Developments in Disability Rights: Recent Supreme Court of Canada Decisions

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I. Introduction

Since November 2012, the Supreme Court of Canada has released two decisions that directly involve and advance the rights and interests of persons with disabilities. Although the Court did not hear many cases directly related to disability rights during this time, it did seize an opportunity to underscore the individualized nature of the duty to accommodate and the high threshold necessary to establish an undue hardship defence, as well as clarify the applicability of a statutory regime when disagreement arises following a decision to terminate a patient's life support.

The following short paper provides a summary of these two decisions, and will briefly highlight an upcoming case that will be heard by the Supreme Court of Canada.

II. *Cuthbertson v. Rasouli*

At issue before the Supreme Court of Canada in the matter of *Cuthbertson v. Rasouli*[1] was whether a physician could unilaterally withhold or withdraw treatment they believed no longer offered medical benefit to a patient. The Respondent substitute decision-maker, on behalf of the patient in question, argued that the *Health Care Consent Act* (*HCCA*)[2] was a procedural code that applied to a physician's decision to withdraw life support. At the center of this case is the protection of patient autonomy, and by extension, the role of the designated substitute decision-maker. This case was framed

[1] 2013 SCC 53. [*Rasouli*]
[2] S.O. 1996, c.2, Sched. A. [*HCCA*]

as one of statutory interpretation; the parties agreed that no constitutional challenge would be raised. The Court released its decision on October 18, 2013.

Summary of facts

Mr. Hassan Rasouli was a patient of Sunnybrook Health Sciences Centre who underwent surgery to remove a brain tumor. He subsequently developed an infection following the surgery causing brain damage and lost consciousness. Mr. Rasouli was kept alive, “by mechanical ventilation, connected to a tube surgically inserted into his trachea, and artificial nutrition and hydration, delivered through a tube inserted into his stomach”[3] and diagnosed as being in a ‘persistent vegetative state’. Mr. Rasouli’s treating physicians opined that they exhausted all possible treatments to improve his condition and that the life support should be removed as it did not provide medical benefit to him.

Mr. Rasouli’s spouse, and substitute decision maker, Parichehr Salasel, disagreed with the decision to withdraw life support. She successfully made an application to the Superior Court of Justice for an order prohibiting the removal of life support without her consent. The Court further ordered that the Consent and Capacity Board would be the appropriate forum to hear any challenges to her consent.[4] The Court of Appeal for Ontario upheld the Superior Court’s decision, although on very different grounds.[5]

Issues before the Supreme Court

The Chief Justice, writing for the majority of a seven member panel (Abella and Karakatsanis JJ. dissenting), emphasized that the Court was not being asked to decide who has the final say on withdrawing life support or whether the wishes of the substitute decision-maker would trump those of the physician. Rather, at issue was whether the common law or the *HCCA* applied in circumstances where a substitute

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[3] *Rasouli, supra* note 1 at para 5.
[4] *Rasouli v. Sunnybrook Health Sciences Centre*, 2011 ONSC 1500.
[5] *Rasouli v. Sunnybrook Health Sciences Centre*, 2011 ONCA 482.

decision-maker disagrees with the decision of health care service providers to withdraw life sustaining measures.

Applicability of statutory scheme

McLachlin C.J.C. found that the existence of the statutory framework set out in the *HCCA* articulates the appropriate process when dealing with decisions to withdraw life support, which includes the opportunity for physicians to challenge the decision of the substitute decision-maker before the Consent and Capacity Board. The Court found that the *HCCA* is not simply a codification of the common law, but rather a scheme "entirely independent of the common law".[6]

The Supreme Court provided a short synopsis of the common law on a patient's informed consent to treatment, underscoring the difficulties in circumstances when the patient is incapable to provide such consent. In Ontario, as in numerous other Provinces, the legislature created a statutory scheme that governs consent to treatment. Among the purposes of the *HCCA* is to resolve the more complex situations where a "patient's autonomy is compromised by lack of capacity".[7] Furthermore, the *HCCA* provides for an expedient and expert administrative tribunal process to deal with those complexities when challenged. Thus, health care that falls within the definition of "treatment" would fall within the ambit of the *HCCA,* and for anything that falls outside of this definition, the common law applies.[8]

Interpreting Treatment

At the center of this decision is the interpretation of the term "treatment" as defined at section 2(1) of the *HCCA.* The appellant physicians argued that consent is not required for decisions to withdraw life support because it does not provide medical benefit to the patient.

