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2013 Annual Human Rights Update: Keeping on Top of Key Developments Part II

Comparing the Incomparable in Human Rights Claims: *Moore* Guidance

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Friday, June 7, 2013

Ontario Bar Association
Continuing Professional Development

Comparing the Incomparable in Human Rights Claims: *Moore* Guidance

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I. Introduction

Our understanding of human rights law in Canada continues to evolve with major developments having taken place in the last several decades. Jurisprudence and academic commentary alike have conceptually distanced our understanding of substantive equality from Aristotelean notions of treating likes alike. Formal equality, we all argue, is no longer relevant in our Canadian collective understanding of equality and social justice. Nonetheless, tensions *in juris* continue to challenge, and at times undermine, that very fundamental understanding, sometimes edging closer to “treating likes alike” than we wish to acknowledge.

Anti-discrimination and equality jurisprudence pursuant to human rights legislation and the *Canadian Charter of Rights and Freedoms*² (the “*Charter*”), often inform one another with the aim of advancing the discourse on achieving true equality and enhancing the purposes and intent of each respective framework. The reverse holds true when such interplay of frameworks leads to the adoption of elements that are incongruous to that specific legal regime thus stifling and limiting valid equality seeking claims.

Specifically, the importation of a *Charter*-like comparator group analysis into the framing and adjudicating of statutory human rights claims, and particularly duty to accommodate disability claims, shifts the focus away from the proper approach to one that undermines claims for substantive equality.

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² Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

The Supreme Court of Canada has recently released decisions which have cautioned us away from the use of artificial comparators which “may fail to identify and, indeed, thwart the identification of the discrimination”³. Specifically within the statutory human rights context, the Supreme Court in *Moore v British Columbia (Ministry of Education)*⁴ provided much needed clarity on the appropriate test to be applied in making out a claim of discrimination pursuant to human rights legislation. The Court concluded that the use of a comparator group is not an element of the *prima facie* test to making out a claim of discrimination. The Federal Court of Appeal adopted this reasoning in its recent decision of *Canada (Attorney General) v Canadian Human Rights Commission*⁵.

The Supreme Court clearly articulated the test to be applied in statutory human rights cases in *Moore* and underscored that the sole consideration is whether there is discrimination. Nonetheless, concern remains that statutory human rights claims may continue to be framed through a comparative lens.

In this paper, we provide a brief history of the analyses used both in the *Charter* and statutory human rights frameworks. We also provide a review of the *Moore* and *First Nations Child and Family Caring Society* decisions, several decisions released prior to *Moore* which demonstrate the devastating effects of importing a strict comparator analysis into statutory human rights adjudication, and a small sampling of recent decisions from the Human Rights Tribunal of Ontario (“HRTO”) following the *Moore* decision where comparative elements exist. Lastly, we argue that a comparator analysis is particularly problematic in duty to accommodate disability cases.

II. The Interplay Between Human Rights Legislation and the *Charter*

i) The differences between two frameworks

Predating the *Charter*, a body of jurisprudence stemming from claims of inequality and discrimination continued to grow under provincial and federal human rights regimes. In

³ *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at para 60 [Withler]; *Quebec (Attorney General) v A* 2013 SCC 5 at para 346 [Quebec].

⁴ 2012 SCC 61 [Moore].

⁵ 2013 FCA 75 [First Nations Child and Family Caring Society].

1985, the Supreme Court of Canada delivered its decision in *Ontario Human Rights Commission v Simpsons-Sears*,⁶ outlining the appropriate framework for determining discrimination within statutory human rights regimes. Known as the “O’Malley test”, the claimant must identify with a protected social ground, and demonstrate a distinction causing disadvantage based on that protected ground.

In the 1989 decision of *Andrews v British Columbia Law Society*,⁷ the Supreme Court borrowed heavily from the body of human rights jurisprudence and the *O’Malley* decision in particular, to articulate a framework within which equality cases pursuant to the *Charter* would be considered. The Court articulated the test for determining infringements of section 15(1) finding that it required more than the demonstration of a distinction on a prohibited ground as was required under human rights statutes. The analysis under the *Charter* required an additional step that 1) there be differential treatment on an analogous or enumerated ground and 2) that the differential treatment causes prejudice or stereotyping.⁸

The Supreme Court has underscored the differences between the *Charter* and human rights legislation notwithstanding that human rights principles generally are applicable to section 15(1) of the *Charter*. Human rights legislation applies to private activities as well as government laws and actions. Human rights statutes apply to specified types of relationships and prohibit discrimination within specified grounds whereas the enumerated grounds in the *Charter* are not exhaustive and are open to expansion. As well, human rights statutes allow for exemptions and defences to discrimination. The Court in *Andrews* acknowledged these fundamental differences:

Where discrimination is forbidden in the Human Rights Acts it is done in absolute terms, and where a defence or exception is allowed it, too, speaks in absolute terms and the discrimination is excused. There is, in this sense, no middle ground. In the *Charter*, however, while s. 15(1), subject always to subs. (2), expresses its prohibition of discrimination in absolute terms, s. 1 makes allowance for a reasonable limit upon the operation of s. 15(1). A different approach under s. 15(1) is therefore

⁶ [1985] 2 SCR 536 [*O’Malley*].

