

**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)

FACTUMS OF THE APPELLANT

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Pursuant to Rule 42 of the Rules of the Supreme Court of Canada

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This case is about how British Columbia's education system failed in its obligation to be inclusive of all children. Frederick Moore, on behalf of his son Jeffrey, asks this Court to affirm that special education is a necessary part of an inclusive and equitable education system, and not a distinct or ancillary service that can be severed from the general curriculum provided to students without disabilities. He asks this Court to affirm that, even in times of financial strain, school districts and government ministries cannot place the resulting burden disproportionately on children with severe learning disabilities. This means that programs designed to enable their meaningful access to an education cannot be first on the budgetary chopping block, ahead of non-core programs that do not determine a child's access to an education. Mr. Moore asks this Court to hold the Ministry of Education to its promise of delivering an education to all children, regardless of disability.

2. The appeals centre on Jeffrey Moore, a student with a severe learning disability called dyslexia. Dyslexia is a life long condition that affects a child's ability to learn to read and acquire basic literacy. Dyslexia cannot be cured, but its effects can be minimized by intensive remediation: specialized instruction that can involve different approaches to teaching, low teacher/student ratios, and an environment that minimizes distraction.

3. In 1991, Jeffrey began elementary school in North Vancouver School District 44 [the **District**]. Since 1976, the District had provided severely learning disabled students with intensive remediation through the Diagnostic Centre 1 [**DC1**]. The DC1 provided full day specialized programming for small groups of students. In April 1994, responding to budgetary pressure, the District closed the DC1. This decision was made over a two week period, with no evaluation of its impact, or consideration of how severely learning disabled students would be educated in its absence.

4. The closure of the DC1 coincided with Jeffrey's official designation as severely learning disabled, and the District's recommendation that he attend the DC1. District staff advised Jeffrey's parents that the intensive remediation Jeffrey needed to access an education was no longer available in the District, and that they should enroll him in a private school able to educate students with severe learning disabilities. Jeffrey's parents followed this advice and removed

Jeffrey from the public school system. At their own expense, they enrolled him in a private school that was able to accommodate his needs. He was eight years old.

5. The erosion of supports for severely learning disabled students in the District reflected provincial trends in the 1990s.

6. Mr. Moore filed human rights complaints against the District and the Ministry of Education [the **Ministry**; collectively, the **Respondents**], alleging ongoing individual and systemic discrimination on the basis of disability through the denial of a public service. The British Columbia Human Rights Tribunal [the **Tribunal**] found that the Respondents had failed to provide Jeffrey with an education sufficiently adapted to meet his needs. The Tribunal also found that the Respondents had systemically discriminated against children with severe learning disabilities in the District by closing the DC1 without ensuring that intensive interventions remained available to educate these students, and disproportionately cutting core accommodations for severely learning disabled children in a time of financial strain. In addition, the Ministry systemically discriminated against severely learning disabled students throughout the province when it maintained an arbitrary cap on the funding available to support them, and did not provide systemic oversight to ensure that its education system was inclusive of all children, including those with severe learning disabilities.

7. The Tribunal's decision was reversed by the British Columbia Supreme Court and the majority of the Court of Appeal, based on a substantial re-writing of the Tribunal's factual findings and a vision of the education provided to children with "special needs" as a separate service from the general public education services available to students without those needs. In these appeals, Mr. Moore seeks to have the decision of the Tribunal restored.

8. To understand the Tribunal's conclusions, and why Jeffrey was advised to leave his public school in grade two, it is necessary to understand the legal, political, and economic forces that shaped British Columbia's education system in the 1990s.

A. Overview of school legislation

9. Jeffrey attended public school from 1991 until 1995. During this period, the public education system was governed by the *School Act*, S.B.C. 1989, c. 61 [***School Act 1989***], and

various orders and policy statements issued by the Minister of Education.¹ These documents conceive of an inclusive education system, but in practice their promise has fallen short.

10. Under the *School Act 1989*, the Ministry is the ultimate supervisor of educational services.² The Ministry has primary responsibility for defining the academic subjects making up the core curriculum and for ensuring that all students have equal access to it.³ It may make orders necessary to carry out its functions under the *Act*.⁴ Reading is an integral part of the core curriculum.

11. British Columbia is divided into school districts, each of which is governed by a school board, tasked with making an educational program available to all children of school age who enroll in schools in their district, free of charge.⁵ If a district fails to comply with their duties under the school legislation, the Ministry may appoint an official trustee to conduct the affairs of the district.⁶

12. The Ministry has the power to assess the effectiveness of districts' educational programs, but in practice did not do so.⁷

B. Special education is an extension of the regular curriculum

13. Some children, by reason of disability or other barrier to traditional learning, are unable to benefit from an education without extra supports. For these students, the Ministry has developed policies and specialized funding in support of "special education". The Ministry can, without restriction, make Ministerial Orders to govern the delivery of education for students with

¹ *School Act*, S.B.C. 1989, c. 61 (Mr. Moore's Book of Authorities [**Moore BoA**], Vol. II, Tab 39A) [***School Act 1989***]. In 1996, the various amendments to the *School Act 1989* were consolidated; the key provisions in this case remained the same: Reasons for Decision of the British Columbia Human Rights Tribunal at para. 63 (Appellant's Record [**A.R.**], Vol. II, Tab 5) [**Tribunal Reasons**]; see also *School Act*, R.S.B.C. 1996, c. 412 (Moore BoA Vol. II, Tab 39E) [**Current School Act**].

² *School Act 1989*, *supra* note 1, ss. 181-182; see also *Current School Act*, *supra* note 1, ss. 167-168.

³ Tribunal Reasons, *supra* note 1 at para. 66.

⁴ *School Act 1989*, *supra* note 1, s. 182; Tribunal Reasons, *supra* note 1 at para. 66; see also *Current School Act*, *supra* note 1, s. 168.

⁵ *School Act 1989*, *supra* note 1, s. 94; see also *Current School Act*, *supra* note 1, s. 75.

⁶ *School Act 1989*, *supra* note 1, ss. 186-196; see also *Current School Act*, *supra* note 1, ss. 172-173.

⁷ *School Act 1989*, *supra* note 1, s. 182(2)(d); Tribunal Reasons, *supra* note 1 at para. 880 see also *Current School Act*, *supra* note 1, s. 168(2)(d).

special needs.⁸

14. The Ministry has issued policies to govern the provision of special education. The main policy manual in this regard was published by the Special Education Branch in 1985, and was titled “Special Programs: A Manual of Policies, Procedures and Guidelines” [**1985 Manual**]. The 1985 Manual governed until it was updated in 1995. In it, the Ministry explains:

In British Columbia, as a matter of public policy, every child is entitled to an education. The Ministry of Education is the major agency through which the Government implements this Policy. Specific responsibility ... rests with [the] locally – elected Board of School Trustees of the district in which the child is resident.

...

Special education shares the basic purpose of all education....⁹

15. The 1985 Manual defines the Ministry’s leadership role in creating educational standards for students with special needs, and monitoring their implementation. The Manual describes the processes of identifying special needs students, as well as planning and evaluating their education programming. It sets best educational practices.

16. Effective September 1, 1989, the Ministry enacted the *Special Needs Student Order*. The Order requires school boards to focus on needs-based placements by ensuring that students with disabilities are integrated into classrooms with non-disabled students unless the educational needs of the student indicate otherwise.¹⁰

17. This Order was consistent with the direction in the 1985 Manual that a “continuum of service delivery” be provided for students with special needs.¹¹ The notion that a range of services will be necessary to meet the individual needs of students reflected the prevailing value of “inclusion”. Inclusion focuses on the needs of the child and represents a “belief that all students are included in the community of learners and entitled to equitable access to learning,

⁸ *School Act 1989*, *supra* note 1, s. 182; see also *Current School Act*, *supra* note 1, s. 168.

⁹ Division of Special Education, *Special Programs: A Manual of Policies, Procedures and Guidelines* (British Columbia: Ministry of Education, May 1985) at pp. 7 and 9 (A.R. Vol. IX, Tab 78) [**1985 Manual**].

¹⁰ *Special Needs Student Order*, M150/89 (Moore BoA Vol. II, Tab 40A).

¹¹ 1985 Manual, *supra* note 9 at p. 15.

achievement and the pursuit of excellence in all aspects of their education”.¹² It is a broader concept than “integration”, which is a strategy to include students with special needs in the regular classroom. Integration is one means of achieving inclusion, but may not suit the needs of every child. The distinction is important because the District in this case used a misconceived notion of “inclusion” as an *ex post facto* rationalization for closing a specialized program designed to educate severely learning disabled students outside the classroom.¹³ In fact, the Ministry has never suggested that a full integration model is appropriate for all children.¹⁴

18. School districts are encouraged to develop comprehensive plans for special education. They are accountable to the Ministry for the programs that they deliver to children with special needs. Among other things, the Ministry’s Special Education Programs Branch is responsible for developing, implementing, and assessing education for “exceptional students” in all public schools. It is tasked with ensuring the accountability of special education programming.¹⁵

C. Children with severe learning disabilities are at risk of academic and social failure

19. Students whose disability affects their ability to read experience increasing knowledge deficits in all subject areas and fall further behind with each passing year. Children without early reading skills develop a chain of negative consequences, including “delay in automaticity; severe repercussions for future reading ability; severe repercussions for cognitive development; impaired vocabulary; impaired concept development; and impaired syntactic knowledge”.¹⁶

20. Long term studies show that people whose learning disabilities are not addressed experience high rates of academic and social failure. They leave school early without acquiring basic literacy, and are unable to participate in a technological society. They experience high unemployment, welfare, suicide, and incarceration rates.¹⁷

¹² Tribunal Reasons, *supra* note 1 at para. 122; see also Special Education Branch, *Special Education Services: A Manual of Policies, Procedures and Guidelines* (British Columbia: Ministry of Education, 1995) at pp. 14-15 (A.R. Vol. XI, Tab 83) [1995 Manual].

¹³ Tribunal Reasons, *supra* note 1 at para. 384.

¹⁴ Tribunal Reasons, *supra* note 1 at para. 122.

¹⁵ 1985 Manual, *supra* note 9 at pp. 13 and 22.

¹⁶ Tribunal Reasons, *supra* note 1 at para. 575.

¹⁷ Tribunal Reasons, *supra* note 1 at paras. 572-580.

21. According to the 1985 Manual, students with severe learning disabilities are those who “experience difficulties with learning that are so severe as to almost totally impede educational instruction by conventional methods”.¹⁸ Children diagnosed as severely learning disabled are entitled to an Individualized Educational Plan that takes into account the student’s particular needs.¹⁹ While most can be educated in the classroom, it is contemplated that “[s]ome students may require ongoing intensive long term service in a resource room or a self-contained class”.²⁰

D. Funding for education

22. Within this legislative and policy framework, the Ministry imposed stringent financial conditions on school districts in the early 1990s, making it increasingly challenging for districts to maintain educational services. Specifically, the Ministry implemented a block funding formula and funding cap for students with certain types of disabilities. This funding structure was found by the Tribunal to impose systemic barriers to the inclusion of children with severe learning disabilities in the public education system.

23. In 1990/91, the Ministry implemented a block funding formula that distributed a set amount of money between all school districts, based on full time student enrollment and district variation in program delivery.²¹ Among other things, the formula did not account for the particular costs of providing supports to students with severe learning disabilities, and complying with collective agreements. At the same time, school districts lost their ability to raise supplemental funds through local taxation, and were no longer permitted to run a deficit.²²

24. Districts had discretion over how to spend funds, though amendments to the *School Act* 1989 in 1991 and 1994 established minimum levels of spending for special education.²³

¹⁸ 1985 Manual, *supra* note 9 at pp. 85.

¹⁹ 1985 Manual, *supra* note 9 at p. 86; the requirement for an Individualized Educational Plan was formalized effective December 1995: *Individual Education Plan Order*, M638/95 (Moore BoA Vol. II, Tab 40C).

²⁰ 1985 Manual, *supra* note 9 at p. 86; Tribunal Reasons, *supra* note 1 at para. 892; 1995 Manual, *supra* note 12 at p. 30.

²¹ *School Amendment Act*, S.B.C. 1990, c. 2, s. 5 (Moore BoA Vol. II, Tab 39B).

²² Tribunal Reasons, *supra* note 1 at paras. 83-92 and 264.

²³ Adding s. 129.1: *Miscellaneous Statutes Amendment Act (No. 2)*, S.B.C. 1991, c. 14, s. 17 (Moore BoA Vol. II, Tab 39C); Repealing s. 129.1 and replacing it with s. 125.1: *Budget Measures Implementation Act*, S.B.C. 1994, c. 4, s. 9 (Moore BoA Vol. II, Tab 39D).

25. In addition to funds allocated based on full-time student enrolment, districts were eligible for supplemental funding to support specific students designated as having special needs. Students like Jeffrey, who were designated as severely learning disabled, were categorized as “high incidence/low cost” [**HILC**] and were eligible for supplemental funding.²⁴

26. In 1987, the Ministry introduced a cap on the funding available to support certain HILC students, including the severely learning disabled.²⁵ Students designated as HILC were eligible for supplemental funding up to the level of the cap; students identified above the level of the cap did not receive any supplemental funding. The cap was introduced to control the increasing number of students being identified as HILC.²⁶ Students with other disabilities were funded based on actual incidence, and not subject to a cap.

27. The cap was consistently below the actual reported incidence of HILC students. A 1994 report about the inclusion of special needs students [the **Johnstone Report**] found that:

In the majority of cases districts report **significantly higher** numbers of students receiving additional special services in those programs covered by the funding system ‘cap’ of 4% in the High Incidence generic program category. This is especially the case in small school districts where some districts report incidence levels greater than 10% in the following programs:

→ Severe Learning Disabled ...²⁷

The Johnstone Report recommended the removal of the cap, a move also supported by the Ministry’s Special Education Advisory Committee.²⁸

28. The Ministry was aware that the cap created a disincentive for districts to identify and serve students in the HILC category. If districts identified HILC students over the cap, they were obliged to provide special education programming without additional funding; essentially, they

²⁴ Tribunal Reasons, *supra* note 1 at para. 124.

²⁵ Tribunal Reasons, *supra* note 1 at para. 217. In 1989/1990, students with mild intellectual disabilities were removed from the cap and funded on actual incidence: Tribunal Reasons, *supra* note 1 at para. 223.

²⁶ Tribunal Reasons, *supra* note 1 at paras. 221 and 259; Testimony of Robert Gage (in cross) at p. 74, ll 26-30 (A.R. Vol. IV, Tab 26).

²⁷ Johnstone & Associates, *The Inclusion of Students with Special Needs Data Collection and Analysis*, (British Columbia: 1994) at p. 52 [emphasis in original], see also p. 68 (A.R. Vol. XV, Tab 92) [**Johnstone Report**].

²⁸ Memorandum from Shirley R. McBride to Special Education Advisory Committee Members (1 March 1994) at p. 121 (A.R. Vol. V, Tab 58); Johnstone Report, *supra* note 27 at p. 74 (Recommendation #13).

were “penalized”.²⁹ The Ministry’s Working Group on De-Targeting and Accountability confirmed that the cap deterred districts from assessing students’ special needs.³⁰

29. The District exemplified how the cap could deter designation of students. In a time of financial crisis, the District developed a cost saving strategy to de-list students who had been designated as HILC. Six students were summarily de-listed in this way. The District also advised school principals to exercise all possible discretion to avoid identifying any further HILC students.³¹

E. Supports for severely learning disabled students were eroded

30. Within the context of constrained finances, district programs designed to educate severely learning disabled students steadily eroded throughout the 1990s. Among the disappearing supports were specialized settings that offered intensive accommodations.