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[6] *Rasouli, supra* note 1 at para 52.
[7] *Rasouli, supra* note 1 at para 23.
[8] *Rasouli, supra* note 1 at para 52.

Chief Justice McLachlin emphasized the need for a broad interpretation, and stated that including life support as falling within the definition of treatment provides:

> …consistency with respect to consent, protects autonomy through the requirement of consent, and provides a meaningful role in the consent process for family members. An interpretation of "treatment" that is confined to what the medical caregiver considers to be of medical benefit to the patient would give these statutory purposes short shrift. The legislature cannot have intended such a crabbed interpretation of "treatment".[9]

The majority decision provides a detailed consideration of the arguments against finding that withdrawal of life support falls within the definition of treatment.[10] Chief Justice McLachlin, in finding that the withdrawal of life support is treatment, states that:

> ...withdrawal of life support aims at the health-related purpose of preventing suffering and indignity at the end of life, often entails physical interference with the patient's body, and is closely associated with the provision of palliative care. Withdrawal of life support is inextricably bound up with care that serves health-related purposes and is tied to the objects of the Act. By removing medical services that are keeping a patient alive, withdrawal of life support impacts patient autonomy in the most fundamental way. [11]

Once determined that withdrawal of life support is captured within the definition of treatment, it followed that the Court found that the *HCCA* applies rather than a common law analysis.

Steps to address disagreement re: withdrawal of life support

Relying on the framework within the *HCCA,* the Court sets out the necessary steps to be taken when dealing with withdrawal of life support.

> 1. The health practitioner determines whether in his view continuance of life support is medically indicated for the patient;
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> 2. If the health practitioner determines that continuance of life support is no longer medically indicated for the patient, he advises the patient's

[9] *Rasouli, supra* note 1 at para 43.
[10] *Rasouli, supra* note 1 at paras 45 – 76.
[11] *Rasouli, supra* note 1 at para 68.

> substitute decision-maker and seeks her consent to withdraw the treatment;
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> 3. The substitute decision-maker gives or refuses consent in accordance with the applicable prior wishes of the incapable person, or in the absence of such wishes on the basis of the best interests of the patient, having regard to the specified factors in s. 21(2) of the *HCCA*;
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> 4. If the substitute decision-maker consents, the health practitioner withdraws life support;
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> 5. If the substitute decision-maker refuses consent to withdrawal of life support, the health practitioner may challenge the substitute decision-maker's refusal by applying to the Consent and Capacity Board: s. 37;
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> 6. If the Board finds that the refusal to provide consent to the withdrawal of life support was not in accordance with the requirements of the *HCCA*, it may substitute its own decision for that of the substitute decision-maker, and permit withdrawal of life support.[12]

The confirmation of this framework for resolving disputes in withdrawal of life support cases is of significant importance to persons with disabilities in Ontario, from both an autonomy and access to justice perspective.

Conclusion

As an Intervener, ARCH Disability Law Centre argued that persons with disabilities are disproportionately affected by the physicians' position. Ableist views and assumptions often undermine the autonomy and dignity of persons with disabilities as they interact with the health care system. Reinforcing the applicability of the *HCCA* provides for a certain level of safeguards offered to persons who are incapable of expressing their own consent. The Court underscored the negative impact that would arise if the common law and the courts were the only available recourse in these types of situations.

> It may heighten the vulnerability of incapable patients, since the legal burden will be on family or friends to initiate court proceedings to prevent the withdrawal of life support, rather than on physicians to obtain consent before acting. The implications of this shift are particularly troubling where

[12] *Rasouli, supra* note 1 at para 116.

> the incapable patient lacks a network of family and friends with the financial resources to fund legal action, which could entail a trial on the medical standard of care. [13]

The Chief Justice acknowledged the barriers that would be imposed on patients and families if court proceedings were necessary to halt the withdrawal of life support, and underscored the importance to ensure accessible access to a process to resolve such fundamental concerns. In contrast, as a matter of access to justice, the Consent and Capacity Board offers an accessible, expedient and cost-efficient process to address disputes.