⁷ [1989] 1 SCR 143 [*Andrews*].

⁸ *Ibid* at paras 178-183.

required.⁹

The road to concluding a finding of discrimination under the Ontario *Human Rights Code*¹⁰ (the “Code”) is therefore very different than the road to a conclusion of unconstitutionality. In a *Code* analysis, the finding of discrimination cannot be made until both the *prima facie* case and the respondent’s defences/justifications have been examined. In the *Charter* context, a finding of discrimination is entirely on the claimant to prove. If no finding is reached, the respondent does not need to justify this breach.

For many years, the distinction between the test of discrimination under the statutory human rights regimes and the test to establish a *Charter* infringement under section 15(1) remained clear.

In 1999, the Supreme Court released its decision in *Law v Canada (Minister of Employment and Immigration)*¹¹ in which the Court expanded upon the section 15 analysis set out in *Andrews*.¹² In order to determine if the differential treatment discriminated, the Court outlined four “contextual” factors which developed into a framework that courts rigidly applied in *Charter* analysis. The “Law Test”, became an impediment to advancing rights claims. In *R v Kapp*¹³ the Supreme Court recognized these barriers and acknowledged the extensive criticism of the courts’ stringent application. In *Kapp* and again in *Withler v. Canada (Attorney General)*,¹⁴ the Supreme Court reaffirmed the analytical framework under 15(1) to be that which was first set out in *Andrews*. The *Andrews* framework was affirmed again in the recent Supreme Court of Canada decision in *Quebec (AG) v. A.*¹⁵ and the Court also provides an understanding of the meaning of “perpetuating prejudice” and “stereotyping”.¹⁶

⁹ *Ibid* at para 176.

¹⁰ RSO 1990, c H19 [*Code*].

¹¹ [1999] 1 SCR 497 [*Law*].

¹² *Ibid* at paras 39, 84 & 88.

¹³ 2008 SCC 41, [2008] 2 SCR 483, [*Kapp*].

¹⁴ *Withler*, *supra* note 3.

¹⁵ *Quebec*, *supra* note 3.

¹⁶ *Ibid* at paras 170 – 206.

ii) Comparator groups and the Charter

In *Andrews*, the Supreme Court described equality as a comparative concept and that, “the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises”.¹⁷ In section 15 *Charter* jurisprudence since *Andrews*, the Court has built upon the comparative concept of equality.

In recent years, the Court has faced a great deal of criticism for its analysis and choice of appropriate comparator groups. Many critics have argued that the choice of comparators has often doomed the equality claim and has resulted in a formal equality analysis rather than achieving the *Charter’s* objective of substantive equality.¹⁸ The Supreme Court decision in *Auton (Guardian ad litem of) v British Columbia (Attorney General)*¹⁹ is such an example of how a strict comparator group analysis can thwart the claims of equality seekers.

In its 2011 decision in *Withler*, the Supreme Court reviewed a number of its decisions in which the choice of comparator was a central issue. The Court stated that its section 15 jurisprudence has affirmed the need “for a substantive contextual approach and a corresponding repudiation of a formalistic ‘treat likes alike’ approach”.²⁰ The Court acknowledged and agreed with the criticisms that have been raised concerning the use of strict comparator analyses²¹ stating “the use of mirror comparator groups as an analytic tool may mean that the definition of the comparator group determines the analysis and the outcome”.²²

The barriers to equality claims created by strict comparator analyses were revisited by

¹⁷ *Andrews*, *supra* note 7 at para 164.

¹⁸ *Kapp*, *supra* note 13 at para 22. See Denise Réaume, “Discrimination and Dignity” in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 123. See also Judith Keene, “The Supreme Court, the Law Decision, and Social Programs: The Substantive Equality Deficit” in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 345.

¹⁹ 2004 SCC 78, [2004] 3 SCR 657 [*Auton*].

²⁰ *Withler*, *supra* note 3 at para 43.

²¹ *Ibid* at paras 55- 60.

²² *Ibid* at para 56.

the Supreme Court most recently in *Quebec (Attorney General) v A*:²³

The Court thus acknowledged the general usefulness of comparison in determining whether a distinction exists and gaining a better contextual understanding of the claimant's place within the legislative scheme at issue and within society. The Court nonetheless made the use of the comparative approach more flexible by emphasizing the need to assess the impact of the impugned scheme on substantive equality. In so doing, it moved away from the rigid comparative analytical approach based on the identification of comparator groups that had been adopted in some of its decisions [...].²⁴

Following the *Withler* decision, the approach to be taken in *Charter* claims as it relates to comparators is first to “engage comparison [when] the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not”.²⁵ The Court acknowledged that, in some cases, establishing the denial or burden will be more difficult and will require a focus on the “effect of the law and the situation of the claimant group”.²⁶ Second, “comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping”.²⁷ The factors to consider in reaching the contextual understanding will “vary with the nature of the case”.²⁸

iii) Comparator groups and human rights claims

Prior to the Supreme Court's decision in *Moore*, and the Federal Court of Appeal's decision in *First Nations Child and Family Caring Society* there appeared to be a growing propensity for lower courts and tribunals to diverge from *O'Malley* and import elements of the *Charter* analysis into the human rights framework.²⁹

²³ *Quebec, supra* note 3.