31. In 1992 and 1994, the Learning Disabilities Association of British Columbia sent letters to the Ministry outlining concerns over the disappearance of specialized intensive programs for severely learning disabled students across the province. The 1994 letter summarizes its concern:

Many children with diverse learning needs can, and should be educated in the regular classroom... For some, the regular classroom is not intensive enough and the setting too large and crowded to best meet their needs. The regular classroom is one of many education options but is not a substitute for the full continuum necessary to assure the provision of an appropriate education for all students with learning disabilities. We believe:

- A continuum of services also includes settings or environments as a factor for many learners, e/g. those with central auditory processing deficits, ADD/ADHD and learning disabilities. The emphasis has been placed so heavily on the right to be in the regular classroom that many districts are choosing to ignore the needs of some learners for alternative settings;
- The rush to become inclusive has meant that specialized settings i.e. resource

²⁹ 1988 – 1989 Financial Management System Review at p. 145 (A.R. Vol. XV, Tab 97) [FMS Review]; Testimony of Robert Gage (in cross) at p. 77 ll 28-40 (A.R. Vol. IV, Tab 27); Tribunal Reasons, *supra* note 1 at paras. 248 and 860.

³⁰ *Report of the Working Group on De-targeting and Accountability in Special Education* (November 1997) at p. 8 (A.R. Vol. XV, Tab 91).

³¹ Tribunal Reasons, *supra* note 1 at para. 333; Memorandum from C. Kelly, Assistant Superintendent of School District 44, to R. Brayne, Superintendent of School District 44 (18 July 1994) at p. 37 (A.R. Vol. X, Tab 81).

rooms and self contained classrooms are being lost at a tremendous rate. Frequently, the settings are eliminated without setting up the appropriate supports to adequately assist learners with learning disabilities and their teachers to cope. Services for learners with learning disabilities have been decimated under the guise of inclusion.³²

32. Dr. Overgaard, director of special education for the Vancouver School Board, expressed concern that specialized pull-out programs, which offered severely learning disabled students 12 weeks of intensive instruction in small groups, had disappeared from that district. She described these as successful models that provided severely learning disabled students the “more intensive support” they required, but explained that the Board was encountering “more and more obstacles that don’t allow us to give it”. The Vancouver School Board reduced and restructured these programs in 1997.³³

33. The Ministry was aware of eroding supports for children with learning disabilities. In 1995, a briefing note prepared for the Minister by the Director of Special Education advised:

Some districts have reduced the services which they provide to support students with learning disabilities in regular classes. This may be because (a) these districts were spending more than the targeted amount in the past and (b) the districts are likely impacted by the cost of class size and composition agreements. It is probable that some districts are using supplemental special education funding to cover off some or all of these costs. The reality for these parents, however, is that specialized support is not present to the extent that it was in the past...³⁴

34. As specialized settings disappeared, districts increasingly turned to Learning Assistance Centres [LAC; also called learning assistance services] to meet the needs of severely learning disabled students. The LAC comprised “school-based, non-categorical resource services designed to support classroom teachers and their students who have mild to moderate difficulties

³² Learning Disabilities Association of British Columbia, “Agenda for meeting between Art Charbonneau, Minister of Education, and the Learning Disabilities Association of British Columbia” (27 June 1994) at p. 221(A.R. Vol. VIII, Tab 77); Letter from P. Foodikoff, President of the Learning Disabilities Association of British Columbia, to A. Hagen, Minister of Education (9 December 1992) (A.R. Vol XV, Tab 95).

³³ Submission of School District No. 39 (Vancouver) to the Provincial Review of Special Education, Ministry of Education [nd] at p. 211 (A.R. Vol. VIII, Tab 76); Testimony of V. Overgaard (in chief) at p. 154, ll 3-6 (A.R. Vol. IV, Tab 46).

³⁴ Briefing Note prepared by Shirley McBride, Director Special Education Branch for Ministry of Education (9 November 1995) at pp. 111-112 (A.R. Vol. V, Tab 57) [emphasis added].

in learning and adjustment”.³⁵ It was not intended for children with severe learning disabilities and was not designed to meet their needs.³⁶

35. In 1996, the Ministry commissioned expert Wayne Desharnais to conduct a review of the LAC. The “Review of Learning Assistance Services” was published in 1997 [the **LAC Review**]. It indicated that pressure was increasing on learning assistance teachers to take on a wide range of special needs students outside their mandate, and that “due to resource pressures (funding and Learning Assistance teacher allocation reductions) the Learning Assistance Program is having to serve the more difficult learning problems (low incidence; severe behaviour; severe learning disabled)”.³⁷ The findings of the LAC Review confirmed what the Ministry already knew anecdotally: that the trend to refer severely learning disabled students to the LAC for their primary remediation was a failure, and detrimental to both the LAC program (which was inundated by severe students beyond its mandate) and to the students. The LAC became a “dumping ground” for the most severely disabled students, whose needs could not be met.³⁸ This finding was summarized in the Ministry’s Executive Summary of the LAC Review:

As support services have been reduced, the caseloads of Learning Assistance teachers have increasingly included students with more complex learning difficulties. About 25 percent of the caseloads are students who have severe learning disabilities and intensive remedial needs. It raises the question of whether the amount of remedial intervention needed can be reasonably delivered given these caseloads.³⁹

36. The Ministry buried the LAC Review for close to a year. Ministry officials were concerned that special education parents were “well organized and vocal” and would react to the Review with an “I told you so”. When it was finally released, officials were concerned above all with keeping the findings “low key”. The Minister was advised not to sign off on the report by

³⁵ Desharnais & Associates, *Review of Learning Assistance Services* (British Columbia: Ministry of Education, Skills and Training, July 1997) at p. 3 (A.R. Vol. XIII, Tab 86) [**LAC Review**].

³⁶ Tribunal Reasons, *supra* note 1 at para. 817; 1985 Manual, *supra* note 1 at p. 143; Testimony of Dr. Nancy Perry (in chief) at p. 157 ll 6-29 (A.R. Vol. IV, Tab 47); Letter from Dr. Nancy E. Perry, Assistant Professor, Educational and Counseling Psychology and Special Education, to Angie Westmacott (13 October 2000) at p. 186 (A.R. Vol. VIII, Tab 75) [**Perry Report**].

³⁷ LAC Review, *supra* note 35 at p. 92.

³⁸ Tribunal Reasons, *supra* note 1 at paras. 184-187; LAC Review, *supra* note 35 at p. 82.

³⁹ Executive Summary of: Desharnais & Associates, *Review of Learning Assistance Services* (British Columbia: Ministry of Education, Skills and Training, July 1997) at p. 106 (A.R. Vol. V, Tab 55).

his communications advisors, because it confirmed problems with the LAC.⁴⁰

37. In 1998, the Special Education Programs Branch again acknowledged the erosion of supports across the province, and the pressures this placed on the system. The Branch Coordinator noted that “[p]arents report that most districts have reduced services to [HILC] students because of fiscal pressures (results of the Learning Assistance Review 1997 confirm this)”.⁴¹

38. Although the Ministry was responsible for monitoring special education programming to ensure effective program delivery, it monitored only for financial compliance.⁴² It did not collect data to determine whether severely learning disabled students were provided with adequate educational supports, or monitor programs for compliance with the 1985 Manual. This was the subject of criticism in a 1992 report about financing for public schools [the **Spangelo Report**]: “we are not satisfied that the restrictions on how much school districts budget for special needs programs (Section 129.1 of the *School Act*) are a useful way of ensuring that schools deliver suitable services to students with special needs”.⁴³ The concern was repeated by reports commissioned by the Ministry in 1997 and 1999.⁴⁴

39. More specifically, the Ministry did not monitor or evaluate the supports being provided by the District for students with severe learning disabilities throughout the time Jeffrey attended public school. The Ministry effectively ignored repeated warnings by its own staff and others, that changing policy and financial practices threatened the delivery of basic supports necessary to educate severely learning disabled students.⁴⁵

⁴⁰ Tribunal Reasons, *supra* note 1 at paras.186-187; Ministry of Education draft Communications Plan (25 March 1998) at pp. 123-124 (A.R. Vol. XV, Tab 93) [**LAC Communications Plan**].

⁴¹ Briefing Note prepared for Paul Ramsey, Minister of Education (17 March 1998) at p. 104 (A.R. Vol. V, Tab 54).

⁴² Tribunal Reasons, *supra* note 1 at paras. 880-883.

⁴³ Education Funding Review Panel, *Building Partnerships: A Finance System for Public Schools* (1992) at p. 27 (A.R. Vol. XII, Tab 84).

⁴⁴ *Report of the Working Group on De-targeting and Accountability in Special Education* (November 1997) at pp. 9-11 (A.R. Vol. XV, Tab 91); Linda Siegel & Stewart Ladyman, *A Review of Special Education in British Columbia* (British Columbia: Ministry of Education, 1999) at pp. 74-75 (Recommendation #15) (A.R. Vol. V, Tab 52) [**Siegel, “Special Education Review”**].

⁴⁵ Tribunal Reasons, *supra* note 1 at para. 924.

F. The District closed the DC1 without making alternate arrangements for students with severe learning disabilities

40. Intensive remediation is specialized instruction that can involve unconventional approaches to teaching, low teacher/student ratios, and an environment that minimizes distraction. The most severely learning disabled students will require the most intensive remediation. Some will require instruction in specialized settings, including resource rooms, diagnostic and programming centres, alternate classes, or other specialized settings.⁴⁶

41. From 1976 until 1994, the District offered intensive remediation to severely learning disabled students through the DC1. The function of the DC1 was described in a 1986 overview of North Vancouver's special education programs as follows:

The D.C. I program consists of three teachers and eighteen learning disabled students. These students are enrolled for a three or four month stay in one of the D.C. I classes (Grades 3-4; Grades 5-6; Grade 7). The program is intensive and the teachers utilize an ongoing diagnostic teaching approach. A detailed program is developed for each student, both in the diagnostic centre and later for use back in the regular classroom. The addition of a .6 teacher allows each full-time D.C. I teacher one day a week to work with classroom and learning assistance teachers after the children have returned to their home school. This follow-up is continued for two years...⁴⁷

42. The District made the hasty decision to close the DC1 over a two-week period in April 1994, at the same time that District special education staff were recommending that Jeffrey attend the DC1 for intensive remediation.

43. The reason for the closure was financial. The District was under financial pressure due to under-funding by the Ministry, and a clause in the new collective agreement that entitled severely learning disabled students to time with a teacher's aide in the regular classroom.⁴⁸

44. Given the short time frame, there was no time to plan which alternatives would be put in place for severely learning disabled students.⁴⁹ In deciding to close the DC1, District staff

⁴⁶ Tribunal Reasons, *supra* note 1 at paras. 120 and 891; 1995 Manual, *supra* note 12, p. 107.

⁴⁷ Description of North Vancouver Special Education Services (1986 – 1987), p. 5 (A.R. Vol. X, Tab 79); see also Tribunal Reasons, *supra* note 1 at para. 459.

⁴⁸ Tribunal Reasons, *supra* note 1 at paras. 309 and 379-387; Memorandum from C. Kelly, Assistant Superintendent, to R. Brayne (12 April 1994) (A.R. Vol. VII, Tab 69).

⁴⁹ Tribunal Reasons, *supra* note 1 at paras. 894-896; Testimony of Robin Brayne (in cross) at p.109 ll 9-21 (A.R. Vol. IV, Tab 33).

performed no qualitative or quantitative inquiry into what would replace it. They did not know how many students would be affected, or how their needs would be met. They did not ask or consider the opinion of the experts who staffed the DC1, or Mary Tennant, the District psychologist. They did not consult with the parties that would be impacted by the closure, including the North Vancouver Teachers' Association [the **Union**], parents, teachers and students. They did not ask for the opinion of Barbara Waigh, the LAC teacher who would be expected to take over important functions. Many protested the closure to no avail.⁵⁰

45. The District also simultaneously eliminated the Elementary Learning Resource Team: professional psychologists who provided supports and assessments to severely learning disabled students and their teachers.⁵¹ The Team was cut from four full-time positions to one. The remaining position provided itinerant consulting services to 33 schools.⁵²

46. The District did not develop a plan to address the needs of severely learning disabled students who had been waitlisted for the DC1 until more than two months after the closure. The plan then developed was to put all responsibility for education of severely learning disabled students onto the classroom and LAC teachers. The LAC became the central plank of the new service delivery model. The District recognized that this would be a major role refinement and would require skills that many teachers did not have.

47. Teachers' aides would also play a supportive role under the plan. Aides are paraprofessionals who provide support to teachers. Teachers remain legally responsible for the education of children.⁵³ Aides do not provide intensive programming.⁵⁴

48. There was no intensive program in place by the start of the 1994/95 school year. As of October 1994, the only step that had been taken to address the new roles for staff was the

⁵⁰ Tribunal Reasons, *supra* note 1 at paras. 895 and 938; Letters between parents, Ministry of Education and School Districts (various dates, 1994) (A.R. Vol. X, Tab 82).

⁵¹ Tribunal Reasons, *supra* note 1 at para. 416.

⁵² Tribunal Reasons, *supra* note 1 at paras. 890 and 672; Letter from Rochelle Watts, Elementary Learning Resource Teacher, to Dr. Shirley McBride, Director of Special Education (24 May 1994) (A.R. Vol. V, Tab 53) [**Watts Letter**]; see also discussion in *Board of School Trustees of School District No. 44 (North Vancouver) v. North Vancouver Teachers' Association* (1995) (Arbitrator: Barbara R. Bluman) at pp. 15-21 (A.R. Vol. X, Tab 80) [**Arbitration Decision**].

⁵³ Siegel, "Special Education Review", *supra* note 44 at pp. 68-70.

⁵⁴ Tribunal Reasons, *supra* note 1 at paras. 493, 497 and 801-802.

provision of an optional seminar.⁵⁵

49. The DC1 had cost the District \$292,500 per year. After its closure, the District continued to fund non-core programs, including an Outdoor School that taught children about the environment.⁵⁶

50. In the 1993/94 and 1994/95 school years, District programs for students with special needs were cut disproportionately. There was no policy in place to ensure that special needs children were not disproportionately affected by cuts.⁵⁷

51. The Ministry knew the DC1 was closing for financial reasons and was advised that there were no concrete plans to replace it. The Ministry did not act to ensure that a range of services remained in place after the closure.⁵⁸

52. The Union grieved the elimination of the DC1 and the Elementary Learning Resource Team, arguing that those cuts violated the class size provisions of the collective agreement. Its grievance was ultimately unsuccessful.⁵⁹

53. In 1996, the Ministry fired the District Board for financial non-compliance and replaced it with an Official Trustee. The Trustee attributed the District's financial difficulties to the Ministry's funding distribution formula, but also noted that the District had engaged in a pattern of spending that he believed was inappropriate in an era of public sector fiscal restraint.⁶⁰

54. After the DC1 closed, there was no equivalent or parallel program in the District. A 1998 review of special education in the District found that, since the closure of the DC1, students with

⁵⁵ Tribunal Reasons, *supra* note 1 at paras. 396-400; J.S. Merilees and C. Kelly, *Serving Students with Learning Disabilities: A Statement of Philosophy, Organization and Support* (North Vancouver School District, 1994-95) p. 11 (A.R. Vol. VII, Tab 67); School District No. 44, "Student Services School Reorganization 1994-1995" at p. 174 (A.R. Vol. VI, Tab 65).

⁵⁶ Tribunal Reasons, *supra* note 1 at paras. 366, 372 and 938; Robert Smith, Official Trustee, *Final Report to the Minister of Education and the Communities of North Vancouver City and District on the Financial Review of School District 44 (North Vancouver)* (North Vancouver: March 31, 1996) at p. 148 (A.R. Vol. VIII, Tab 74) [**Trustee's Report**].

⁵⁷ Tribunal Reasons, *supra* note 1 at para. 403 and 902.

⁵⁸ Tribunal Reasons, *supra* note 1 at para. 394-395; see also Memorandum from Mario Strauss, Ministry of Education, to Paul Pallan and Shirley McBride (7 September 1994) (A.R. Vol. XIII, Tab 87).

⁵⁹ Arbitration Decision, *supra* note 52.