III. *Moore v. British Columbia (Ministry of Education)*

The Supreme Court of Canada released its unanimous decision in *Moore v British Columbia (Ministry of Education)*[14] on November 9, 2012, which considered the applicability of statutory human rights legislation within the context of public education services delivered to students with disabilities. Written by Justice Abella for a full bench, the Court provides significant guidance as the first decision to consider a disability accommodation case within a statutory human rights framework in the delivery of public education services. This decision furthers the duty to accommodate; providing a strong framework for disability rights. The Court clearly articulated a highly individualized human rights approach to accommodation within the delivery of education services and further reaffirmed the high standard that must be imposed on service providers, such as school boards, relying on undue hardship defences.

Summary of facts

The facts in this case center on Jeffrey Moore, a student of the North Vancouver School District No. 44 (District). Concerns had been raised regarding Jeffrey's difficulty with literacy as early as kindergarten and by grade 2, he was diagnosed with dyslexia. The

[13] *Rasouli, supra* note 1 at para 114.

[14] *Moore v. British Columbia (Education),* 2012 SCC 61, [2012] 3 S.C.R. 360 [*Moore*].

District operated a specialized facility for intensive remediation (DC1)[15] specific to severe learning disabilities, and it was recommended by the District psychologist that Jeffrey should attend when he became eligible in grade 3. However, the DC1 program was cut due to financial cost saving measures by the District and thus unavailable to Jeffrey when he became eligible for the program. The District's decision to cut the program was in response to the Ministry of Education's changes in funding allocation. Jeffrey continued to attend his regular school in grade 3, without any significant changes made to his individualized education plan. The services he received were not comparable to those that would have been offered at DC1. From grade 4 onward, Jeffrey attended a private school specializing in learning disabilities.

Two applications were filed on behalf of Jeffrey, by his father Frederick Moore, to the British Columbia Human Rights Tribunal alleging he was not appropriately accommodated for his disability by both the District and the British Columbia Ministry of Education.

Lower court decisions

The British Columbia Human Rights Tribunal found that the Respondents, the District and Ministry of Education, failed to provide Jeffrey with appropriate accommodations because he was not given effective remediation as required, and because services were cut to students with severe learning disabilities without appropriate alternatives in place. The matter was judicially reviewed by the British Columbia Supreme Court and the Tribunal's decision was overturned.[16] An appeal to the Court of Appeal for British Columbia was dismissed.[17] Both reviewing courts narrowly defined the term 'service' as per the British Columbia *Human Rights Code*[18] encompassing 'special education

[15] DC1 was a 2 to 4 months segregated program that provided intensive remediation for students with severe learning disabilities.

[16] *British Columbia (Ministry of Education) v Moore,* 2008 BCSC 264.
[17] *British Columbia (Ministry of Education) v Moore,* 2010 BCCA 478 [*Moore* BCCA].
[18] RSBC 1996, c 210.

services' only and concluded that the appellants failed to establish a proper comparator group within that narrowly defined service.

Both Courts adopted a *Charter*-like comparator analysis which controlled the outcome from the outset. The Courts reduced the scope of services from public education, to the very accommodation that the claimant was requesting i.e. special education.

The Court of Appeal determined that the comparator group in relation to the service in question was "special needs students other than those with severe learning disabilities".[19] Since no student receiving "special education" had access to the services that Jeffrey required, the Court concluded that there was no differential treatment. Viewing special education as an "ancillary service" rather than as a means to support and accommodate students of various abilities in accessing public education, severely limits the realm of available comparisons.

Ultimately, the definition of the comparator group determined the analysis and the outcome of the appeal. Furthermore, an undue hardship analysis was avoided altogether. This framework as advanced by the Court of Appeal is antithetical to substantive equality and to the evolution of the duty to accommodate as now understood to be. Furthermore, this interpretation of service and approach inherently promotes a separate and exclusionary delivery of education services, reinforcing stereotypes, prejudice and historical exclusionary practices.

In contrast, the Human Rights Tribunal had found that there was no need for identifying a comparator group.[20] This was supported by Rowles J., dissenting for the Court of Appeal.[21]

Issues before the Supreme Court

At issue in this case was the nature and extent to which the duty to accommodate applied within the education context, as well as the appropriate test to be applied to statutory human rights claims.