²⁴ *Ibid* at para 169.

²⁵ *Withler, supra* note 3 at para 62.

²⁶ *Ibid* at para 64.

²⁷ *Ibid* at para 65.

²⁸ *Ibid* at para 66.

²⁹ But see *ADGA Group Consultants Inc v Lane*, (2008), 91 OR (3d) 649. In the Ontario's Divisional Court decision, Justice Ferrier addressed the parties' competing submissions on the use of a comparator analysis in claims of employment based discrimination. Justice Ferrier instructed that determining the

In some instances, it becomes clear that the decision-maker narrows the comparator groups to such an extent that it becomes nothing more than a formal equality analysis of treating likes alike, dooming the claim from the outset.³⁰ The use of strict comparator groups to defeat substantive equality claims has been well documented by many scholars.³¹

The following cases are a small sampling of decisions rendered prior to the Supreme Court of Canada's decision in *Moore*, nonetheless demonstrating that this is not a new trend specific to the aforementioned cases, nor is it a jurisdiction-specific concern. Below, we highlight some of the cases that best demonstrate the undermining of substantive equality when this 'borrowing' occurs, particularly when a comparator analysis is brought into duty to accommodate cases.

appropriate comparator group is neither necessary nor appropriate in such claims. Affirming that disability is individualized the Court concluded that once the employee has established that the termination was due to disability the *prima facie* case is established and the onus shifts to the respondent to meet the undue hardship test.

³⁰ See e.g. *B.C. Government and Service Employees' Union v British Columbia (Public Service Employee Relations Commission)* 2005 BCCA 129, 251 DLR (4th) 73. The claimant argued that a clause pursuant to the collective agreement discriminated on the basis of disability. The clause stated that all employees whose long-term disability benefits had terminated would be eligible for assistance in job searching for a period of six months through the 'Rehabilitation Committee'. The claimant argued that the six month limitation had a discriminatory impact on employees whose disabilities may cause them to require more time to be prepared for a return to alternate work. The Arbitration Board embarked on a very narrow comparator group analysis to find that there was no discrimination. The British Columbia Court of Appeal first considered the purpose of the Rehabilitation Committee, deemed to facilitate access to gainful employment for persons with disabilities. The Court then decided the proper comparator was not those gainfully employed, "but that under the narrower category, that which enjoys the benefit that serves to facilitate access to the broader category the Rehabilitation Committee." (at para 34) The Court found the appropriate comparator to be "those employees who have disabilities who also cannot return to their own job, but are not placed elsewhere within the same six month period" (at para 35). Rather than considering the impact of the claimant's disability on her access to the Rehabilitation Centre, the Court found that the distinction was between those that found a placement within the six months and those that did not; disability was not the basis for the distinction.

³¹ See *Withler*, *supra* note 3 at para 65. See also Leslie Reaume, "Postcards from O'Malley: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the *Charter*" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 373; Andrea Wright, "Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 409 at 414 [Wright, "Formulaic Comparisons"].

In *Real Canadian Superstore v United Food and Commercial Workers, Local 1400*³², the claimant challenged the calculation of a bonus provision. The bonus was payable to all full-time employees and prorated for part-time employees. The claimant was a part-time employee who was unable to work for several months due to his disability. The time off due to his disability was included in the prorating. The Saskatchewan Queen's Bench determined that the manner of calculating the bonus did not have discriminatory impact on the claimant. The Court stated:

In relation to the treatment of the hours he had not worked as a result of his disability leave, *he was treated the same as all other part-time workers who had been on leave or absent from their usual hours of work*. The correlation between hours actually worked (by the grievor as well as all other part-time employees) and entitlement to bonus is rationally related to the underlying purpose of the bonus provision to provide a short-term increase in wages, or compensation for work performed, payable to employees. Thus, while it is true, as the Board noted, that the grievor's *disability* had an "adverse effect" upon his entitlement to the bonus, it is wrong to conclude that such effect was *disparate* in comparison with the effect of the policy on other members of the comparator group and was therefore discriminatory.³³ (emphasis added)

There are also concerning cases where adjudicators dismissed claims on the basis that an appropriate comparator group was not identified, as is demonstrated by the following decisions.