⁶⁰ Tribunal Reasons, *supra* note 1 at para. 360-366; Trustee's Report, *supra* note 56 at pp. 95-96.

learning disabilities were being “underserved”.⁶¹

55. Against this backdrop, Jeffrey entered the public school system and, three years later, was advised by District staff to leave it.

G. Jeffrey’s experience at Braemar Elementary

56. Jeffrey attended Braemar Elementary in the District from kindergarten until grade three. Mary Tennant, the District psychologist who worked with Jeffrey for four years, described his learning disability as one of the worst she had ever seen.⁶² Jeffrey’s dyslexia was so severe that it prevented him from learning to read and write through standard pedagogical methods.

57. Jeffrey was identified as an at-risk reader in kindergarten. The staff at Braemar recognized that he was “unusually disabled” at that time. An assessment performed by Ms. Tennant in grade one suggested that Jeffrey had a learning disability. His teachers asked on several occasions throughout grades one and two that he be assessed to determine whether he was learning disabled or simply delayed. He was designated as severely learning disabled at the end of grade two. This designation was important because it entitled the District to extra funding for his education, and entitled Jeffrey to extra supports.⁶³

58. Jeffrey received some supports from kindergarten to grade two, including help from volunteers, in-class teachers’ aides, and the LAC.

59. By the end of grade two, Jeffrey was suffering the psychological, educational, and physical effects of an unremediated learning disability. He had diminished self esteem and told his parents he was “not clever”. He wet his pants when asked to identify the letter “C”. Toward the end of kindergarten, he had begun to suffer from stress-induced migraine headaches, sometimes accompanied by vomiting.⁶⁴ After neurologist Dr. Roland stated that addressing Jeffrey’s learning disability might reduce his migraines, Jeffrey was referred for a full psycho-

⁶¹ Tribunal Reasons, *supra* note 1 at para. 401; D. Chapman, *A Review of Special Education: School District 44 North Vancouver*, (1995) at pp. 112-113 (A.R. Vol. XIV, Tab 89) [**Chapman Report**].

⁶² Tribunal Reasons, *supra* note 1 at para. 494.

⁶³ Tribunal Reasons, *supra* note 1 at para. 462.

⁶⁴ Tribunal Reasons, *supra* note 1 at paras. 425-426, 517 and 804.

educational assessment.⁶⁵

60. Ms. Tennant completed the psycho-educational assessment in early April 1994 – grade two. It confirmed that Jeffrey had a severe learning disability and required intensive remediation. The central recommendation in her assessment, and the only change from earlier recommendations, was that Jeffrey attend the DC1 for intensive educational programming. After three years of watching Jeffrey’s steady decline, his parents looked forward to his placement in an intensive program with great hope.⁶⁶

61. In late April 1994, the Moores attended a meeting with the District staff. The staff told the family that Jeffrey would not be able to attend the DC1 for intensive remediation because it would be closing. They advised the Moores that, in light of this, the only place where Jeffrey could get the intensive programming they recommended would be in Kenneth Gordon School, a private school that specialized in remediating severely learning disabled students.⁶⁷

62. The Moores were worried about Jeffrey’s continued inability to read and his declining self esteem. They followed the District’s advice, taking immediate steps to enroll Jeffrey in the private school, which they understood to be the only option that could address Jeffrey’s needs.⁶⁸

63. The tuition for Kenneth Gordon School was \$10,000 per year. This was significant for Jeffrey’s parents, who worked respectively as a bus driver and a secretary.⁶⁹

64. On May 31, 1994, Ms. Tennant advised Assistant Superintendent Christopher Kelly that she was “really concerned” about Jeffrey, given his limited literacy skills. He was going into grade three, but could only recognize 30 words, and only when they were presented in the same

⁶⁵ Tribunal Reasons, *supra* note 1 at paras. 456 and 461.

⁶⁶ Tribunal Reasons, *supra* note 1 at paras. 465-466 and 475; Psycho-Educational Report by Mary Tennant, in Grade two records of Jeffrey Moore, Braemar Elementary School (1993-1994) at p. 11-14 (A.R. Vol. V, Tab 49); Testimony of Frederick Moore (in chief) at p. 149 ll 3-8 (A.R. Vol. IV, Tab 44) [**Psycho-Educational Report**].

⁶⁷ Tribunal Reasons, *supra* note 1 at para. 498.

⁶⁸ Tribunal Reasons, *supra* note 1 at para. 476; Testimony of Frederick Moore (in chief) at p. 151 ll 20-23 (A.R. Vol. IV, Tab 45).

⁶⁹ Tribunal Reasons, *supra* note 1 at para. 6.

context.⁷⁰

65. Jeffrey was waitlisted for Kenneth Gordon School, and attended Braemar for grade three. He continued to receive half an hour's assistance in the LAC three times a week, as well as some support from a volunteer tutor and an in-class teacher's aide.⁷¹

66. Grade three is a key learning year in a student's education. Students who do not learn to read by grade three will experience greater literacy problems later in their schooling, and require greater resources. Some losses will never be regained.⁷²

67. Despite the assistance he received, a form completed by Jeffrey's grade three teacher on February 7, 1995, painted a bleak picture. His teacher confirmed Jeffrey's serious lack of progress in reading and spelling and his poor self esteem. He could only become actively involved in school-related assignments when working on a highly modified program with individual attention from an adult. He could not read at even a basic level. He could not find his own spelling mistakes. He was very conscious of his learning difficulties and sensitive about peer approval, and he was at the bottom of the class. He could not read the card his classmates gave him at his eighth birthday party.⁷³

68. At the end of grade three, Jeffrey was basically a non-reader.⁷⁴

H. Jeffrey completed his education in private schools

69. Jeffrey attended Kenneth Gordon School for grades four until seven. Both his self esteem and reading ability improved. The general goal of the school was to remediate students for a year or two and then refer them back to the public school system. However, at the end of grade seven, the staff recommended that Jeffrey attend a private high school, which could continue his intensive remediation.⁷⁵ The Moores followed this recommendation, and Jeffrey completed his

⁷⁰ Tribunal Reasons, *supra* note 1 at para. 503; Letter from Mary Tennant to Christopher Kelly (31 May 1994), in Grade two records of Jeffrey Moore, Braemar Elementary School (1993-1994) at p. 25 (A.R. Vol. V, Tab 49).

⁷¹ Tribunal Reasons, *supra* note 1 at paras. 509-510.

⁷² Tribunal Reasons, *supra* note 1 at paras. 235, 644, 771 and 988; Testimony of Mary Tennant (in cross) at p. 130 ll 11-21 (A.R. Vol. IV, Tab 38).

⁷³ Tribunal Reasons, *supra* note 1 at para. 517 and 804.

⁷⁴ Tribunal Reasons, *supra* note 1 at paras. 534, 633 and 988.

⁷⁵ Tribunal Reasons, *supra* note 1 at para. 537.

education in a private school.

I. The Human Rights Tribunal found that the Respondents discriminated against children with severe learning disabilities, including Jeffrey

70. Mr. Moore filed human rights complaints against the Respondents, on Jeffrey's behalf, under s. 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*]. He alleged individual and systemic discrimination on the basis of disability in the provision of a public education.⁷⁶

71. The hearing of the complaint took 43 days. The Tribunal received evidence from 20 witnesses, including four experts, and reviewed over 10,000 pages of documentary evidence. It issued its decision on December 21, 2005.

72. The Tribunal held that the District had discriminated both individually and systemically by denying severely learning disabled students meaningful access to an education. The Tribunal concluded that it was not the closure of the DC1 itself that was discriminatory; rather, it was the failure to replace it with a program that delivered equivalent intensive remediation. The District had not proven that it could not accommodate severely learning disabled students without incurring undue hardship. The Ministry was also liable for this discrimination.

73. The Tribunal further found that the Ministry systemically discriminated against severely learning disabled students by arbitrarily capping the funding available to support these students, failing to monitor supports available to them, and underfunding the District. The Ministry did not lead evidence to support a defence of undue hardship.

74. The Tribunal ordered the Respondents to compensate Mr. Moore for: (1) costs incurred to provide Jeffrey with an Orton-Gillingham tutor; (2) tuition paid for Jeffrey's attendance at private schools; (3) half of the costs incurred for Jeffrey's transportation to private schools; and (4) costs incurred to obtain expert evidence for the hearing.

75. The Tribunal ordered the Ministry, within one year of the decision, to: (1) fund severely learning disabled students based on actual incidence; (2) establish mechanisms for ensuring that the supports available to severely learning disabled students meet the stated goals of the *School*

⁷⁶ See the Reasons for Judgment of the Supreme Court of British Columbia (Shaw J.) on judicial review of the preliminary decision on scope of complaint and disclosure application (15 February 2001) for a discussion of the scope of the complaint (A.R. Vol. I, Tab 4) [**Preliminary Decision**].

Act and the *Special Needs Student Order*; (3) ensure that all districts have in place early intervention programs; and (4) ensure that all school districts have in place a range of services to meet all the needs of severely learning disabled students.

76. The Tribunal ordered the District, within one year of the decision, to: (1) establish mechanisms for determining that its delivery of services to severely learning disabled students is appropriate and meets the stated goals of the *School Act*, the *Special Needs Student Order*, and the 1995 Manual; (2) ensure that it has in place an early intervention program; and (3) ensure that it has in place a range of services to meet the needs of its severely learning disabled students.

77. Finally, the Respondents were ordered to pay Jeffrey \$10,000 for injury to his dignity, feelings, and self-respect.⁷⁷

J. The BC Supreme Court quashed the decision of the Tribunal

78. On February 29, 2008, the British Columbia Supreme Court quashed the Tribunal's decision on the basis that the Tribunal had erred in its application of the discrimination test under s. 8 of the *Code*. Dillon J. re-wrote the facts of the case and held that the Tribunal erred in construing the public service and in selecting a comparator.⁷⁸

K. The BC Court of Appeal upheld the decision of the Supreme Court; Rowles J.A. dissenting

79. In reasons delivered October 29, 2010, the majority of the Court of Appeal upheld the Supreme Court decision on the basis of the same reasoning. In dissent, Rowles J.A. found there was no basis to interfere with the Tribunal's findings of fact or legal reasoning. She would have allowed the appeal.⁷⁹

⁷⁷ Tribunal Reasons, *supra* note 1 at paras. 1020-1025.

⁷⁸ Reasons for judgment of the Supreme Court of British Columbia (Dillon J.) (29 February 2008) at paras. 149-150 (A.R. Vol. III, Tab 6) [**BCSC Reasons**].

⁷⁹ Reasons for judgment of the British Columbia Court of Appeal (Low and Saunders JJ.A.; Rowles J.A. dissenting) (29 October 2010) (A.R. Vol. III, Tab 7) [**BCCA Reasons**].

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

80. Mr. Moore submits that the following questions are raised in these appeals:

- (a) Did the Court of Appeal err in failing to apply the proper standard of review to the factual findings of the Tribunal? Answer: Yes.
- (b) Did the Court of Appeal err in construing the service customarily available to the public as “special education services provided to special needs students”? Answer: Yes.
- (c) Did the Court of Appeal err in its application of the comparator analysis as part of the *prima facie* test for discrimination, and in identifying the comparator group as “special needs students other than those with severe learning disabilities”? Answer: Yes.
- (d) Was the Tribunal’s conclusion that Jeffrey was denied meaningful access to an education on the basis of his disability reasonable? Answer: Yes.
- (e) Was the Tribunal’s conclusion that the Respondents had systemically discriminated against severely learning disabled children in the District reasonable? Answer: Yes.
- (f) Was the Tribunal correct in concluding that the Ministry had systemically discriminated against severely learning disabled children province-wide? Answer: Yes.
- (g) Was the Tribunal’s finding that neither Respondent had established a defence of undue hardship reasonable? Answer: Yes.
- (h) Did the Tribunal err in its remedial orders? Answer: No.

81. Mr. Moore no longer defends three of the Tribunal’s orders, namely that: (1) the Respondents reimburse Mr. Moore for the costs of an Orton-Gillingham tutor; (2) the Respondents put in place early intervention programs; and (3) the Respondents compensate Mr. Moore for costs incurred to obtain expert evidence.

PART III – STATEMENT OF ARGUMENT

82. This is a judicial review of a decision of the British Columbia Human Rights Tribunal. In conducting a judicial review, the first issue that a court must resolve is the standard of review. Then, the analysis under s. 8 of the *Code* proceeds as follows (with regard to the appropriate deference afforded to the Tribunal’s findings):

- (a) What is the “service customarily available to the public”?
- (b) Did Mr. Moore succeed in proving a *prima facie* case of discrimination?
 - i) Did the Respondents discriminate against Jeffrey?
 - ii) Did the Respondents discriminate on a system-wide level in the District?
 - iii) Did the Ministry discriminate on a provincial level?
- (c) Did either Respondent establish a defence of undue hardship?
- (d) What remedy is appropriate?

The following sections track this analysis and explain why there was no basis to interfere with the Tribunal’s factual findings or legal conclusions.

A. The courts below failed to apply the appropriate standard of review to the Tribunal’s factual findings

83. The courts below erred in ignoring the standard of review that applies to the Tribunal, particularly with respect to its findings of fact. The Tribunal is subject to the legislated standard of review set out in s. 59 of the *Administrative Tribunals Act*, which provides, in relevant part:

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable. ...⁸⁰

84. The legislature has forbidden courts from interfering with a Tribunal’s factual finding unless there was no evidence to support it or it was otherwise unreasonable. This type of deference recognizes that there may not be a single right answer, and that the administrative decision maker, like a trial judge, is best-placed to make factual findings because of her exposure

⁸⁰ *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 59 (Moore BoA Vol. II, Tab 36), applies by operation of s. 32 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (Moore BoA Vol. II, Tab 37) [*Code*] [emphasis added].

to the evidence and the advantage of hearing *viva voce* testimony.⁸¹ So long as the Tribunal's findings are "within a range of possible, acceptable outcomes", a reviewing judge is not permitted to re-weigh the evidence and draw her own conclusions.⁸²

85. Dillon J. set out the scope of the challenges to the Tribunal's findings of fact:

... The Tribunal's factual findings were not disputed by the Ministry. The District, however, challenged certain conclusions, particularly that Moore should have been provided with specific programs such as Orton – Gillingham and phonemic awareness training during the period of the alleged discrimination and that Moore should have been diagnosed with a severe learning disability earlier than grade two.⁸³

As stated above, Mr. Moore does not defend the orders with respect to Orton-Gillingham and early intervention programs.

86. Despite the limited scope of the factual challenges, Dillon J. re-wrote and undermined many of the Tribunal's findings with no analysis of whether those findings were "unreasonable". She used these revised findings to support her conclusion that there was no discrimination. The Court of Appeal then accepted and applied the facts as found by the chambers judge, on the basis that she had thoroughly and "correctly" canvassed the evidence.⁸⁴ This was done with no discussion of the deference afforded to the Tribunal in its fact-finding role.

87. A few specific examples of impermissible judicial interference demonstrate the concern.

88. First, Dillon J. found that "[t]he Johnstone report did not recommend removal of the cap as suggested by the Tribunal".⁸⁵ In fact, the Johnstone Report specifically recommended that the Ministry: "Re-examine the service levels for the Severe Behaviour and Severely Learning Disabled categories. Clarify program criteria and remove the artificial funding 'cap'."⁸⁶

⁸¹ *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 46 (Moore BoA Vol. I, Tab 11) [*Khosa*].

⁸² *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47 (Moore BoA Vol. I, Tab 17); see also *Khosa*, *supra* note 81 at para. 46; *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at para. 102 (Moore BoA Vol. I, Tab 14) [*Via Rail*].

⁸³ BCSC Reasons, *supra* note 78 at para. 6 [emphasis added].

⁸⁴ BCCA Reasons, *supra* note 79 at para. 166.

⁸⁵ BCSC Reasons, *supra* note 78 at para. 58.