[19] *Moore BCCA, supra* note 17 at para 178.
[20] *Moore v British Columbia (Ministry of Education),* 2005 BCHRT 580 at para 746.
[21] *Moore* BCCA*, supra* note 17 at para 121.

Test for proving discrimination

In its analysis, the Supreme Court rejected the importation of a comparator group approach as required in making out an equality claim pursuant to the *Canadian Charter of Rights and Freedoms* (*Charter*).[22] Justice Abella stated that “[i]t is not a question of who else is or is not experiencing similar barriers”.[23]

> If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to. This, as Rowles J.A. noted, “risks perpetuating the very disadvantage and exclusion from mainstream society the *Code* is intended to remedy” […].[24]

The Court further noted that if Jeffrey were compared to only other children with disabilities, it would yield absurd results since the District could then cut all services to children in this group and would nonetheless remain immune to claims of discrimination.[25]

The Court reconfirmed the traditional test for establishing discrimination within the statutory human rights context as set out in *O’Malley.*[26] Justice Abella summarized the *O’Malley* test in the *Moore* decision as follows:

> [T]o demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.[27]

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[22] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[23] *Moore* BCCA*, supra* note 17 at para 30.
[24] *Moore, supra* note 14 at para 31.
[25] *Moore, supra* note 14 at para 30.
[26] *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536 [*O’Malley*].
[27] *Moore*, *supra* note 14 at para 33.

The Supreme Court did not adopt a comparative analysis and demonstrated clarity in its reasoning by not confusing or importing elements from an equality analysis pursuant to the *Charter.* It is no doubt significant that several months following this decision, Justice Abella, in her decision in *Québec (Attorney General) v. A*[28] maintained the analysis for equality claims pursuant to section 15 of the *Charter* distinct by not relying on the framework as set out in her decision in *Moore.*

Interpreting 'services customarily available to the public'

One of the central issues was the meaning of "services" as set out at section 8 of British Columbia's *Human Rights Code* for students with disabilities in the education context. ARCH Disability Law Centre represented the Intervener, Canadian Association for Community Living, and argued that to define service in this context as "special education services" rather than regular education services promotes exclusion of students with disabilities from general education services that are to be available to all. This interpretation is inconsistent with the goals and principles of Canadian human rights legislation as well as the *Convention on the Rights of Persons with Disabilities*.[29]

The Supreme Court agreed that the lower courts had erred in defining "special education" as the service itself. Justice Abella rejected the separate but equal approach that this meaning of services promoted. The Court stated that special education should not be considered as a separate service, but it is rather the "*means* by which those students get meaningful access to general education services available to all of British Columbia's students".[30] The impact of the narrow interpretation that had been adopted by the Court of Appeal would, "relieve the Province and District of their duty to ensure that no student is excluded from the benefit of the education system by virtue of their disability"[31]

[28] [2013] 1 SCR 61, 2013 SCC 5.
[29] UN GAOR, 61st Sess., 76th Mtg., UN Doc. GA/10554 (2006), online: United Nations Enable http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf [*CRPD*].
[30] *Moore, supra* note 14 at para 28.
[31] *Moore, supra* note 14 at para 29.

The duty to accommodate

The Supreme Court found that a general goal of public education is to enable all learners to achieve their potential and the District did not take all the steps necessary to provide Jeffrey with meaningful education in order to achieve this goal. [32] In reaching this conclusion, the Supreme Court confirmed that the District needed to show that, "it could not have done anything else reasonable or practical to avoid the negative impact on the individual".[33] The Ministry of Education was not found liable for discrimination.[34]

The matter before the Court was framed as a pure accommodation question, which requires a highly individualized analysis as to whether the accommodations provided were the most appropriate, short of undue hardship. In this case, the evidence showed that Jeffrey was provided various resources and supports, and the District contended that Jeffrey received more supports than any other student. However, the Court reaffirmed that the inquiry does not stop there. Although it was accepted that Jeffrey received accommodations in the form of learning assistance, the Court found that this was not the accommodation appropriate for Jeffrey given his individualized support needs.[35]

In concluding that the District had discriminated against Jeffery, the Court considered the procedural component of the District's duty, and that it failed to investigate alternatives, and consider the impact of its decision to cut programming, notwithstanding the importance of supports that Jeffrey needed.