In *Cucek v British Columbia (Ministry of Children and Family Development)*,³⁴ the claimant alleged that the government had failed to provide the services he needed to appropriately meet his needs as a person with multiple disabilities. The British Columbia Human Rights Tribunal rejected the claim on the basis that he "did not provide any submissions on what the appropriate comparator group would be".³⁵ The Tribunal failed to take the appropriate individualized approach to accommodations and thus determined that the claim further failed as "there are no allegations in the complaint that

³² 1999 SKQB 196, 182 DLR (4th) 223.

³³ *Ibid* at para 19.

³⁴ 2005 BCHRT 247.

³⁵ *Ibid* at para 52.

the treatment received with respect to the services provided was any different from, or adverse to, that experienced by any other individuals or groups”.³⁶

In the case of *New Brunswick Human Rights Commission v Province of New Brunswick (Department of Social Development)*,³⁷ at issue was the nature of the test that the New Brunswick Human Rights Commission must meet in order to recommend referring a complaint to a Board of Inquiry. The Commission’s recommendation to refer was subsequently quashed by the Court of Appeal of New Brunswick, for reasons that included the failure to identify a proper comparator group.

The facts of this case centre on a young man, W.A., with multiple disabilities including autism. He was assessed as requiring the highest level of care available under New Brunswick’s Long Term Care Program. This program proved insufficient to address W.A.’s complex needs and he was subsequently transferred to a facility that provided twenty-four hour supervision. W.A.’s needs were not met at this facility and it was alleged that he had been sexually assaulted by another resident while there. W.A. was transferred to a facility in Maine, United States. W.A.’s parents had requested a community placement for him in Fredericton.

W.A.’s parents filed a complaint with the New Brunswick Human Rights Commission alleging that W.A. experienced discrimination “because of the severity of his mental disability”.³⁸ W.A.’s parents also claimed that he was not properly accommodated in the receipt of services.³⁹

The New Brunswick Court of Appeal found that the Commission failed to outline “an arguable case”. The Court concluded that “[n]ot only does the record fail to isolate one or more possible comparator groups, with a view to demonstrating unequal treatment, the record makes no reference to the denial of a service which is available to others”.⁴⁰

³⁶ *Ibid* at para 52.

³⁷ 2010 NBCA 40, leave to appeal to SCC refused, 33820 (January 20, 2011), [2010] SCCA No 313 [NBHRC].

³⁸ *PNB v NB Human Rights Comm.*, 2009 NBQB 47 at para 6.

³⁹ *Ibid* at para 17.

⁴⁰ *NBHRC*, *supra* note 36 at para 7.

As demonstrated by these duty to accommodate cases, when the adjudicator applies a strict and narrow comparator group analysis to determine the first stage of the *prima facie* test of discrimination i.e. “is there a distinction based on a prohibited ground”, the claimants most often fail and respondents’ obligations to accommodate short of undue hardship are never addressed.

III. Clarifying the Test under a Human Rights Framework: the *Moore* decision

On November 9, 2012, the Supreme Court of Canada released the much anticipated decision of *Moore v British Columbia (Ministry of Education)*. This matter originated from the British Columbia Human Rights Tribunal and centered on a student diagnosed with a severe learning disability alleging discrimination due to a failure to be appropriately accommodated in the receipt of education services. The Respondent school board had recommended that he attend an intensive program for students with severe learning disabilities for remediation. However, the year that the student, Jeffrey, became eligible for this service, the program was cut due to financial cost saving measures. Jeffrey did not receive support that would have benefited him to the same extent as the intensive remediation program was to assist with his difficulties in literacy. He subsequently attended private school to receive the necessary remediation services.

The Human Rights Tribunal found that the respondents failed to provide Jeffrey with appropriate accommodations because he was not provided the effective remediation required, and because services were cut to students with severe learning disabilities without sufficient alternate services in place. The matter was judicially reviewed by the British Columbia Supreme Court,⁴¹ and appealed to the Court of Appeal for British Columbia.⁴²

The reasons of both Courts illustrate how the use of a comparator analysis can control, from the outset, the outcome of a statutory human rights claim. Contrary to the Tribunal’s decision, the Courts found that a comparator analysis must be conducted and

⁴¹ *British Columbia (Ministry of Education) v Moore*, 2008 BCSC 264.

⁴² *British Columbia (Ministry of Education) v Moore*, 2010 BCCA 478 [*Moore* BCCA].

the proper comparator group identified. The Courts reduced the scope of services from public education, to the very accommodation that the claimant was requesting i.e. special education. When special education is viewed as an “ancillary service” rather than as a means to support and accommodate students of various abilities in accessing public education, the realm of available comparisons suddenly becomes severely limited.

The Court of Appeal determined that the comparator group in relation to the service in question i.e. special education services, was “special needs students other than those with severe learning disabilities”.⁴³ Since no student receiving “special education” had access to the services that Jeffrey required, the Court concluded that there was no differential treatment. Ultimately, the definition of the comparator group determined the analysis and the outcome of the appeal. Furthermore, an undue hardship analysis was avoided. This analytical framework is antithetical to our understanding of substantive equality and to the evolution of the duty to accommodate as we now understand it to be.