⁸⁶ Johnstone Report, *supra* note 27 at p. 74 (Recommendation #13) [emphasis added].

89. Second, Dillon J. found that, “during the period to 1995, there was not general acceptance of the definition of [a severely learning disabled] student and there was no accepted agreement on prevalence rates”.⁸⁷ She used this to subtly undermine the Tribunal’s finding that districts were reporting a higher prevalence of severely learning disabled students than the Ministry’s estimate of 1-2 %.⁸⁸ In fact, both the 1985 and 1995 Manuals define what is meant by a “severely learning disabled” student,⁸⁹ and the 1994 Johnstone Report reported on prevalence levels for these students in 16 schools. In all but three of the schools, prevalence of severely learning disabled students was over the Ministry’s estimate of 1-2%.⁹⁰

90. Third, Dillon J. found that the Tribunal erred in finding that early intervention for reading recovery had been introduced in Vancouver for grade one in 1991. She substituted her own finding that “no school district had an early intervention program prior to 1997”.⁹¹ In fact, the record confirmed the Tribunal’s finding that the Vancouver School District introduced its pilot program in 1991 and that, as of 1996, at least 20 BC school districts were providing some early reading recovery instruction.⁹²

91. Fourth, Dillon J. found that the LAC “was primarily intended to provide assistance to mild to moderately disabled students but also supported [severely learning disabled] students through qualified resource teachers”.⁹³ This undermined the Tribunal’s finding that the LAC was never intended to be the primary resource for severely learning disabled students.⁹⁴ This finding was supported by, among other things, the express direction in the 1985 Manual that severely learning disabled students were not candidates for learning assistance. The 1985 and

⁸⁷ BCSC Reasons, *supra* note 78 at para. 61.

⁸⁸ Tribunal Reasons, *supra* note 1 at para. 862.

⁸⁹ 1985 Manual, *supra* note 9 at p. 85; 1995 Manual, *supra* note 12 at pp. 107-108.

⁹⁰ Johnstone Report, *supra* note 27 at pp. 48-53.

⁹¹ BCSC Reasons, *supra* note 78 at para. 28.

⁹² Tribunal Reasons, *supra* note 1 at para. 823; Submission of School District No. 39 (Vancouver) to the Provincial Review of Special Education, Ministry of Education [nd] at p. 211 (A.R. Vol. VIII, Tab 76); Ministry of Education, Skills and Training, *Early Intervention of Learning Difficulties*, (British Columbia: 1996) at p. 188 (A.R. Vol. XIV, Tab 90).

⁹³ BCSC Reasons, *supra* note 78 at para. 42.

⁹⁴ See e.g. Tribunal Reasons, *supra* note 1 at para. 817.

1995 Manuals also set out greater qualifications for teachers working with severely learning disabled students, beyond the qualifications for a learning assistance teacher.⁹⁵

92. The most troubling fact that Dillon J. overturned, and the most important for the purposes of these appeals, is the Tribunal's factual conclusion that Jeffrey and other severely learning disabled students were denied the intensive programming that they needed to meaningfully access an education. Though she recognized that there was evidence to support this conclusion, Dillon J. went on to re-weigh the evidence and draw her own conclusion that "[t]he closure of DC1 affected the setting for provision of temporary services: the services themselves were provided through the LAC and in the classroom with no reduction in the teacher/aide levels."⁹⁶

93. In so doing, Dillon J. noted Dr. Siegel's evidence that Jeffrey had been provided sufficient supports.⁹⁷ But the Tribunal expressly rejected the evidence of Dr. Siegel on this point.⁹⁸ Dillon J. did not explain why this finding of credibility was "unreasonable". Dillon J. also found that, after the closure of the DC1, The District planned to support severely learning disabled students with "specially trained aides".⁹⁹ Aside from providing some optional seminars, The District's plan did not incorporate any "specially trained" teachers' aides.¹⁰⁰

94. The Tribunal's finding that the closure of the DC1 left Jeffrey, and other students in the District, with no options for intensive remediation was based on extensive expert and other evidence, including:

- (a) the testimony of Ms. Tennant that the help Jeffrey got through the LAC did not constitute intensive remediation, and that the District could not offer Jeffrey anything else in terms of intensive remediation;¹⁰¹

⁹⁵ 1985 Manual, *supra* note 9 at pp. 87 and 143; 1995 Manual, *supra* note 12 at pp. 74 and 110; see also LAC Review, *supra* note 35 at p. 89.

⁹⁶ BCSC Reasons, *supra* note 78 at paras. 25 and 70.

⁹⁷ BCSC Reasons, *supra* note 78 at para. 29.

⁹⁸ Tribunal Reasons, *supra* note 1 at paras. 652-660.

⁹⁹ BCSC Reasons, *supra* note 78 at para. 70.

¹⁰⁰ Tribunal Reasons, *supra* note 1 at paras. 398-400. The District's plan was set out in: School District No. 44, "Student Services School Reorganization 1994-1995" (A.R. Vol. VI, Tab 65), and J.S. Merilees and C. Kelly, *Serving Students with Learning Disabilities: A Statement of Philosophy, Organization and Support* (North Vancouver School District, 1994-95) (A.R. Vol. VII, Tab 67).

¹⁰¹ Testimony of Mary Tennant (in cross) at pp. 115-116 ll 15-43 (AR. Vol. IV, Tab 35); Tribunal Reasons, *supra* note 1 at para. 802.

- (b) the testimony of Barbara Waigh that the LAC could not duplicate the DC1 because it did not provide small group, full-day, remediation;¹⁰²
- (c) the conclusion of the Chapman Report that, after the closure of the DC1, the District lacked intensive settings to support severely learning disabled students and, as a result, they were being “underserved”;¹⁰³
- (d) reports and Ministry policies confirming that the LAC was not appropriate as the primary resource to educate students with severe learning disabilities;¹⁰⁴
- (e) reports and evidence that teachers’ aides do not provide intensive remediation;¹⁰⁵
- (f) District Superintendent Brayne’s evidence that severely learning disabled students were disproportionately impacted by District cuts;¹⁰⁶
- (g) evidence that, by the end of grade two, Ms. Tennant was “really concerned” about Jeffrey and that, by the end of grade three, after receiving the supports of the LAC and a teacher’s aide, he was basically a non-reader;¹⁰⁷ and
- (h) the ultimate recommendation by District staff that Jeffrey leave the public school system in order to access intensive remediation.¹⁰⁸

95. It was open to the Tribunal to accept this evidence and draw a conclusion that, after the closure of the DC1, severely learning disabled students in the District were left without the support they needed to meaningfully access an education.¹⁰⁹

96. There are numerous other examples where Dillon J. has undermined and re-written the facts found by the Tribunal, without consideration of whether those findings were unreasonable.¹¹⁰ This error permeates the entire analysis, as explained by Rowles J.A.:

¹⁰² Tribunal Reasons, *supra* note 1 at paras. 459 and 798; Testimony of Barbara Waigh (in cross) at pp. 84-85 ll 45-13, and pp. 88-89, ll 42-45 (A.R. Vol. IV, Tab 29).

¹⁰³ Tribunal Reasons, *supra* note 1 at para. 878; Chapman Report, *supra* note 61 at pp. 112-113.

¹⁰⁴ Tribunal Reasons, *supra* note 1 at paras. 801-802, 814 and 897-899; 1985 Manual, *supra* note 9 at p. 143; 1995 Manual, *supra* note 12 at p. 72; LAC Review, *supra* note 35 at p. 92; Perry Report, *supra* note 36 at p. 186.

¹⁰⁵ Tribunal Reasons, *supra* note 1 at paras. 796 and 801-802; Siegel, “Special Education Review”, *supra* note 44 at pp. 67-70.

¹⁰⁶ Tribunal Reasons, *supra* note 1 at para. 403; Testimony of Robin Brayne (in cross) at p. 101 (A.R. Vol. IV, Tab 31).

¹⁰⁷ Tribunal Reasons, *supra* note 1 at paras. 503, 521 and 988; Letter from Mary Tennant to Christopher Kelly (31 May 1994), in Grade two records of Jeffrey Moore, Braemar Elementary School (1993-1994) at p. 25 (A.R. Vol. V, Tab 49).

¹⁰⁸ Tribunal Reasons, *supra* note 1 at para. 498.

¹⁰⁹ See also BCCA Reasons, *supra* note 79 at paras. 129 and 134-135 (*per* Rowles J.A.).

A proper application of s. 59(2) [of the *Administrative Tribunals Act*] would require a reviewing court to first ascertain whether any of the facts found by the Tribunal are being challenged and, if so, to review them on the deferential standard set out in that subsection. If the Tribunal's findings of fact are not challenged, or not overturned on application of the standard in s. 59(2), it is to those facts that the reviewing court applies the law. In this case, however, the judge's analysis of the questions reviewable on the correctness standard was predicated on factual findings that were not in accord with those found by the Tribunal.¹¹¹

97. As there is no basis to interfere with the factual findings of the Tribunal, this Court is bound to accept those findings and apply the law to those facts.

B. Education is the service customarily available to the public

98. As stated above, the first step in the s. 8 analysis is the identification of the "service customarily available to the public". The Respondents, and two levels of court, have used this issue 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 have effectively shielded themselves from a probing consideration of whether their education system allows for participation by all children.

99. The identification of the service must be made substantively and contextually, with a view to furthering the goals of human rights legislation.¹¹² The Tribunal and courts below have been asked to choose between three options for construing the service:

(a) **Education:** The Tribunal held that the service was "the educational programs offered by the Ministry and the District". Rowles J.A., in dissent, agreed.¹¹³

¹¹⁰ For other examples of where Dillon J. re-wrote the facts of this case, see: **para. 78** ("the complaint was refined to demand that a 'particular teaching method or program' such as Orton-Gillingham be implemented throughout the public school system", contradicting Shaw J.'s earlier explanation that "the complainant is not requesting as part of his remedy that a particular teaching method or program, such as the Orton-Gillingham method, be implemented through the public school system" (Preliminary Decision, *supra* note 76 at para. 14 [emphasis added]); **para. 62** (questioning the Tribunal's finding at para. 863 that Quesnel, Stikine and Cranbrook reported an incidence of severely learning disabled students above 2%); **para. 69** (inclusion was a consideration in the closure of DC1, overturning Tribunal's finding at para. 386 that "the sole reason for the closure was financial"); and **para. 25** (the DC1 was "unique to the District", contradicting the Tribunal's finding at para. 877 that the Vancouver School District had equivalent programs until 1999).

¹¹¹ BCCA Reasons, *supra* note 79 at para. 14.

¹¹² *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at pp. 89-90 (Moore BoA Vol. I, Tab 31) [*Robichaud*].

¹¹³ Tribunal Reasons, *supra* note 1 at para. 707; BCCA Reasons, *supra* note 79 at para. 29.

- (b) **Special education:** The BC Supreme Court and a majority of the Court of Appeal held that the service was “special education in addition to or in place of the general curriculum”.¹¹⁴
- (c) **The specific accommodations sought by Jeffrey:** This view of the service has been consistently advanced by the District, but not adopted by any decision maker.

A contextual analysis reveals that the service Jeffrey sought, and was entitled to, was an education.

100. In British Columbia, public education is a service customarily available to the public.¹¹⁵ In delivering this service, the *School Act 1989* aims “to enable learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy society and a prosperous and sustainable economy”.¹¹⁶

101. This purpose is consistent with that of the *Code*, which strives towards an inclusive society, in which no one – and especially no child – is denied opportunities based on pre-conceived notions of ability or worth.¹¹⁷ In the words of this Court in *Meiorin*, “by enacting human rights statutes... the legislatures have determined that the standards governing [the provision of services] should be designed to reflect all members of society”.¹¹⁸ This is particularly important in this context because, as the Court recognized in *Ross*,

...we are dealing here with the education of young children. While the importance of education of all ages is acknowledged, of principal importance is the education of the young ... education awakens children to the values a society hopes to foster and to nurture....¹¹⁹

One of those key values is that, absent legal justification, no person should be excluded from

¹¹⁴ BCCA Reasons, *supra* note 79 at para. 171; BCSC Reasons, *supra* note 78 at para. 122.

¹¹⁵ See Ontario Human Rights Commission, “Guidelines on Accessible Education” (December 2009) at p. 5 (Moore BoA Vol. II, Tab 45) and *Howard v. UBC*, [1993] B.C.C.H.R.D. No. 8 (BCHRT) at paras. 33 and 39 (Moore BoA Vol. I, Tab 23) [*Howard*].

¹¹⁶ *School Act 1989*, *supra* note 1, Preamble.

¹¹⁷ *Code*, *supra* note 80, s. 3; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 174 (Moore BoA Tab 2).

¹¹⁸ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 at para. 68 (Moore BoA Tab 7) [*Meiorin*].

¹¹⁹ *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 82 (Moore BoA Vol. I, Tab 32) [*Ross*].

opportunities on the basis of a disability.

102. Every school-aged child resident in a British Columbia school district “is entitled to enroll in an educational program...”.¹²⁰ In fact, children between the ages of five and 16 are required to enroll in an educational program offered by a school board or other recognized institution.¹²¹ School boards must make an educational program available to all children who enroll in schools in their district.¹²²

103. “Educational program” is defined to mean “an organized set of learning activities that ... is designed to enable learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy society”.¹²³

104. As in many other aspects of our “relentlessly” able-bodied society,¹²⁴ students with disabilities may require recognition of their true characteristics in order to fine-tune their education to remove structures and assumptions which exclude and marginalize them from the mainstream.¹²⁵ Substantive equality means that, in some cases, “differential treatment is required in order to ameliorate the actual situation of the claimant group”.¹²⁶

105. To that end, “special education” is provided as an “extension of regular curriculum, modified as necessary to meet the unique needs of each student” and is “based on the assumption that every child has the fundamental right to an education regardless of the child’s disability”.¹²⁷ In a 1999 “Review of Special Education in British Columbia”, the authors explained that the design of the *School Act 1989* ensured that “students with special needs were not separated from other students in terms of defining their basic right to an educational program”.¹²⁸

¹²⁰ *School Act 1989*, *supra* note 1, s. 2.

¹²¹ *School Act 1989*, *supra* note 1, s. 3.

¹²² *School Act 1989*, *supra* note 1, ss. 94 and 100.

¹²³ *School Act 1989*, *supra* note 1, s. 1.

¹²⁴ *Granovsky v. Canada*, 2000 SCC 28, [2000] 1 S.C.R. 703 at para. 33 (Moore BoA Vol. I, Tab 21) [*Granovsky*].

¹²⁵ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 67 (Moore BoA Vol. I, Tab 18) [*Eaton*].

¹²⁶ *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 at para. 39 (Moore BoA Vol. I, Tab 34) [*Withler*]; see also *Howard*, *supra* note 115 at paras. 45-46.

¹²⁷ 1985 Manual, *supra* note 9 at p. 9 [emphasis added].

¹²⁸ Siegel, “Special Education Review”, *supra* note 44 at p. 58.

106. In other words, special education is the means by which children with disabilities are able to access the education they are guaranteed by the *School Act*:

... In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education...¹²⁹

In *Eaton*, Emily's placement in a special education class was aimed at accommodating her special needs and "[enabling] her to benefit from the services that an educational program offers".¹³⁰ As in *Eldridge*, where sign language interpreters were "the means by which deaf persons may receive the same quality of medical care as the hearing population", special education is the very means by which children with disabilities may receive the same quality of education as their able-bodied peers. It is not a discrete or ancillary service.¹³¹

107. This view is consistent with Article 24 of the *Convention on the Rights of Persons with Disabilities*, which recognizes the right of persons with disabilities to an education. State parties to the Convention, including Canada, have agreed to provide persons with disabilities with an "an inclusive, quality and free primary education ... on an equal basis with others in the communities in which they live", by supporting their needs "within the general education system".¹³² Similar provisions are found in the *Convention on the Rights of the Child*.¹³³

108. The American statutory regime also guarantees children with disabilities a "free and appropriate education".¹³⁴ That regime, like the one in British Columbia, affirms the right of children with disabilities to the same education as children without disabilities. It recognizes that

¹²⁹ *Eaton*, *supra* note 125 at para. 69.