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[32] *Moore, supra* note 14 at para 5.
[33] *Moore, supra* note 14 at para 49, *citing British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, at para. 38.
[34] *Moore, supra* note 14 at para 54.
[35] *Moore, supra* note 14 at para 52.

High standard for undue hardship defence

The Court found that the District was not justified in its failure to accommodate.

> There is no doubt that the District was facing serious financial constraints. Nor is there any doubt that this is a relevant consideration. It is undoubtedly difficult for administrators to implement education policy in the face of severe fiscal limitations, but accommodation is not a question of "mere efficiency", since "[i]t will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier" (*VIA Rail*, at para. 225).[36]

The Court underscored the need to conduct a thorough analysis when considering a defence of undue hardship. The Court relied on the Tribunal's findings that the District did not conduct any form of assessment of what alternatives would be available or could have been put into place to accommodate students when making its decision to close DC1. This failure ultimately undermined the District's defence. "In order to decide that it had *no* other choice, it had at least to consider what those other choices were."[37]

Remedies

The Human Rights Tribunal ordered broad systemic remedies, as well as individual remedies. The Supreme Court found that those systemic remedies were too remote[38] and that remedies "must flow from the claim".[39] The Court did uphold significant individual remedies, including an award for the amount of tuition for private school from grade 4 until grade 12, as well as half of the transportation costs incurred to attend those schools. Also, the Court ordered that Moore's legal costs throughout this very long litigation process be paid by the District.

[36] *Moore, supra* note 14 at para 50.
[37] *Moore, supra* note 14 at para 52.
[38] *Moore, supra* note 14 at para 57.
[39] *Moore, supra* note 14 at para 64.

Conclusion

The Supreme Court's decision is a very positive one for students with disabilities as it affirms not only a highly individualized process for accommodation, but reinforces the procedural duty on school boards when they are accommodating the needs of students with disabilities. The Court has clearly stated that school boards must make a full assessment of all the alternatives that could be available in accommodating the needs of students with disabilities. The impact of this decision has been felt in Ontario, as the legal framework outlined by the Supreme Court was adopted by the Human Rights Tribunal of Ontario (HRTO) in *RB v Keewatin-Patricia District School Board.*[40] This is the first decision from the Tribunal that considered and applied the *Moore* decision within an education context. The HRTO found that the Applicant was denied 'meaningful access to education', as articulated in *Moore.*[41] The Tribunal found that a *prima facie* case of discrimination was made out, and that the Respondent school board did not establish an undue hardship defence.

Moreover, the *Moore* judgement is among the leading decisions in statutory human rights jurisprudence. This decision provides needed clarity to the applicable legal test for establishing *prima facie* discrimination, and provides further direction to establishing claims of a failure to provide appropriate accommodations to persons with disabilities.

IV. Upcoming case of interest

On January 16, 2014, the Supreme Court of Canada granted leave to appeal in the matter of *Carter, et al. v. Attorney General of Canada*.[42] This case raises important issues for persons with disabilities about self-determination and autonomy by

[40] 2013 HRTO 1436 at paras 213 - 224.
[41] *Ibid* at paras 213, 259.
[42] *Carter v. Canada (Attorney General),* 2013 BCCA 435 (BCCA), leave to appeal to SCC granted, 35591, 2014 CanLII 1206 (SCC).

challenging the constitutionality of *Criminal Code*[43] provisions that prohibit physician assisted death, pursuant to sections 7 and 15 of the *Charter.*

The lead plaintiffs, Ms. Lee Carter and Ms. Gloria Taylor, now both deceased, were successful before the Supreme Court of British Columbia. The trial judge determined that the impugned *Criminal Code* provisions violated both sections 7 and 15 of the *Charter,* and granted declaratory orders that provisions prohibiting physician-assisted suicide in specified circumstances be of no force and effect.[44] This decision was overturned on appeal to the Court of Appeal for British Columbia,[45] primarily relying on the Supreme Court's decision in *Rodriguez v. British Columbia (Attorney General).*[46]

A tentative hearing date has been scheduled for October 14, 2014.

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[43] R.S.C. 1985, c. C-46.
[44] *Carter v. Canada (Attorney General),* 2012 BCSC 886.
[45] *Carter v. Canada (Attorney General),* 2013 BCCA 435.
[46] [1993] 3 SCR 519.