In contrast, the Human Rights Tribunal had found that there was no need for identifying a comparator group.⁴⁴ As well, Rowles J. dissenting for the Court of Appeal opined that:

[r]equiring a comparison with another disability group, who may also be suffering from a lack of accommodation, risks perpetuating the very disadvantage and exclusion from mainstream society the Code is intended to remedy. The fact that there may have been same treatment of some groups is irrelevant if the end result is that the complainant receives unequal access to the benefit or service.⁴⁵

The Respondents argued that a prima facie case of discrimination had not been made out because there was “no denial of services provided to others”.⁴⁶ In addition, they argued that Jeffrey received more services than any other student enrolled at his school. This approach encapsulates nothing more than formal equality. A substantive equality approach within the statutory human rights context would require that once a prima facie case was made as in this case, independent of whether other students

⁴³ *Ibid* at para 178.

⁴⁴ *Moore v British Columbia (Ministry of Education)*, 2005 BCHRT 580 at para 746.

⁴⁵ *Moore BCCA*, *supra* note 42 at para 121.

⁴⁶ *Ibid* at para 130.

received or were denied similar services, the respondents would then need to show that the accommodations provided to Jeffrey were the most appropriate for him short of undue hardship.

Moore demonstrates how the importing of Charter analyses, specifically mirror-like comparisons, not only confuses the statutory human rights analysis, but can lead to devastating results ultimately denying true substantive equality.

The Supreme Court found that Jeffrey was discriminated by the Respondent school board. In her reasoning, the Honourable Justice Abella for a unanimous Court stated:

Comparing Jeffrey only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers.⁴⁷

The Court articulated the issue before it as a pure accommodation question to be adjudicated as all other accommodation cases pursuant to human rights legislation. This decision provides a continued understanding of a highly individualized duty to accommodate pursuant to human rights legislation. The evidence showed that Jeffrey was provided various resources and supports. The school board contended that Jeffrey received more supports than any other student, but as the Court reaffirmed, the inquiry does not stop there. The Court accepted that Jeffrey received accommodations in the form of learning assistance, but given Jeffrey's individualized support needs, this was not an appropriate accommodation.

In its analysis, the Court rejected the importation of *Charter* tests when litigating human rights cases. Justice Abella states that “[i]t is not a question of who else is or is not experiencing similar barriers”.⁴⁸

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

⁴⁷ *Moore*, *supra* note 4 at para 20.

⁴⁸ *Ibid* at para 30.

Rowles J.A. noted, “risks perpetuating the very disadvantage and exclusion from mainstream society the *Code* is intended to remedy” [...].⁴⁹

The Court reconfirmed the traditional test for establishing discrimination as set out in *O’Malley*.⁵⁰ The elements required in order to make out a claim of discrimination in no way included or relied on the use of a comparator group or a strict comparative approach. Justice Abella summarizes 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.⁵¹

The Court further articulated the test in this manner:

The inquiry is into whether there is discrimination, period. The question in every case is the same: does the practice result in the claimant suffering arbitrary — or unjustified — barriers on the basis of his or her membership in a protected group. Where it does, discrimination will be established.⁵²

We argue that the Supreme Court’s reasoning applies to all claims alleging discrimination pursuant to human rights legislation. This articulation of the *prima facie* test is not limited to disability and duty to accommodate claims.

Following the release of the *Moore* decision, the Federal Court of Appeal decided *First Nations Child and Family Caring Society*⁵³ which raised similar issues regarding the use of a comparator analysis to defeat a discrimination claim pursuant to the *Canadian Human Rights Act*.⁵⁴ The Federal Court of Appeal acknowledged the importance of

⁴⁹ *Ibid* at para 31.

⁵⁰ *O’Malley*, *supra* note 6.

⁵¹ *Moore*, *supra* note 4 at para 33.

⁵² *Ibid* at para 60.

⁵³ *First Nations Child and Family Caring Society*, *supra* note 5.

⁵⁴ RSC 1985, c H-6.

Charter jurisprudence as it “informs the content of the equality jurisprudence under human rights legislation and *vice versa*”.⁵⁵

Nonetheless, the Federal Court of Appeal, interpreting the Supreme Court’s decision in *Moore*, stated the following:

[T]he Supreme Court reiterated that the existence of a comparator group does not determine or define the presence of discrimination, but rather, at best, is just useful evidence. It added that insistence on a mirror comparator group would return us to formalism, rather than substantive equality [...].⁵⁶

There is caution required however, when considering how comparative evidence can be used in order to avoid situations in which the need to provide comparative evidence becomes determinative of the claim. The concern remains that claims may rest on the evidence regarding a specific comparator and may result in a failure to appreciate the nature of the impact the discrimination had on the claimant. When considering human rights claims rooted in social grounds other than disability, it is perhaps easier to understand the evidentiary role that a comparator group analysis may have in making out a *prima facie* case. The distinction between a comparative approach as a possible evidentiary tool and the reliance on a comparator group analysis to make out a *prima facie* case of discrimination may be subtle and blurred. With regards to disability, it is plausible that for claims that centre on equal access to a benefit or service, in a formal equality sense, such comparative evidence may be useful. Again, caution in framing the claim in this manner is warranted.