¹³⁰ *Eaton*, *supra* note 125 at paras. 69 and 72.

¹³¹ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 71 (Moore BoA Vol. I, Tab 19) [*Eldridge*].

¹³² *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTS 3 (entered into force 3 March 2008, ratification by Canada 11 March 2010) (Moore BoA Vol. II, Tab 41) [emphasis added].

¹³³ *Convention on the Rights of the Child*, 29 May 1990, 1577 UNTS 3 (entered into force 2 September 1990, ratification by Canada 13 December 1991), Articles 23(3) and 28 (Moore BoA Vol. II, Tab 42). These international laws, which Canada has agreed to abide by, "inform the contextual approach to statutory interpretation and judicial review": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70 (Moore BoA Vol. I, Tab 4).

¹³⁴ See discussion in *Florence County School District Four v. Shannon Carter*, 510 US 7 (1993) (Moore BoA Vol. I, Tab 20) [*Florence County*]; *Mark H. v. Hamamoto*, 620 F 3d 1090 (9th Cir 2010) (Moore BoA Vol. I, Tab 24) [*Mark H. v. Hamamoto*]; and *Mark H. v. Lemahieu*, 513 F 3d 922 (9th Cir 2008) (Moore BoA Vol. I, Tab 25) [*Mark H. v. Lemahieu*].

“a disabled individual may be denied ‘meaningful access’ to public education when that education is not designed to meet her needs as adequately as the needs of other students are met”.¹³⁵

109. The lower courts’ construction of “special education” as a distinct service, apart from the general education that all children in British Columbia are entitled to, segregates children with disabilities from the mainstream population in a way not contemplated by the legislation or education policy. This approach typifies the way in which disability becomes a social, rather than a bio-medical, construct. The legal analysis of discrimination should more properly focus on changing or adapting society to better meet the needs of people with disabilities.¹³⁶

110. Socially constructed barriers to inclusion in society are particularly harmful where they undermine or circumscribe a child’s access to education, which is “the very foundation of good citizenship”.¹³⁷ Children deprived of meaningful access to an education will be unable to fully participate in the democratic process and other social institutions. Children with learning disabilities who never attain basic literacy face increased prospects of ending up poor, unemployed, on welfare, in jail, or suffering an early death.¹³⁸

111. This is not a case, as the Respondents have argued, like *Auton v. British Columbia* or *Wynberg v. Ontario*, in which the claimants sought funding for a particular therapy of benefit to children with autism.¹³⁹ In *Auton*, the claim failed on the basis that the legislative health scheme did not provide British Columbians with funding for all medically necessary treatment. The benefit that the claimants sought, therefore, was not provided by law.¹⁴⁰ Further, there was insufficient evidence to establish that the claimants were treated adversely in relation to a request for an emergent medical therapy on the basis of their disability.

¹³⁵ *Mark H. v. Lemahieu*, *supra* note 134 at p. 619, fn 14 [emphasis added].

¹³⁶ *Granovsky*, *supra* note 124 at para 26; and Dianne Pothier, “Tackling Systemic Discrimination at Work: Towards a Systemic Approach” (2010) 4(1) McGill JL & Health 17 at p. 21 (Moore BoA Vol. II, Tab 46) [Pothier, “Tackling Disability Discrimination”].

¹³⁷ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), cited in *Ross*, *supra* note 119 at para. 82.

¹³⁸ Tribunal Reasons, *supra* note 1 at para. 574.

¹³⁹ *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 (CA), leave to appeal to SCC refused, [2006] S.C.C.A. No. 441 (QL) (Moore BoA Vol. I, Tab 35) [Wynberg]; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657 (Moore BoA Vol. I, Tab 3) [Auton].

¹⁴⁰ *Auton*, *supra* note 139 at para. 35.

112. In contrast, the benefit (service) sought in this case is one that the government has agreed to provide: an educational program designed to enable “learners to develop their individual potential”.¹⁴¹ In order to access that benefit, Jeffrey required intensive remediation. He did not seek access to an emergent or specific therapy. The District had been providing intensive remediation through the DC1 before it abruptly ended that program and did not replace it with an equivalent level of support. The Tribunal was clear that “the decision to close the DC1 would not, alone, have been problematic if the District had provided an alternative service that was similarly intense and effective”.¹⁴² The Tribunal purposely left it to the Respondents to determine the best design for an inclusive educational program, finding that it was they who had the institutional expertise required to determine “the means by which to remedy their failure to provide the appropriate strategies for [severely learning disabled] students”.¹⁴³

113. In *Wynberg*, the claimants sought access to a specific therapy in Ontario’s public school system. The claimants framed their case within the government’s separate legislated duty to provide an appropriate special education, and expressly did *not* rely on a general entitlement to appropriate education programs.¹⁴⁴ In contrast, in British Columbia, special education was not conceived as a distinct benefit scheme, but rather as “an extension” of the regular curriculum.

114. The reasoning of the Court of Appeal illustrates how the definition of the service pre-determines the outcome. The majority acknowledged that “[i]f a group of students were denied a general education on the basis of a characteristic possessed by them as contemplated by s. 8 of the *Code*, little analysis would be required to find discrimination and a breach of s. 8”.¹⁴⁵ The lower courts went on, however, to narrow the service sought to “special education”, thus conflating the question of whether Jeffrey had been discriminated against with the question of whether the Respondents had accommodated his learning disabilities to allow him to access an education:

... To suggest that the service in question was general education services fails to take into

¹⁴¹ *School Act 1989*, *supra* note 1, Preamble.

¹⁴² Tribunal Reasons, *supra* note 1 at para. 799.

¹⁴³ Tribunal Reasons, *supra* note 1 at para. 1014 .

¹⁴⁴ *Wynberg*, *supra* note 139 at para. 109; BCCA Reasons, *supra* note 79 at paras. 97-98 (*per* Rowles J.A.).

¹⁴⁵ BCCA Reasons, *supra* note 79 at para. 170.

account the specific accommodations that were made for Moore's differences that placed him within the eligibility criteria for special education services ... [t]o say that the service in question is general education services negates the special education benefits program established by the Minister and the positive actions taken by the District within that benefits program to accommodate Moore ...¹⁴⁶

The provision of services aimed at accommodating special needs cannot be measured against a standard of perfection...¹⁴⁷

115. The result of this error, as Rowles J.A. points out, is to mask and perpetuate any disadvantage in the mainstream education system.¹⁴⁸

116. The lower courts' determinative finding that "[a]ll students are offered the same curriculum when they begin school and as they progress through the grade levels ... [and therefore] are treated equally" is the antithesis of substantive equality.¹⁴⁹ In effect, they never considered the question of whether Jeffrey, like children without disabilities, received an education that took into account his true characteristics. Jeffrey was denied substantive equality, and the socially constructed barriers to his full participation in society were left unchallenged.

117. A substantive approach to discrimination, which takes into account the social construction of disability and the legislative guarantee of an education, leads to the conclusion that the service subject to scrutiny in this case is a public education.

C. The Tribunal correctly found that Mr. Moore had proven a case of *prima facie* discrimination

118. In human rights cases, the complainant bears the burden of proving a *prima facie* case of discrimination before the burden shifts to the respondent to prove a *bona fide* and reasonable justification. A *prima facie* case is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent" [the *O'Malley test*].¹⁵⁰ The complainant must prove that: (1)

¹⁴⁶ BCSC Reasons, *supra* note 78 at para. 112 [emphasis added].

¹⁴⁷ BCCA Reasons, *supra* note 79 at para. 177 [emphasis added].

¹⁴⁸ BCCA Reasons, *supra* note 79 at para. 109; see also the concern in *Withler*, *supra* note 126 at para. 56.

¹⁴⁹ BCCA Reasons, *supra* note 79 at para. 170; *Eaton*, *supra* note 125 at paras. 66-69.

¹⁵⁰ *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at p. 558 (Moore BoAVol. I, Tab 29) [*O'Malley*].

she is a member of a protected group; (2) she has suffered an adverse consequence; and (3) her membership in the protected group was a factor in the adverse treatment.¹⁵¹

119. The *O'Malley* test is well-suited to statutory human rights claims because of its simplicity, flexibility and origins in the statutory context, where discrimination has been defined by the legislature. In applying the *O'Malley* test, it is appropriate to reference principles developed under s. 15 of the *Charter* “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”.¹⁵²

i. The Court of Appeal erred in comparing Jeffrey to other “special needs” students

120. One *Charter* concept that has crept inconsistently into the sphere of statutory human rights claims is the comparator analysis. While comparative evidence may, in some cases, assist in illuminating adverse treatment, its use should not be elevated to a conclusory status.¹⁵³

121. In *Withler*, this Court rejected the formalistic application of a comparator analysis to obscure the true issues underlying a claim to substantive equality.¹⁵⁴ In this case, the reasons of the majority of the Court of Appeal illustrate precisely how a formulaic comparison of “likes” can perpetuate, rather than rigorously challenge, systemic barriers to equality:

Jeffrey Moore and other severely learning disabled students were given the same opportunity to receive a general education as was given to all other students. To compare these students with the general student population is to invite an enquiry into general education policy and its application. That cannot be the purpose of the hearing of a human rights complaint ...¹⁵⁵

¹⁵¹ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para. 23 (Moore BoA Vol. I, Tab 8) [*Grismer*]; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161 at para. 11 (Moore BoA Vol. I, Tab 26); *Meiorin*, *supra* note 118 at para. 69.

¹⁵² 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 at p. 375 (Moore BoA Vol. II, Tab 43).

¹⁵³ Andrea Wright, “Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate”, in F. Faraday M. Denike & M. K. Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 409 at p. 410 (Moore BoA Vol. II, Tab 47).

¹⁵⁴ *Withler*, *supra* note 126 at paras. 40 and 60.

¹⁵⁵ BCCA Reasons, *supra* note 79 at para. 183.

The court narrowed the scope of inquiry to a comparison of the accommodations received by different “special needs” students, asking: “Did other special needs students receive supports or accommodations that Moore did not receive?”¹⁵⁶

122. A strict comparator analysis is unhelpful where a person with a disability seeks an accommodation to take into account his or her needs, because the claim is not one to equal treatment.¹⁵⁷ This is unlike disability cases where a person with a disability seeks equal access to a benefit scheme.¹⁵⁸ In this case, the lower courts’ comparative test would sanction a system where every child with disabilities could be excluded because of a disability: the important thing, under such an approach, would be that everyone is treated the same.

123. To the extent an overt comparative analysis is necessary, the comparison is between Jeffrey (and other severely learning disabled students) and students without disabilities. The analysis can then proceed to ask whether Jeffrey, as a result of being severely learning disabled, was disadvantaged in his education in a way that non-disabled students were not.¹⁵⁹

124. Again, the American jurisprudence is of assistance. In defining the statutory obligation to provide children with disabilities a “free and appropriate education”, the Court of Appeals for the Ninth Circuit has explained that “school districts need only design education programs for disabled persons that are intended to meet their educational needs to the same degree that the needs of nondisabled students are met”.¹⁶⁰ It noted the futility of comparing supports provided to different children with disabilities, explaining: “evidence that appropriate services were provided to *some* disabled individuals does not demonstrate that others were not denied meaningful access ‘solely on the basis of their disability’”.¹⁶¹ The comparison is with children without disabilities.

125. It is insufficient from a human rights perspective to say that, because Jeffrey was permitted to enroll in an educational program like “all other students”, he was treated equally.

¹⁵⁶ BCCA Reasons, *supra* note 79 at para. 184, citing BCSC Reasons, *supra* note 78 at para. 139.

¹⁵⁷ *ADGA Group Consultants Inc. v. Lane* (2008), 91 O.R. (3d) 649 (Ont Div Ct) at paras. 88-92 and 95 (Moore BoA Vol. I, Tab 1).

¹⁵⁸ See e.g. *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566 (Moore BoA Vol. I, Tab 5).

¹⁵⁹ See Pothier, “Tackling Disability Discrimination”, *supra* note 136 at pp. 33-36.

¹⁶⁰ *Mark H. v. Lemahieu*, *supra* note 134 at p. 617.

¹⁶¹ *Mark H. v. Lemahieu*, *supra* note 134 at p. 618 [emphasis in original, citation omitted].

The question that the Tribunal was tasked with, and the courts below should have examined is: was Jeffrey disadvantaged in receiving his education because of his disability?¹⁶² Put another way, did the Respondents, as providers of public education, do whatever was reasonably possible to accommodate Jeffrey's right to the same education as non-disabled students?¹⁶³ The answer is no. The following sections discuss the individual and systemic discrimination in this case.

ii. Individual Discrimination: Jeffrey was denied meaningful access to a public education on the basis of his disability

126. The gravamen of this complaint is that the District closed the DC1 without making adequate provision for the students who relied on this program to remediate their severe learning disabilities. The Ministry, in turn, failed in its obligation to ensure that a range of supports were left in place after the closure.

127. Jeffrey was officially designated as "severely learning disabled" at the end of grade two. In grade three, the year that he should have entered the DC1, the District provided him the following weekly supports: three 30 minute sessions in the LAC; two 40 minute sessions with a teacher's aide in the LAC; and four 40 minute sessions with a teacher's aide in the regular classroom. The first two supports were the same as those provided in grade two.¹⁶⁴

128. On April 1, 1994, Ms. Tennant, the District psychologist, completed a psycho-educational assessment on Jeffrey. She acknowledged that Jeffrey had benefited from the LAC program at the school and private tutoring, but concluded that "Jeffrey will require intensive remediation in the future to help remediate his learning difficulty".¹⁶⁵ She recommended that he be enrolled in the DC1 program, in addition to the support he'd been receiving through the LAC.

129. Ultimately, Jeffrey could not benefit from the DC1 because it was abruptly closed. At a meeting with Jeffrey's School Based Resource Team, his parents were told that the intensive remediation Jeffrey needed was only available at a private school that cost \$10,000 per year.¹⁶⁶ In that regard, Ms. Tennant later told a Canada Revenue officer that Jeffrey was one of the

¹⁶² *Withler*, *supra* note 126 at para. 35.

¹⁶³ *Via Rail*, *supra* note 82 at para. 121.

¹⁶⁴ Tribunal Reasons, *supra* note 1 at paras. 509-510.

¹⁶⁵ Tribunal Reasons, *supra* note 1 at paras. 465 and 798; Psycho-Educational Report, *supra* note 66 at p. 13.

¹⁶⁶ Tribunal Reasons, *supra* note 1 at para. 498.

“worst cases she had ever seen”, and that “[i]n 1995 he had shown very little improvement and as a result she recommended that he attend Kenneth Gordon. She could not put this in writing because she works for the Vancouver School system and it would not have been appropriate.”¹⁶⁷

130. The inability to provide Jeffrey with intensive remediation in grade three caused concern to staff. Grade three is a key learning year for children to develop reading skills.¹⁶⁸

131. As previously explained, the LAC was not designed for children with severe learning disabilities. The 1985 Manual explains it is intended for students with “mild learning problems”, and that “[s]tudents with moderate to severe disabilities are not candidates for learning assistance”.¹⁶⁹ The 1995 Manual reiterates that “[s]tudents with severe learning disabilities will generally require more intensive intervention” than the LAC can offer.¹⁷⁰

132. Dr. Perry, a professor from the University of British Columbia qualified as an expert in special education, testified that the LAC can provide a “first line of defense” for severely learning disabled students, but that it should not be their primary remediation. She expressed the concern that many learning assistance teachers are not qualified to support special education students, and that they are in fact intended to support “students with mild to moderate difficulties (not disabilities)”.¹⁷¹

133. Barbara Waigh, Jeffrey’s learning assistance teacher, testified that the LAC could not duplicate DC1 because it did not allow for all day small group instruction.¹⁷² Indeed, Jeffrey was already receiving the services of the LAC when he was referred to the DC1 – a clear indication that learning assistance, on its own, was proving insufficient to meet his needs.

