some hardship is acceptable; it is only 'undue' hardship that satisfies this test".

> *Meiorin*, *supra,* at para.62, Appellant's BOA, Vol. I, Tab 7
>
> *Grismer, supra* at para.18, Appellant's BOA, Vol. I, Tab 8

28. While it is clear from this Court's jurisprudence that respondents must show that the cost is excessive before it may amount to undue hardship, this case provides an opportunity for this Court to articulate the details of such a standard.

> See for example *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at para. 131-133, Appellants BOA, Vol. I, Tab 14 [***Via Rail***]

29. This Court has explained that, while "excessive cost" can be a factor to be taken into consideration in determining undue hardship, such a defence should be applied with caution. Costs would have to be substantial in order for a hardship defence to succeed. In *Via Rail*, this Court explained that *undue* hardship of this nature generally means "disproportionate, improper, inordinate, excessive or oppressive, and expresses a notion of seriousness or significance".

> *Grismer, supra,* at para.41, Appellant's BOA, Vol. I, Tab 8
>
> *Via Rail, supra,* para. 140, Appellants BOA, Vol. I, Tab 14

30. A determination of what constitutes "excessive cost" for the purposes of an undue hardship defence must be construed narrowly in favour of promoting the substantive equality purposes in the *Code*, as this Court explained in *Via Rail*:

> Members of the public who are physically disabled are members of the public. This is not a fight between able-bodied and disabled persons to keep fares down by avoiding the expense of eliminating discrimination. Safety measures can be expensive too, but one would hardly expect to hear that their cost justifies dangerous conditions. In the long run, danger is more expensive than safety and discrimination is more expensive than inclusion. [...]
>
> The threshold of "undue hardship" is not mere efficiency. It goes without saying that in weighing the competing interests on a balance sheet, the costs of restructuring or retrofitting are financially calculable, while the benefits of eliminating discrimination tend not to be. What monetary value can be assigned to dignity, to be weighed against the measurable cost of an accessible environment? It will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier.
>
> *Via Rail, supra* at paras.221 and 225, Appellant's BOA, Vol. I, Tab 14

31. In this case, of the two Respondents, only the District has argued that it is unduly burdened with the cost of the accommodating program for Jeffrey; the Ministry relies solely on the alleged failure of the Appellant to show a *prima facie* case of discrimination and fails to provide an undue hardship defence. In doing so, the District is arguing that it cannot afford to treat students equally. While this Court has recognized that cost can amount to undue hardship in extreme circumstances, such a result may be contrary to the purposes of the *Code* and therefore must meet a high standard before it can be used to justify discriminatory conduct.

> *Meiorin, supra* at paras.36 and 68, Appellant's BOA, Vol. I, Tab 7

32. Respondents' high burden to show cost-based hardship is founded on the dictum that respondents' spending decisions must be made in accordance with the *Code*. When a respondent raises the argument of undue hardship based on cost, the Court's assessment of the respondent's claim must be made in the context of other spending decisions, and an analysis of whether such allocations are in accordance with human rights standards.

33. This means that it ought not to be open to respondents to make claims that the costs of accommodation are excessive by pitting the needs of one group against another. This is formal equality at its worst. Spending decisions must be in accordance with human rights considerations. Human rights law ensures that spending decisions cannot be decided on the utilitarian basis of the greatest benefit to the greatest number; rather, human rights law mandates that spending decisions prioritize substantive equality, and prevents the will of the majority from trumping the rights of the minority.

> *Meiorin* at para.33, see also paras.34-36, Appellant's BOA, Vol. I, Tab 8
>
> *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at paras.68-70 (Wilson J. in dissent) cited with approval in *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, 2004 SCC 66, [2004] 3 S.C.R. 381, *supra* at para.66, Appellant's BOA, Vol. I, Tab 27, [***N.A.P.E.***]

34. As in *Via Rail*, this case is not about pitting the costs associated with students with disabilities against the costs of students without disabilities; rather, this is a case about whether the Respondents could accommodate the cost of inclusion and dignity without undue hardship. Reducing expenditures on outdoor education or other non-core programs does not amount to undue hardship.

35. Courts must examine the cuts at issue against other spending priorities. Where the sole purpose of a respondent's impugned action is financial, the respondent may not rely on the undue hardship defence. Respondents must have the discretion to balance competing interests in accordance with human rights law, but their compliance with law must be assessed in the context of the whole balancing act rather than the individual impugned decision. For example, in *N.A.P.E.* the Court notes that the decision to delay pay equity was justified when

balanced against the closure of hundreds of hospital beds, and the government was not engaging in an exercise "whose sole purpose is financial".

N.A.P.E. supra at paras.66-72, Appellant's BOA, Vol. I, Tab 27

36. To give effect to the purpose of the *Code*, any claims for "excessive cost" must be viewed in terms of the larger social and financial context. It is not enough for respondents to claim that in times of budgetary restraint, cuts had to be implemented and tough choices made. This kind of argument cannot be sustained when one considers the larger systemic and holistic framework within which funding is allocated and spending decisions are made. Choices must be made according to human rights standards, and the Court must inquire as to whether the cuts prioritized human rights over the preferences of the majority.

37. To do otherwise is to allow the Respondents to deny the most vulnerable individuals and groups in society access to the protections of the *Code*. To inoculate government spending decisions from human rights scrutiny is to undercut the very foundation of human rights law. The quasi-constitutional nature of human rights law means that it must trump other more pedestrian concerns; human dignity does not have a price. While necessity is a valid defence under the *Code*, preference of the Respondents or the majority of their students is not.

PART IV – COSTS

38. West Coast LEAF is not seeking costs and requests that no costs be ordered against it.

PART V – ORDERS SOUGHT

39. West Coast LEAF respectfully requests that: (a) it be granted the right to make oral submissions at the hearing of this appeal; and (b) that the appeal be granted.

All of which is respectfully submitted this 8th day of March 2011

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PART VI – TABLE OF AUTHORITIES

A. CASES

	Paragraph Number
British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3. S.C.R.3	4, 17, 27, 31, 33
British Columbia (Superintendent of Motor Vehicles) v British Columbia, [1993] 3 S.C.R. 868	11, 17, 29
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B. Legislation

Human Rights Code, RSBC, 1996, c. 20	12, 24

C. Academic Articles

Gwen Brodsky, Shelagh Day, and 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	14, 20

Benjamin Oliphant, "*Prima Facie Discrimination: Is Tranchemontagne consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence*", forthcoming (2012) Journal of Law and Equality	14, 18, 20, 21
Denise Réaume, *Defending the Human Rights Codes from the Charter*, forthcoming (2012) Journal of Law and Equality	19

PART VII – STATUES AND REGULATIONS

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

[...]

Purposes

3 The purposes of this Code are as follows:

(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;
(f) and (g) [Repealed 2002-62-2.]

[...]

Discrimination in accommodation, service and facility

8 (1) A person must not, without a bona fide and reasonable justification,

(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

(2) A person does not contravene this section by discriminating

(a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or
(b) on the basis of physical or mental disability or age, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.

[...]