IV. HRTO Decisions Released Post-*Moore*

A review of the HRTO decisions that have been released since the Supreme Court’s decision in *Moore*, would indicate that the Tribunal is most often not importing a comparator analysis into its decisions. There have been however, several decisions that do incorporate elements of a comparative approach to varying degrees.

⁵⁵ *First Nations Child and Family Caring Society*, *supra* note 5 at para 19.

⁵⁶ *Ibid* at para 18.

In two race based claims, the HRTO has considered comparative evidence in its determination of disadvantage caused by differential treatment. In *Hay v Ontario Provincial Police*⁵⁷ the Tribunal considered how an Aboriginal police officer was treated compared to non-Aboriginal officers in employment discipline decisions. Hay's claim appears to have failed because he may have made the wrong comparison choice. In *Addai v Toronto*,⁵⁸ the Applicant claimed that taxi drivers from racialized communities were treated differently when the City was distributing certain licences. The adjudicator stated that it was not necessary for the complainant to establish a comparator group, however the adjudicator states that, "on a strict comparison" between two types of taxi licences there are disadvantages to being awarded one type of licence rather than the other.

With regards to claims grounded in disability, it is less clear how the comparative approach used in two decisions is in line with the reasoning in *Moore*. The decision in *Barber v South East Community Care Access Centre*,⁵⁹ an interim decision regarding a denial of service and duty to accommodate claim, raises concerns as to how comparative approaches are relied upon. Associate Chair Wright states:

The *Code* prohibits discrimination, which is a comparative concept. To establish discrimination because of disability, the applicant must show that she experienced substantive discrimination as compared with others, because of her disability, by the [Respondent].⁶⁰

Of most concern, is a recent HRTO decision styled, *Mann v Dimplex North America Limited*.⁶¹ The Applicant was in receipt of long-term disability benefits and made an arrangement with her employer for extended health benefits provided she cover the monthly costs. This arrangement continued for fifteen (15) years at which point the Respondent employer advised the Applicant that the required monthly payment amount would be significantly increased. In her decision, Vice Chair Price did not consider the

⁵⁷ 2012 HRTO 2316.

⁵⁸ 2012 HRTO 2252.

⁵⁹ 2013 HRTO 60.

⁶⁰ *Ibid* at para 26.

⁶¹ 2013 HRTO 606.

impact of the employer's decision on the Applicant as a person with a disability and determined that her application had no reasonable prospect of success:

During the summary hearing, it became apparent that the applicant in this case is not actually complaining that she was treated worse than other employees of the respondent because of her disability. What the applicant is really complaining about is that, in 2010, the respondent treated her worse than it had treated her previously. Although this may be true, it is not a basis upon which the Tribunal could find that the respondent infringed the applicant's "right to equal treatment without discrimination" in s.5 of the *Code*. In order for the Tribunal to come to that conclusion, the applicant would need to show that the respondent treated her in a distinct and disadvantageous manner, as compared to others, because of her disability. This is in keeping with the Supreme Court of Canada's definition of discrimination as:

... a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages *not imposed upon others* or which withholds or limits access to advantages *available to other members of society*. (*Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143). (emphasis added)⁶²

Rather than rely on the Supreme Court's recent articulation of the definition of discrimination as it applies within a statutory human rights context in *Moore*, Vice Chair Price relies on the definition set out in *Andrews*. The claim was essentially defeated due to the Applicant's failure to establish a comparator group.

V. Comparisons are Antithetical to Disability Accommodation

The right to be free from discrimination includes a right to individualized and meaningful accommodations.⁶³ This is an important principle for persons with disabilities. Accommodations are often the means for people with disabilities to access and fully participate in otherwise inaccessible communities. Landlords', employers' and service providers' duty to accommodate the needs of persons with disabilities gives *effect* to

⁶² *Ibid* at para 23.

⁶³ See *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 62. [*Meiorin*]; See also *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 22.

human rights. Accommodations are the workhorses - doing the bulk of the work to achieve the promises of human rights law within the disability context.

It is settled that substantive equality for persons with disabilities is dependant on a highly individualized approach to accommodation.⁶⁴ It is our argument that there is no room for a comparative analysis in that 'highly individualized approach', especially as it applies to the statutory human rights claims of persons with disabilities. To make that argument, and in considering the very purpose and goals of statutory human rights legislation, we rely on the following two propositions:

1. A comparative approach can not account for the infinite differences in circumstances, strengths, disability-related needs and the interplay of these as they relate to persons with disabilities; and
2. Discrimination claims of persons with disabilities are complex, nuanced, insidious and intersect on other grounds, and therefore, the claims of people with disabilities must be subject to a highly individualized case by case analysis. A comparative approach can not do justice to the complexities of the discrimination experienced by persons with disabilities.