134. The District has argued that Jeffrey received better supports than he would have through the DC1, on the basis that he got more individualized assistance from teachers’ aides. It has also

¹⁶⁷ Tribunal Reasons, *supra* note 1 at para. 494; Memorandum of Jean Sterling, Revenue Canada [nd] at pp. 47-48 (A.R. Vol. V, Tab 51).

¹⁶⁸ Tribunal Reasons, *supra* note 1 at paras. 235, 644, 771 and 988.

¹⁶⁹ 1985 Manual, *supra* note 9 at p. 143 [emphasis added].

¹⁷⁰ 1995 Manual, *supra* note 12 at p. 107 [emphasis added].

¹⁷¹ Perry Report, *supra* note 36 at p. 186 [emphasis added]; Tribunal Reasons, *supra* note 1 at para. 898.

¹⁷² Testimony of Barbara Waigh (in cross) at p. 85 ll 6-13, and pp. 88-89 ll 42-5 (A.R. Vol. IV, Tab 29); Tribunal Reasons, *supra* note 1 at paras. 459 and 798.

argued that it did not apply to increase Jeffrey's aide time because of the Moores' direction that District staff not place any additional pressure on him.

135. The Tribunal rejected this argument, finding that it had never been the Moores' attitude that the school should not provide appropriate supports to Jeffrey. Further, the District staff owed a duty to Jeffrey to provide him the supports that they, as education professionals, deemed necessary.¹⁷³ That said, even if a request had been made for more aide time, that would not have constituted the intensive remediation that Jeffrey needed. The Tribunal reasonably concluded that the provision of a teacher's aide was not "intensive remediation."¹⁷⁴

136. Aide time for severely learning disabled students provides a benefit and support to classroom teachers, who remain responsible for the students' education. The 1999 Review of Special Education (which District expert Dr. Siegel conducted) noted that the increased use of aides arose in part from collective agreements. There was, at that time, no real data on the effect the proliferation of aides was having on children. The Review cautioned that the use of aides in the delivery of educational programming could be potentially detrimental to students. It recommended that their role be clarified, and performance standards be set.¹⁷⁵

137. Kristie Green, Jeffrey's grade 3 aide, testified that she felt that aides were "there to support the teacher".¹⁷⁶ Her time with Jeffrey was "primarily spent in the hall outside the classroom".¹⁷⁷ Ms. Tennant testified that Jeffrey's aide was an accommodation intended to allow him to stay in the regular classroom, but that it was not intensive remediation.¹⁷⁸

¹⁷³ Tribunal Reasons, *supra* note 1 at paras. 806-808.

¹⁷⁴ Tribunal Reasons, *supra* note 1 at paras. 797 and 801-802.

¹⁷⁵ Siegel, "Special Education Review", *supra* note 44 at pp. 67-70.

¹⁷⁶ Testimony of Kristie Green (in cross) at p. 137 ll 29-35 (A.R. Vol. IV, Tab 41).

¹⁷⁷ Tribunal Reasons, *supra* note 1 at para. 516.

¹⁷⁸ Tribunal Reasons, *supra* note 1 at para. 796; Testimony of Mary Tennant (in cross) at p. 118 ll 38-41 (A.R. Vol. IV, Tab 35). Dr. Siegel was asked about Jeffrey's kindergarten aide, but testified that she did not know the aide's qualifications, or the details of what the aide was doing in her sessions with Jeffrey: Testimony of Linda Siegel (in cross) at p. 131-132 ll 20-24 and 37-6 (A.R. Vol. IV, Tab 39).

138. The collective agreement expressly provided that aide time allocated to severely learning disabled students “does not include the allocation for aides for D.C. 1 ...”.¹⁷⁹ It contemplated that aide time would be provided in addition to assistance provided in the DC1.

139. The Respondents and courts below have emphasized that Jeffrey received “more special education services than any other student in his school”.¹⁸⁰ However, as noted, substantive equality rejects formal and de-contextualized comparisons. For example, it is irrelevant that a deaf-blind student receives more accommodations than other students with disabilities, if all she receives is sign language – which she cannot see. She is still excluded and marginalized from the mainstream because of her disability. Likewise in *Eldridge*, the minimum accommodation of allowing deaf patients to rely on written notes for communicating with medical professionals was insufficient. In the words of Rowles J.A.,

[a] service provider cannot shield from the *Code* a discriminatory conferral of benefits by providing the bare minimum of (inadequate) accommodation. Human rights jurisprudence requires not merely that the complainant be accorded some accommodation, but that the accommodation provided be sufficient to allow meaningful access to the benefit in question, or if not, that the complainant be accommodated up to the point of undue hardship ...¹⁸¹

140. Ms. Tennant, the District’s witness, testified that the supports that Jeffrey received did not add up to intensive remediation:

Q And the help that Jeffrey received in the Learning Assistance Centre did not constitute intensive remediation?

A Not at that time, no.

...

Q But you would agree, Ms. Tennant, that in light of the closure of DC1, [Kenneth Gordon School] was the only option for intensive remediation at that time, wasn’t it?

¹⁷⁹ Collective Agreement between the Board of School Trustees School District No. 44 (North Vancouver) and the North Vancouver Teachers’ Association (1992-1995, excerpts) at D.4, A. 5. H. I (A.R. Vol. VI, Tab 64); cited in the Arbitration Decision, *supra* note 52 at pp. 12 and 20.

¹⁸⁰ BCCA Reasons, *supra* note 79 at para. 175.

¹⁸¹ BCCA Reasons, *supra* note 79 at para. 105 (*per* Rowles J.A.). See also *Florence County*, *supra* note 134, where a child with learning disabilities was provided an individual education program and individualized instruction, but the education providers had nonetheless failed in their obligation to provide a ‘free and appropriate education.’

A Yes, unless – unless they had kept Jeffrey in the school system and increased the Orton-Gillingham tutoring at home to four times a week, which some children do. That, to me, would have been considered intensive as well.

Q But that wasn't an option that was being offered by the –

A School.

Q -- public school system?

A No, no.

...

Q Apart from continuing with LAC, tutoring and aide time in a modified program, the North Vancouver School District couldn't really offer Jeffrey anything else in terms of intensive remediation?

A Without DC1, no.¹⁸²

141. Given the evidence that neither the LAC nor the aide time was the intensive remediation that Jeffrey needed, the Tribunal's finding that Jeffrey's disability was not accommodated within the District is reasonable.

142. The Ministry is liable for the District's discrimination against Jeffrey. It bears the ultimate responsibility for educating children in British Columbia.¹⁸³ It is granted ample authority to carry out this important function.

143. Throughout this litigation, the Ministry has attempted to deflect responsibility for the system's failings down to the district level. This approach is similar to that of the government in *Eldridge*, in which it argued that the *Charter* did not apply to the decisions of hospitals not to provide sign language interpreters, because the hospitals were exercising a non-governmental discretion conferred by the *Hospital Insurance Act*. This Court rejected that argument:

... The alleged discrimination -- the failure to provide sign language interpretation -- is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an expression of government policy. Thus, while hospitals may be autonomous in their day-to-day operations, they act as agents for the government in providing the specific medical services set out in the *Act*. The Legislature, upon defining its objective as

¹⁸² Testimony of Mary Tennant (in cross) at pp. 115-116 ll 15-43 (A.R. Vol. IV, Tab 35).

¹⁸³ See Tribunal Reasons, *supra* note 1 at paras. 708 – 716 for a discussion of the Ministry's role.

guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective...¹⁸⁴

144. Similarly, in this case, districts are given discretion with respect to service delivery. However, this does not change the fact that they are implementing fundamental government policy with respect to education; they operate as agents for the government in providing educational programs. The responsibility delegated to school districts to provide educational programs is exercised only “subject to the other provisions of [the *School Act*] and the regulations and to any orders of the minister under this *Act*” – ultimate authority always rests with the Minister.¹⁸⁵

145. The remedial purposes of human rights legislation are served where liability attaches to the party best placed to remedy and prevent discrimination. This liability flows from the provisions of the *Code*.¹⁸⁶ In the employment context, employers are ultimately responsible for providing a discrimination-free environment. When it comes to education, the provincial government cannot evade its ultimate responsibility for providing an inclusive education to all children regardless of disability. This is especially true in a case such as this, where the Ministry was put on express notice of the cuts taking place in the District and the impact on severely learning disabled students and their families.

146. The Ministry’s failure to ensure the equality of the education provided to Jeffrey amounts to *prima facie* discrimination.

iii. Systemic Discrimination: The Respondents systemically discriminated against children with severe learning disabilities

147. Systemic discrimination occurs where “practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups”.¹⁸⁷ A fundamental purpose of prohibiting disability discrimination is to challenge able-bodied norms; this is an inherently

¹⁸⁴ *Eldridge*, *supra* note 131 at para. 51[emphasis added].

¹⁸⁵ *School Act 1989*, *supra* note 1, s. 94(1); see also Preliminary Decision, *supra* note 76 at paras. 20-26.

¹⁸⁶ *Robichaud*, *supra* note 112 at pp. 94-95.

¹⁸⁷ *British Columbia v. Crockford*, 2006 BCCA 360, 55 B.C.L.R. (4th) 282 at para. 49 (Moore BoA Vol, I Tab 9) [*Crockford*]; see also *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at pp. 1138-1139 (Moore BoA Vol. I, Tab 15) [*Action Travail*].

systemic task.¹⁸⁸ In disability-discrimination cases, it is often a system-wide failure to take into account the actual characteristics of persons with disabilities that leads to their exclusion from mainstream society.¹⁸⁹

148. To establish a case of systemic discrimination, it is not strictly necessary to prove that the individual complainant suffered a specific negative effect. The BC Court of Appeal has held that “[w]hereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct”.¹⁹⁰ Likewise in *Eldridge*, this Court reiterated that “if claimants prove that the equality rights of members of the group to which they belong have been infringed, they need not establish a violation of their own particular rights”.¹⁹¹

1. The Respondents discriminated systemically against students with severe learning disabilities in the District

149. The District’s closure of DC1, without ensuring an adequate alternative was in place, discriminated against all children with severe learning disabilities in the District who required intensive remediation.

150. Dr. Brayne, the District’s Superintendent, testified that, from 1993-1995, budget cuts were made disproportionately to supports for children with “high incidence/low cost” disabilities. He testified that there was no policy in place to guard against this disproportionate impact.¹⁹² The District had no plan for how to serve students who needed the DC1 after its closure.¹⁹³ Between 1991 and 1995, the years that Jeffrey was in public school, the District went from employing 10.6 specialists to support children with severe learning disabilities down to only one.¹⁹⁴

¹⁸⁸ Pothier, “Tackling Disability Discrimination”, *supra* note 136 at pp. 23-24.

¹⁸⁹ *Eaton*, *supra* note 125 at para. 67.

¹⁹⁰ *Crockford*, *supra* note 187 at para. 49.

¹⁹¹ *Eldridge*, *supra* note 131 at para. 83.

¹⁹² Tribunal Reasons, *supra* note 1 at para. 403; Testimony of Robin Brayne (in cross) at p. 101 ll 27-38 (A.R. Vol. IV, Tab 31).

¹⁹³ Tribunal Reasons, *supra* note 1 at paras. 381 and 386-387.

¹⁹⁴ Watts Letter, *supra* note 52; Tribunal Reasons, *supra* note 1 at para. 392.

151. The DC1 was recognized as a valuable and essential accommodation for children with severe learning disabilities. Families and teachers rallied together to protest its abrupt closure, appearing at school board meetings, and writing letters to the Board of Trustees and the Ministry.¹⁹⁵ Parents protesting to the District were referred to the Ministry, and parents protesting to the Ministry were referred to the District.¹⁹⁶ The Learning Disabilities Association of BC presented a brief to the School Board. The Union grieved the closure and the elimination of the Early Learning Resource Team.¹⁹⁷

152. In passing the 1994/1995 budget bylaw that eliminated the DC1, the District Trustees explained that “they were adopting this bylaw as it was required by legislation and not because they believed it met the needs of the students”.¹⁹⁸ The Tribunal found that it was severely learning disabled students who disproportionately bore the brunt of the budget cuts, when the system was re-designed in such a way that they were excluded by reason of their disability. The closure of the DC1 left 183 students on its waitlist, and an unknown number of children whose post-DC1 supports would not be continued, with no alternative for intensive remediation.¹⁹⁹

153. Again, the Ministry is liable for the effect of the closure on severely learning disabled students. The Ministry knew about the cuts taking place in the District.²⁰⁰ As early as 1991, it was warned by the District’s Board of Trustees that, due to funding constraints, the 1991/2 budget would not “meet the needs of the District”²⁰¹ and that “[w]ithout a significant increase [in funding], the Board is fearful that, in the face of virtually non-discretionary cost increases, it will

¹⁹⁵ Letters between parents, Ministry of Education and School District 44 (various dates, 1994) (A.R. Vol. X, Tab 82); see Tribunal Reasons, *supra* note 1 at para. 388.

¹⁹⁶ Tribunal Reasons, *supra* note 1 at paras. 388 and 884.

¹⁹⁷ Arbitration Decision, *supra* note 52.

¹⁹⁸ Tribunal Reasons, *supra* note 1 at para. 328; Schedule C.1 of the Administrative Memorandum (26 April 1994), in School District No. 44 file folder: “Budget – Board (January 1, 1994 – April 30, 1994)” at p. 28 (A.R. Vol. VII, Tab 68) [emphasis added].

¹⁹⁹ Tribunal Reasons, *supra* note 1 at para. 382; Handwritten note from C. Kelly, Assistant Superintendant of School District 44, to R. Brayne (10 May 1994) (A.R. Vol. VIII, Tab 72).

²⁰⁰ Tribunal Reasons, *supra* note 1 at paras. 390 – 394.

²⁰¹ Letter from Leonard Berg, Secretary Treasurer of School District 44, to Stanley Hagen, Minister of Education (17 April 1991) at p. 131 (A.R. Vol. V, Tab 60).

be forced to disassemble many of its programs and services to the disadvantage of its students and their parents”.²⁰²

154. This prediction came true. In 1994, Rochelle Watts, a District psychologist, wrote to the Ministry’s Director of Special Education, describing the District’s devastating cuts to special education, and the community’s reaction:

... Hundreds of faxes and telephone calls have been done by parents and teachers to the Ministry of Education, the North Vancouver MLA’s and school trustees/senior administration. North Vancouver is reducing services for elementary learning disabled students from 10.6 teachers (June 92) to one teacher in September 1994 (one district psychologist servicing 33 elementary schools). ...

You may already know about the proposed cuts but my colleagues and I wanted to make sure you knew of this “massive cutback” in elementary L.D. services.²⁰³

160. Despite the outcry, the Ministry took no meaningful action to protect the District’s most vulnerable students, and ensure that they retained access to an education. It is liable for the systemic barriers in erected in the District.

2. The Ministry systemically discriminated against severely learning disabled students throughout the province

155. The Tribunal heard extensive evidence about how the practices put in place by the Ministry to administer its public education system had the effect of systemically disadvantaging children with severe learning disabilities. Taken together, the effect of the Ministry’s actions and inactions was to create situations like that in the District, where students with severe learning disabilities were disproportionately impacted by budgetary pressures and there were little to no safeguards in place to ensure equitable delivery of education.

156. First, the Ministry placed an arbitrary cap on supplemental funding for children with severe learning disabilities. Robert Gage, senior manager in the Ministry’s Finance Branch, explained that “the HILC cap was brought in not to fund need, but to control the number of

²⁰² Letter from Margaret Jessup, Chairman of Board in School District 44, to Stanley Hagen, Minister of Education (25 January 1991) at p. 143 (A.R. Vol. V, Tab 61).