The able bodied norm continues to be entrenched within all facets of society. A comparative analysis perpetuates the limits set by able bodied standards. It is only through a highly contextualized and individualized analysis - alive to the multiple and complex ways that persons with disabilities experience discrimination – which the impact and limits set by able bodied norms are minimized and challenged.

i) The infinite variety of the accommodation needs of persons with disabilities make a comparative analysis impracticable

⁶⁴ *Ibid.* See *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161 at para 22. See also *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504 at para 81 [*Martin & Laseur*].

This paper argues that the ground of disability operates differently than other grounds. Indeed, disability is a complex phenomenon. The experience of persons with disabilities can not be categorized. Accommodations can be complex and diverse, as diverse as disability itself.

It is a settled principle of Canadian human rights law that the duty to accommodate entails an individualized process of ascertaining the specific needs and requirements of the person with a disability. The Supreme Court has acknowledged the “virtually infinite variety and the widely divergent needs, characteristics and circumstances of persons” with disabilities.⁶⁵ When accommodations are necessary, substantive equality can occur only if the individual needs of the person are considered.

As the Supreme Court stated in *Meiorin*, there is no single formula for accommodation. It is an individualized process which must consider factors, “relating to the unique capabilities and inherent worth and dignity of every individual”.⁶⁶ Accommodations must be consistent with the dignity interests of the persons being accommodated. A failure to consider all the elements of the accommodation process and the defences, such as *bona fide* occupational requirement and undue hardship, undermine the analytical process of adjudicating accommodation cases.

While considering the individualized nature of accommodation generally, Andrea Wright observes that identifying the appropriate accommodations will be “case-specific, and effectively infinite. Most importantly, it certainly does not suffice for a respondent to establish that the claimant is simply subject to the same rule as other employees are, as the comparator-group test allows”.⁶⁷ Indeed, for persons with disabilities, the need for an individualized approach is substantially increased.⁶⁸

⁶⁵ See *Martin & Laseur*, *ibid* at para 81.

⁶⁶ *Meiorin*, *supra* note 63 at para 62.

⁶⁷ Wright, “Formulaic Comparisons”, *supra* note 31 at para 428.

⁶⁸ See Gwen Brodsky, Shelagh Day & Yvonne Peters, *Accommodation in the 21st Century*, (March, 2012), Online: Canadian Human Rights Commission <http://www.chrc-ccdp.gc.ca/proactive_initiatives/default-eng.aspx>. See also: Ontario Human Rights Commission, “Policy and guidelines on disability and the duty to accommodate” (December 2009), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2/pdf> at 10>. See also *supra* note 63.

ii) The nature of disability is exceedingly complex and insidious - a comparative approach is not sufficiently nuanced

As set out in the section above, unique to persons with disabilities is the sheer complexity and diversity of the accommodations required. This is compounded when we consider the intersectionality of protected grounds. For persons with disabilities, discrimination may be much more subtle and the accommodations much more individualized than persons seeking accommodation pursuant to other protected grounds such as religion and gender.

The practical reality is that discrimination is not neatly compartmentalized. The discriminatory effects experienced by persons with disabilities are commonly compounded in different and complex ways by the existence of other factors such as gender, race, sexual orientation, and poverty.

Ena Chadha asserts that “[d]isability discrimination is often difficult to decipher and detect because it can have many complicated manifestations such as adverse effects discrimination, discrimination on intersecting grounds or intra-group discrimination”.⁶⁹ A comparative analysis can not capture the complex, nuanced ways in which persons with disabilities experience discrimination.

A comparative analysis is too blunt a tool to analyze the experience of discrimination on the basis of disability. A comparison is, in practice, impossible. There is no way to compare the experience of one person with disabilities (and their multiple identities) to another person’s experience when at issue is the most appropriate accommodation for the needs of the individual with that, or those specific disabilities. It is not a measurable quantity; there is no ruler at our disposal.

Within the statutory human rights context, claimants enjoy the flexibility that an administrative process offers, and the ability to put forward evidence specific to their claim and their particular circumstances. It is a process that aims to place the claimant and the circumstances at centre. This flexibility, captured by the *O’Malley* decision and

⁶⁹ Ena Chadha, “Running on Empty: The ‘Not So Special Status’ of Paratransit Services in Ontario” (2005) 20 Windsor Rev Legal Soc Issues 1 at 30.

flowing from the underlying goals of human rights legislation is in contrast to the more rigid tests that await equity seekers who bring forward a constitutional challenge pursuant to the *Charter*.

iii) Application of the above principles

In considering the two propositions we set out at the beginning of this part, we illustrate that the dependence on a comparative 'other' hinders the achievement of substantive equality. Rather, it becomes very clear, especially in disability accommodation cases where the need for individualized consideration is so critical, that comparative approaches have the opposite effect. The question of what is the most appropriate accommodation in any given case is always best answered when it is grounded in the specific individual needs of that claimant. The answer is not dependant on whether other individuals receive or do not receive accommodations.