²⁰³ Watts Letter, *supra* note 52 ; Tribunal Reasons, *supra* note 1 at para. 391 [emphasis in original].

students being identified.”²⁰⁴ It was an example, he said, of the Ministry favouring simplicity over the goal of equitable access for special needs students.²⁰⁵

157. When districts received targeted funding for children with HILC disabilities (up to the point of the cap), they were obliged by s. 129.1, and later 125.1, of the *School Act 1989* to spend the funds on supporting those children.²⁰⁶ However, if a district reported HILC students above the level of the cap, they would be required to find money from other areas of the budget to support them. The problem that this presented was illustrated in the report of the Official Trustee to the Minister with respect to possible further cuts in the District:

... Most of the services provided to students with special needs are defined in legislation or contract. Services provided through policy, not through contract, can be reduced. It is noted that further cuts will reduce services to those students who are in greatest need for extra support. Section G in Chapter IV above indicates that special education programs have been reduced by 13 FTE teachers and 4 FTE aides between 1992 and 1994.²⁰⁷

158. The Tribunal found that the evidence did not support the view that districts would have excess funds to support children with HILC disabilities above the level of the cap.²⁰⁸ As a result, those supports were vulnerable to being cut. This was confirmed by the BC School Districts Secretary-Treasurers' Association in a 1999 submission to the Special Education Review:

Generally, funding is not adequate as evidenced by the fact that 55 school districts are subsidizing the special education targeted revenue by \$62 million in the 1998/99 school year. This subsidization from other areas within school districts operating budgets is provided at a significant cost in terms of reduced services and maintenance of facilities which is affecting all students with or without special needs. As resources continue to be reduced within the education system the ability of school districts to continue with this subsidization from other areas is diminished. This is evidenced by a number of school districts forced to reduce special education budgets and services, a situation which has been highly publicized this year. ...

[With respect to caps within funding formulae] [s]chool districts cannot stop providing service to students who are in excess of maximums allowed by the funding formulae and

²⁰⁴ Tribunal Reasons, *supra* note 1 at para. 852.

²⁰⁵ Tribunal Reasons, *supra* note 1 at para. 849.

²⁰⁶ Tribunal Reasons, *supra* note 1 at paras. 137-144 and 154-155.

²⁰⁷ Tribunal Reasons, *supra* note 1 at para. 864-866; Trustee's Report, *supra* note 56 at p. 132 [emphasis added].

²⁰⁸ Tribunal Reasons, *supra* note 1 at para. 864.

if service is mandatory then the funding must be provided. The current formulae appear to assume an efficiency of scale which simply does not exist.²⁰⁹

159. The Ministry was aware as early as 1988/89 of the disincentive for districts to report HILC students above the level of the cap.²¹⁰ As an example, the District developed a strategy to de-list students already identified, and not designate any more students, as having “special needs”.²¹¹ Even despite under-reporting, the Tribunal found that the “majority of districts consistently reported a higher number of students in the HILC program than they received funding for”.²¹² This included severely learning disabled students.²¹³

160. In addition to the HILC cap (which has since been removed), the Ministry failed to put in place any mechanisms to protect against the erosion of supports for severely learning disabled students, and to ensure that their needs continued to be met in times of budgetary strain. Instead, it blamed the districts for eroding supports and claimed (as it has continued to do through two levels of court) that its only role was to provide funding. Throughout the 1990s, the Ministry did not collect information to assess the effectiveness of programs for learning disabled children.²¹⁴ In the District, the Ministry only intervened when it had concerns with the District’s finances. It then replaced the Board of Trustees with an Official Trustee.²¹⁵

161. The Ministry was aware that supports for severely learning disabled children were eroding and being replaced by the LACs, which were ill suited to serve these children. But when the LAC Review confirmed this fact, the Ministry stalled release of the report for nearly a year. Its communication plan revealed an intention to downplay, rather than rigorously address, the findings – which had come as no surprise. The plan cautioned:

²⁰⁹ Submission of British Columbia School Districts Secretary-Treasurers’ Association to the Special Education Review [nd], at p. 128 (Recommendations 1 and 3) (A.R. Vol. V, Tab 59) [emphasis added].

²¹⁰ FMS Review, *supra* note 29 at p. 145.

²¹¹ Tribunal Reasons, *supra* note 1 at para. 333; Memorandum from C. Kelly, Assistant Superintendent of School District 44, to R. Brayne, Superintendent of School District 44 (18 July 1994) (A.R. Vol. X, Tab 81).

²¹² Tribunal Reasons, *supra* note 1 at para. 861.

²¹³ Tribunal Reasons, *supra* note 1 at paras. 862-863; Briefing Note prepared for Paul Ramsey, Minister of Education (17 March 1998) at p. 145 (A.R. Vol. V, Tab 54); Johnstone Report, *supra* note 27 at pp. 48-53.

²¹⁴ Tribunal Reasons, *supra* note 1 at para. 180 and 204.

²¹⁵ Tribunal Reasons, *supra* note 1 at paras. 879 and 884.

Special education parents are well organized and vocal. They can be expected to react with an “I told you so” to the Review. ...

- The findings of the Review confirm anecdotal information that supplementary special education support services have eroded in school districts in recent years of fiscal restraint, leaving Learning Assistance Teachers to assume responsibility for greater numbers of students with a greater range of special needs.
- The “network of special education supports” described in BC’s Special Education Policy as being necessary to ensure the successful inclusion of students with special needs, has diminished. ...
- Ministry messages regarding a corporate response to the findings of the Learning Assistance Review will necessarily be low-key, and should emphasize the allocation of additional resources to local boards to enable them to undertake a local examination of their services, guided by the findings of the Learning Assistance Review Report.²¹⁶

162. The trend of eroding supports for severely learning disabled students was well known to the Ministry in the 1990s. There was a system-wide disconnect between the promises of the policy manuals and the *Special Needs Students Order*, and the delivery of education to severely learning disabled students. The Ministry is obliged by the *Code* to take steps to ensure the inclusiveness of its educational system. Its failure to do so constituted systemic discrimination.

D. The Respondents did not accommodate Jeffrey to the point of undue hardship

163. Before the Tribunal, the District unsuccessfully attempted to rebut the finding of *prima facie* discrimination on the basis of a *bona fide* and reasonable justification.²¹⁷ The Ministry did not lead any evidence to support such a defence, and has not since contested the Tribunal’s finding that its actions were not *bona fide* and reasonably justified.²¹⁸

164. The test for a *bona fide* and reasonable justification requires a human rights respondent to prove that: (1) its *prima facie* discriminatory action was for a purpose or goal that is rationally connected to the function being performed; (2) the action was undertaken in good faith; and (3) the action was reasonably necessary to accomplish its purpose or goal, in the sense that the

²¹⁶ LAC Communications Plan, *supra* note 40 at pp. 123-124; Tribunal Reasons, *supra* note 1 at paras. 187 and 190.

²¹⁷ Tribunal Reasons, *supra* note 1 at paras. 931-941.

²¹⁸ Tribunal Reasons, *supra* note 1 at paras. 926-930.

defendant could not accommodate persons with the characteristics of the claimant without incurring undue hardship.²¹⁹

165. This test subjects the action that has been found to be *prima facie* discriminatory to a rigorous analysis aimed at ensuring that there is no other reasonable alternative to burdening members of a particular group.²²⁰ In *Grismer*, this Court explained:

Once the plaintiff establishes that the standard is *prima facie* discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard ... has a *bona fide* and reasonable justification...²²¹

166. The *prima facie* discriminatory standard in this case is not, as the Tribunal articulated, that: “the Ministry and the District will provide support and accommodation services to Jeffrey, and other [severely learning disabled] students, to allow appropriate and meaningful access to the benefits of the educational system, based on then known best practices and available resources”.²²² In fact, the District’s action that must be rigorously tested is the closure of the DC1, without adequate alternate arrangements for children with severe learning disabilities. The Tribunal’s error on this point made no difference, however, to its ultimate conclusion that the Respondents had not established a defence of undue hardship.

167. The purpose of the closure was to save the District money.²²³ Mr. Moore concedes that this purpose is rationally connected to the District’s function of providing educational services within a budget, and that the District closed the DC1 in a good faith attempt to save money. Therefore, the focus of the analysis is on whether the Tribunal’s factual finding that the District did not prove that it was unable to accommodate Jeffrey and other severely learning disabled students without incurring undue hardship, is unreasonable.²²⁴

²¹⁹ *Grismer*, *supra* note 151 at para. 20; *Meiorin*, *supra* note 118 at para. 54.

²²⁰ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 at p. 518 (Moore BoA Vol. I, Tab 12), cited in *Meiorin*, *supra* note 118 at para. 55.

²²¹ *Grismer*, *supra* note 151 at para. 20 [emphasis added].

²²² Tribunal Reasons, *supra* note 1 at para. 916.

²²³ Tribunal Reasons, *supra* note 1 at para. 386.

²²⁴ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at p. 984 (Moore BoA Vol. I, Tab 13) [*Renaud*]; *Administrative Tribunals Act*, *supra* note 80, s. 59(2).

168. Undue hardship is reached when “all reasonable means of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain”.²²⁵ The analysis of whether this high standard is met examines both the procedure adopted to assess accommodation, and the substance of the failure to accommodate.²²⁶

169. Procedurally, the service provider must show that it has put its mind to alternatives that limit the negative impact of the *prima facie* discriminatory action. This is not an abstract or technical requirement, but an important inquiry central to the fundamental goal of the legislation, which is to facilitate the inclusion of traditionally excluded groups. Disability is socially constructed when society is designed based on unexamined mainstream norms that exclude persons with disabilities, and untested assumptions about the ability to accommodate. The procedural element of undue hardship requires that a service provider address and challenge those exclusionary norms.²²⁷

170. The service provider must show that it has investigated and rejected all viable forms of accommodation that do not have a discriminatory effect before adopting a discriminatory course of action. If the provider did investigate non-discriminatory alternative standards, it must explain why those standards were not implemented.²²⁸

171. In addition, the service provider must demonstrate substantively that it cannot accommodate an individual or group without incurring undue hardship. This standard is more than *de minimus*; the service provider will experience some hardship or incur some expense.²²⁹ The non-exhaustive factors to consider include: financial cost, disruption of a collective agreement, problems of morale, interchangeability of work force and facilities, the size of the

²²⁵ *Via Rail*, *supra* note 82 at para. 130.

²²⁶ *Meiorin*, *supra* note 118 at para. 66.

²²⁷ *Via Rail*, *supra* note 82 at paras. 181 and 186-189, *Eaton*, *supra* note 125 at para. 67; David M. Lepofsky, “The Duty to Accommodate: A Purposive Approach” (1993) 1 Can. Lab. L. J. 1 at pp. 6-7 (Moore BoA Vol. II, Tab 44) [Lepofsky, “Duty to Accommodate”].

²²⁸ *Meiorin*, *supra* note 118 at para. 66; *Grismer*, *supra* note 151 at paras. 19 and 42.

²²⁹ *Renaud*, *supra* note 224 at pp. 983-984.

operation, and safety and risk.²³⁰ Impressionistic evidence or speculative assertions will not be sufficient to prove undue hardship.²³¹

172. In this case, the District argued that it could not accommodate Jeffrey or other severely learning disabled students any further because of the financial pressures that it faced in the early 1990s.²³² In fact, the evidence established that the District did not meet either the procedural or the substantive elements of its duty to accommodate.

i. The District did not investigate alternatives

173. The first mention of closing the DC1 was in a memo prepared for Superintendent Brayne on April 12, 1994.²³³ The option was discussed at the District's Executive Committee meeting on April 13, 1994. The proposal to close the DC1 was then included as a proposal in the draft budget considered by the Board in its meeting on April 19, 1994. The Board approved the draft budget, and the budget by-law eliminating the DC1 was officially passed on April 26, 1994.²³⁴

174. In this two week period, the District did not undertake any qualitative or quantitative analysis of the impact this decision.²³⁵ The District did not inform itself of how many severely learning disabled students would be affected by the closure. It made no inquiry into the nature of the program being cut, or how closing the DC1 would impact the continuum of supports it was required to provide for severely learning disabled students.

175. The District did not consult with experts about the programming needs of severely learning disabled students, including District psychologist Ms. Tennant and learning assistance teacher Ms. Waigh.²³⁶

²³⁰ *Meiorin*, *supra* note 118 at para. 63; *Via Rail*, *supra* note 82 at paras. 131-132.

²³¹ *Grismer*, *supra* note 151 at para. 41.

²³² Tribunal Reasons, *supra* note 1 at para. 931.

²³³ Tribunal Reasons, *supra* note 1 at para. 373; Memorandum from C. Kelly, Assistant Superintendent, to R. Brayne, District Superintendent (12 April 1994) at p. 164 (A.R. Vol. VII, Tab 69).

²³⁴ Tribunal Reasons, *supra* note 1 at paras. 373-379.

²³⁵ Tribunal Reasons, *supra* note 1 at para. 387; Administrative Memorandum of R. Brayne, District Superintendent (19 April 1994) (A.R. Vol. VII, Tab 70); Memorandum from C. Kelly and J. Merilees to R. Brayne, (26 April 1994) (A.R. Vol. V, Tab 56).

²³⁶ Tribunal Reasons, *supra* note 1 at para. 895; Testimony of Barbara Waigh (in cross) at p. 91 at ll 9-25 (A.R. Vol. IV, Tab 29).

176. When the DC1 was closed, there was no plan in place to address the needs of severely learning disabled students. On April 26, 1994 – the day that the budget by-law eliminated funding for the DC1 - Assistant Superintendent Kelly advised Superintendent Brayne that “it is too early to know precisely how the needs of HILC students will be met in the absence of the Diagnostic Centre.”²³⁷ In that regard, Superintendent Brayne testified:

Q And – so would you agree with me, Dr. Brayne, that the decision to close the diagnostic centre at the end of April had significant implications for almost 200 students as at that particular point in time.

A Yes.

Q And still there was no plan in place at that point in time to meet the needs of those students; is that correct?

A Yes.²³⁸

177. The District’s failure to investigate its options before closing the DC1 is evident by the inadequacy of the supports provided to severely learning disabled students well after the closure.²³⁹

178. The District has argued that it was forced to close the DC1 by the aide-time provisions in its collective agreement. This issue is ultimately cost based; the District argues that it could not comply with these provisions if it maintained intensive supports for severely learning disabled students.

179. Where a proposed accommodation runs up against provisions of a collective agreement, the *bona fide* and reasonable justification analysis asks: “what efforts were attempted to elicit the Union’s views on point, and to secure its agreement to waive the contract provision to secure an effective accommodation?”²⁴⁰

²³⁷ Tribunal Reasons, *supra* note 1 at paras. 376, and 380-382; Memorandum from C. Kelly and J. Merilees to R. Brayne, (26 April 1994) (A.R. Vol. V, Tab 56) [emphasis in original]; Testimony of Robin Brayne (in cross) at p. 109 ll 9-21 (A.R. Vol. IV, Tab 33).

²³⁸ Testimony of R. Brayne (in cross) at p. 99 ll 10-20 (A.R. Vol. IV, Tab 30).

²³⁹ Tribunal Reasons, *supra* note 1 at paras. 399-401; Chapman Report, *supra* note 61 at pp. 110 - 111.

²⁴⁰ Lepofsky, “Duty to Accommodate”, *supra* note 227 at p. 14.

180. Here, the District did not pursue a meaningful inquiry about whether there were options available to provide intensive remediation in compliance with the collective agreement. Unlike in *NAPE*, where the union was invited to participate in a process to identify non-discriminatory alternatives, the District did not take the basic step of consulting with the Union before closing the DC1.²⁴¹ The record suggests that discussions with the Union would have been viable and fruitful. The Union viewed the DC1 as a beneficial program and working condition. It grieved its closure as a violation of the collective agreement.²⁴²

181. As in *Health Services and Support - Facilities Subsector Bargaining Assn.*, “the record discloses no consideration by the [District] of whether it could reach its goal by less intrusive measures, and virtually no consultation with unions on the matter.”²⁴³

ii. The District did not accommodate severely learning disabled students to the point of undue hardship

182. The District’s undue hardship defence ultimately rests on financial constraints. Cost can be a factor considered under the undue hardship analysis; however, it should be used carefully and sparingly, particularly in relation to disability discrimination arising from denial of fundamental government services.

183. Cost alone will only justify limiting a right to equality in truly exceptional circumstances, not present here. As this Court has acknowledged, “there are *always* budgetary constraints and there are *always* other pressing government priorities”.²⁴⁴ And in *Grismer*, the Court cautioned that “one must be wary of putting too low a value on accommodating the disabled”.²⁴⁵

184. In 1996, Trustee Smith reviewed the District’s finances. He concluded that, in the years leading up to his appointment, the District engaged in a cumulative pattern of inappropriate spending. He recommended a number of areas, other than special education, where spending

²⁴¹ *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*, 2004 SCC 66, [2004] 3 S.C.R. 381 at paras. 90-92 (Moore BoA Vol. I, Tab 27) [*NAPE*].

²⁴² Arbitration Decision, *supra* note 52.

²⁴³ *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 at para. 156 (More BoA, Vol. I, Tab 22).

²⁴⁴ *NAPE*, *supra* note 241 at para. 72 [emphasis in original]. See also *Via Rail*, *supra* note 82 at para. 225: “It will always seem demonstrably cheaper to maintain the *status quo* and not eliminate a discriminatory barrier”.

²⁴⁵ *Grismer*, *supra* note 151 at para. 41.

could be curtailed or where revenues could be increased, representing a savings of over \$3.5 million.²⁴⁶

185. Trustee Smith also found that, at the same time as it was cutting intensive programming for severely learning disabled students, the District maintained popular non-core programs, to its financial detriment. He reported:

The North Vancouver School District has been pro-active in establishing programs that are not mandated by the Ministry of Education. Examples are the Outdoor School, elementary band and strings, and specialized secondary courses such as Psychology 11 [*sic*]. At least one new initiative, the International Baccalaureate Program, has been in the planning stages for three years. While adding to the quality of education and personal development of the district's students, the additional cost involved in these discretionary programs are not funded by the Ministry. In the interest of cost containment, new programs should be implemented on a full cost recovery basis.²⁴⁷

186. The Trustee singled out the Outdoor School as an example of unwise discretionary spending that should be re-visited. The Outdoor School was a program for students to learn about community and the environment.²⁴⁸ It was an extensive operation with a 165-hectare campus, heated cabins, fish hatchery, farm lab, forest lab, and habitat lab. In addition to instruction costs, the District paid mortgage, maintenance and security costs.

187. The Trustee concluded that in 1993/94 and 1994/95 the District subsidized the Outdoor School in the amounts of \$369,000 and \$242,000, respectively.²⁴⁹

188. The cost of running the DC1 was \$292,500 per year (for staff salaries and benefits). This was 0.29% of the District's total budget of nearly \$100 million.²⁵⁰ In *Eldridge*, the relative insignificance of the cost of providing deaf patients with interpreters defeated the government's argument that its actions were reasonably necessary.²⁵¹

²⁴⁶ Tribunal Reasons, *supra* note 1 at para. 938; Trustee's Report, *supra* note 56 at p. 150.

²⁴⁷ Trustee's Report, *supra* note 56 at p. 148.

²⁴⁸ Tribunal Reasons, *supra* note 1 at para. 275.

²⁴⁹ Tribunal Reasons, *supra* note 1 at paras. 275, 293, 366, and 938; Trustee's Report, *supra* note 56 at pp. 124-126.

²⁵⁰ Tribunal Reasons, *supra* note 1 at para. 372; Memorandum from C. Kelly and J. Merilees to R. Brayne (26 April 1994) at p. 108 (A.R. Vol. V, Tab 56); Operating Budget Summary, in School District No. 44 file folder: "Budget – Board (January 1, 1994 – April 30, 1994)" at p. 38 (A.R. Vol. VII, Tab 68).

²⁵¹ *Eldridge*, *supra* note 131 at para. 87.

189. Although the District was in a difficult financial position, it had a range of options available to save money. In that regard, Dr. Brayne testified that there was some flexibility in the budget.²⁵² The District was obliged by the *Code* to consider what alternatives existed to removing a key accommodation for children with severe learning disabilities, and to implement those alternatives to the extent that doing so would not impose undue hardship. Operating the Outdoor School on a full cost recovery basis would have allowed the District to continue to educate severely learning disabled students. In the words of Rowles J.A., “such specialized and discretionary initiatives [as the Outdoor School] cannot be compared with the accommodations necessary in order to make the core curriculum accessible to severely learning disabled students”.²⁵³

190. Ultimately, the Tribunal’s conclusion that the District had not accommodated severely learning disabled students to the point of undue hardship is a factual one, based on the extensive evidence presented at the hearing. Based on that evidence, the factual findings are reasonable.

E. The Tribunal did not err in its remedial orders

191. In the court below, the Respondents argued that the Tribunal erred in its remedial orders by: (1) failing to exercise proper restraint in its systemic orders; (2) awarding damages in circumstances where their actions were immune from damages; and (3) ordering the Respondents to pay for the costs of Jeffrey’s private education. Mr. Moore submits that none of these arguments can succeed.

192. The orders under attack were made pursuant to ss. 37(2)(c) and (d) of the *Code*, which provide, in relevant part:

37(2) If the member or panel determines that the complaint is justified, the member or panel

... (c) may order the person that contravened this *Code* to do one or both of the following:

²⁵² Testimony of Robin Brayne (in cross) at p. 113 ll 6-10 (A.R. Vol. IV, Tab 34); see also the Note from Leonard Berg, Secretary Treasurer, to R. Brayne (22 April 1994), in School District No. 44 file folder: “Budget – Board (January 1, 1994 – April 30, 1994)”, at p. 59: the budget is “not necessarily fixed in stone” (A.R. Vol. VII, Tab 68).

²⁵³ BCCA Reasons, *supra* note 79 at para. 154.

(i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice; ...

(d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this *Code* to do one or more of the following:

... (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any ... expenses incurred, by the contravention;

(iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them. (Emphases added)

193. In crafting remedies pursuant to these sections, the Tribunal exercised its discretion, which is entitled to deference on a standard of patent unreasonableness. Under the *Administrative Tribunals Act*, a decision is patently unreasonable decision if the discretion: (a) is exercised arbitrarily or in bad faith; (b) is exercised for an improper purpose; (c) is based entirely or predominantly on irrelevant factors; or (d) fails to take statutory requirements into account.²⁵⁴

194. Section 37 of the *Code* is the means by which the Tribunal is empowered to perform its fundamental mandate: the elimination of discrimination. This Court has observed that, in order for this mandate to be fulfilled, “the remedies must be effective, consistent with the ‘almost constitutional’ nature of the rights protected”.²⁵⁵ Where systemic discrimination is uncovered, a systemic remedy will be required to right it.²⁵⁶ Given its quasi-constitutional status and the purposive approach to human rights legislation, the words of the majority of this Court in *Doucette – Boudreau* are apposite:

Purposive interpretation means that remedies provisions must be interpreted in a way that provides “a full, effective and meaningful remedy for *Charter* violations” since “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach” A purposive approach to remedies in a *Charter* context gives modern vitality

²⁵⁴ *Administrative Tribunals Act*, *supra* note 80, ss. 59(3) and (4).

²⁵⁵ *Robichaud*, *supra* note 112 at p. 92.

²⁵⁶ *Action Travail*, *supra* note 187 at p. 1145.

to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.²⁵⁷

i. The Tribunal exercised appropriate restraint in its systemic orders

195. In cases against the government, the Tribunal must endeavor to order remedies that are responsive and effective, but which are not so prescriptive as to usurp the proper role of policy makers. It is a delicate balancing act.

196. In *Eldridge*, this Court granted a declaration that the failure to provide sign language interpreters was unconstitutional and directed the government to administer the health care system in a manner consistent with the requirements of s. 15(1). The Court explained:

A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system ... In fashioning its response, the government should ensure that, after the expiration of six months or any other period of suspension granted by this Court, sign language interpreters will be provided where necessary for effective communication in the delivery of medical services. ...²⁵⁸

197. In this case, the Tribunal held that the Ministry had systemically discriminated against severely learning disabled students by: (1) maintaining the arbitrary HILC cap; (2) underfunding the District to the point that it experienced a financial crisis; and (3) focusing its monitoring only on spending and fiscal concerns and failing to ensure that a range of services for severely learning disabled students was mandatory.²⁵⁹ Accordingly, it ordered the Ministry to:

- a. make available funding for severely learning disabled students at actual incidence levels;
- b. establish mechanisms for determining that the support and accommodation services delivered to severely learning disabled students are appropriate and meet the stated goals of the *School Act* and the *Special Needs Student Order*; and

²⁵⁷ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at para. 25 (Moore BoA Vol. I, Tab 16) [citations omitted, emphasis in original].

²⁵⁸ *Eldridge*, *supra* note 131 at para. 96 [emphasis added].

²⁵⁹ Tribunal Reasons, *supra* note 1 at para. 887.

- c. ensure that all school districts have in place a range of services to meet the needs of severely learning disabled students.²⁶⁰

198. The Tribunal held that the District discriminated against all of its severely learning disabled students by: (1) closing the DC1 without ensuring other sufficiently intensive interventions were available; (2) not ensuring that a range of supports was available for severely learning disabled students; and (3) disproportionately cutting core supports for severely learning disabled students.²⁶¹ Accordingly, it ordered the District to:

- a. establish mechanisms for determining that its delivery of services to severely learning disabled students are appropriate and meet the stated goals of the *School Act*, the *Special Needs Student Order*, and the 1985 Manual; and
- b. ensure that it has in place a range of services to meet the needs of its severely learning disabled students.²⁶²

199. In crafting these orders, the Tribunal was mindful that “tribunals are to identify violations of *Charter* or *Code* rights, but should generally leave the precise method of remedying the breach to the legislature or other body charged with responsibility for implementation of the order”.²⁶³ The Tribunal expressly declined to make more specific orders about how the Respondents should ensure compliance with the *Code*, noting that the expertise for making such determinations “resides in the Ministry, the districts, the faculties of education in our universities in British Columbia, and in the myriad of experts who testified at this hearing”.²⁶⁴

200. The systemic orders track exactly the Tribunal’s findings of discrimination, and require the Respondents to correct practices found to be in violation of the *Code*. The Tribunal made no order with respect to the amount of funding the Ministry was required to provide, or how it should be calculated and distributed – only that it could not be distributed based on an arbitrary cap found to be discriminatory. The Tribunal further ordered the Ministry to comply with its own legislation and policies in establishing “mechanisms” to ensure “appropriate” services. This did

²⁶⁰ Tribunal Reasons, *supra* note 1 at para. 1015. As stated above, Mr. Moore no longer defends the Tribunal’s systemic orders with respect to early intervention.

²⁶¹ Tribunal Reasons, *supra* note 1 at para. 901-902.

²⁶² Tribunal Reasons, *supra* note 1 at para. 1018.

²⁶³ Tribunal Reasons, *supra* note 1 at para. 1012.

²⁶⁴ Tribunal Reasons, *supra* note 1 at para. 1017; see generally paras. 1012-1017.

not require the Ministry to enact new legislation, or make changes to the existing *School Act* and its concomitant policies and Ministerial Orders. It merely required the Ministry to fulfill the promises it had itself made to severely learning disabled students in British Columbia, which would satisfy the requirements of accommodation under the *Code*.

201. The systemic orders in this case are equivalent to the declaration issued in *Eldridge*, which required the government to provide sign language interpreters where necessary to comply with the *Charter*. They have the same effect as the Tribunal's mandatory declaration that the Respondents cease contravening the *Code*, and are not patently unreasonable.²⁶⁵

ii. The Ministry is not immune from liability for damages in a statutory human rights case that does not attack legislative action

202. The Crown will generally not be liable for damages arising from an exercise of its legislative or regulatory functions.²⁶⁶ This does not, however, extend to circumstances where, as here, the government has violated human rights legislation through the discharge of its administrative duties.²⁶⁷

203. The *Code* is binding on the government of British Columbia.²⁶⁸ The government has decreed that the *Code* prevails over any other enactment.²⁶⁹ In applying the remedial provisions of the *Code*, the Tribunal is thus following legislative intent.²⁷⁰

204. The government of British Columbia has tried, unsuccessfully, to extend its immunity beyond the legislative realm. In *Bolster v. British Columbia*, the Court of Appeal rejected the argument that the province was immune from a damages award where the Superintendent of

²⁶⁵ *Code*, *supra* note 80, s. 37(2)(a).

²⁶⁶ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789 at para. 19 (Moore BoA Vol. I, Tab 30).

²⁶⁷ *Bolster v. British Columbia*, 2007 BCCA 65, 63 B.C.L.R. (4th) 263 at para. 76 (Moore BoA Vol. I, Tab 6) [*Bolster*].

²⁶⁸ *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 14(1): "Unless it specifically provides otherwise, an enactment is binding on the government" (Moore BoA Vol. II, Tab 38). The *Code* contains no exemption for the government.

²⁶⁹ *Code*, *supra* note 80, s. 4.

²⁷⁰ *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 at paras. 35-36 (Moore BoA Vol. I, Tab 33).

Motor Vehicles discriminated against the complainant in refusing to provide an individual functional driving assessment. The court held that “[t]he human rights laws of British Columbia preclude the Province from claiming Crown immunity from the remedy of compensation in respect of the discriminatory acts of the Superintendent.”²⁷¹

205. In this case, no legislation was attacked, and in fact the Ministry’s legislation, in large part, supported an inclusive education system. Many government duties relate in some way to legislation. The fact that the Ministry’s duties for administering the public education system arise from the *School Act* cannot operate to immunize the discriminatory exercise of these duties from liability for damages under the *Code*, contrary to the clear wording of the *Code*. Nor can the Ministry transform the case into one involving its legislative function by arguing that the only way to cease contravening the *Code* is to enact further legislation. The Ministry can meet its mandate through a variety of methods, all left open by the Tribunal’s broad orders, including by simply complying with much of the legislation and policy that it had already enacted.

206. Nor can the District reasonably argue that its actions were immune from damages. The failure to provide appropriate supports for students with severe learning disabilities did not arise from legislation, or need to be addressed through any legislated act.

iii. The Tribunal’s order to compensate Mr. Moore for private tuition costs was not patently unreasonable

207. The Tribunal is granted a pure discretion to order compensation for “expenses incurred by the contravention” of the *Code*.²⁷² In this case, the financial consequence of the Respondents’ failure to provide Jeffrey with a place in the public education system was devastating for the Moores. In *Florence County School District Four v. Shannon Carter*, the U.S. Supreme Court upheld an order that the School District compensate the parents of a child with a learning disability for the costs of a private school, noting that:

public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate

²⁷¹ *Bolster*, *supra* note 267 at para. 72.

²⁷² *Code*, *supra* note 80, s. 37(d).

public education in a public setting, or place the child in an appropriate private setting of the State's choice.²⁷³

The Tribunal did not act "irrationally" or "improperly" in granting Mr. Moore an order to make him whole.

F. CONCLUSION

208. Jeffrey, like all severely learning disabled students, was entitled to a public education. The Tribunal's conclusion that the public school system contained discriminatory barriers to their equal participation, with no *bona fide* and reasonable justification, was reasonable in light of the extensive evidence in this case.

PART IV – STATEMENT OF ORDER SOUGHT CONCERNING COSTS

209. The parties have agreed to each bear their own costs.

PART V – STATEMENT OF ORDER SOUGHT

210. Mr. Moore seeks an order allowing the appeals and restoring the decision of the British Columbia Human Rights Tribunal, with the exception of the undefended portions of the Tribunal's order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: November __, 2011

Frances Kelly & Devyn Cousineau
Counsel for the Appellant, Frederick Moore
on behalf of Jeffrey P. Moore

²⁷³ *Florence County*, *supra* note 134 at pp. 293-294.

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