The *Moore* case is a good illustrator of this distinction. Let us begin with the fundamentals that the most appropriate accommodations that Jeffrey requires are those specific to his needs. For the purposes of this exercise, we will assume that all the appropriate range of options are available to Jeffrey and they are not limited by policy decisions and funding cuts, as these considerations should not factor into an accommodation analysis except to demonstrate undue hardship. From this starting point, even the most purposive and generous comparative analysis will begin to break down.

For illustrative purposes, we will assume that the intensive remediation program that Jeffrey required was still being delivered by the Respondent school board. Furthermore, we will assume that while other students continued to receive those accommodations, Jeffrey was denied due to filled enrollment. From this scenario, one may argue that there are multiple layers of comparisons that can be drawn from the source of the discrimination. Three examples of comparators within this modified fact scenario are identified below:

- First, all students are to achieve certain literacy benchmarks. The majority of Jeffrey's peers will rely on resources within the regular classroom to reach those benchmarks. In comparison to them, Jeffrey will need intensive remediation to 'fit into' that norm.
- Second, students who do receive the benefits from the intensive remediation program are being accommodated to meet those goals, but notwithstanding that their disability-related needs are similar, Jeffrey is not. The comparative injustice here is that students with the same 'label' are receiving one accommodation that Jeffrey requires but is not receiving, yet both are similarly situated.
- Third, a comparison can be drawn between students with disabilities other than those similar to Jeffrey's disability and who receive various accommodations in order to access education.

In the first example, the argument in favour of providing Jeffrey the needed accommodations rests on the fact that certain benchmarks, or ableist norms are set and must be met because comparatively, his peers will be meeting them.

In the second example, discrimination exists because likes are not being treated alike.

In the third comparison, which is the one adopted by the Court of Appeal for British Columbia, Jeffrey's claim becomes inextricably linked to others who are similar in that they too have disabilities. The disabilities in question may be vastly different but this approach fails to capture this difference. Contrary to what this approach suggests, Jeffrey's accommodation claim is independent of whether a child with a mobility disability is able to obtain supports with scribing or whether a student with a communication disability has access to needed software. Jeffrey's needs will remain unaccommodated regardless and independent of whether his classmates are accommodated.

The fallacy therefore embedded in each of these three comparisons is that they do not consider a complete substantive equality analysis which incorporates the realities of historical disadvantage, able-bodied norms, assumptions and structures, the

complexities of Jeffrey's disability and his interaction within his environment, and the very individualized nature of his accommodation requests.

Jeffrey required accommodations that he and he alone needed to fully participate, learn and grow to the maximum of his potential, within his school environment. They may or may not appear to be identical requests as those of his peers who have comparable disabilities but this is nonetheless irrelevant to Jeffrey's claim. Even if their accommodation needs appeared to be identical, their development and interactions with the accommodations would not be. Regardless of whether his peers receive similar accommodations, or whether his able-bodied peers fail or meet education and literacy benchmarks, Jeffrey requires specific accommodations for him to achieve what he wishes to achieve and to attain his true potential. The accommodations provided to Jeffrey should be purposed to give him the tools to flourish as a unique individual within his communities; to give him the opportunity to excel in a way that is different than the able bodied, non-disabled norm.

We therefore need to consider the impact that the denial of accommodations has on Jeffrey, independently of whether other students in comparable situations are receiving accommodations. In a statutory human rights context, the key question is whether those denials to accommodate are defensible, not whether other students have received comparable accommodations. This question was not addressed by the majority of the Court of Appeal, but was amply considered and settled by the Supreme Court of Canada.

VI. Conclusion

As we have shown in this paper, the concerning trend to adopt a strict comparator approach when framing or adjudicating statutory human rights claims was considered by the Supreme Court of Canada in *Moore*. The Court clearly articulated that such an approach is antithetical to the purposes and intent of statutory human rights regimes. The concern remains that human rights claims may continue to be framed in this manner by parties inevitably pressing tribunals and courts to consider and give weight

to such considerations; *de facto* modifying the well-established test for proving discrimination.

In clear accommodation cases, where accommodations are required to access that service, the use of this comparative approach falls apart. If it is the case that the need to be accommodated is best demonstrated by showing that others without that disability can access a service, then the function of that comparison is limited to that very purpose such as demonstrating the distinction between accessing services or benefits. It is not however indicative that an individualized accommodation is dependant or intrinsically linked to those who do not need the accommodation or even others who require their own distinct forms of accommodation. The entitlement to the accommodation is not “conditional upon the entitlement of any particular comparator group”.⁷⁰

The *Moore* decision provides carefully articulated guidance in this regard, leaving no doubt that the requirement of such a comparative approach has no place in establishing discrimination within the statutory human rights framework.

⁷⁰ Sophia R Moreau, “Equality Rights and the Relevance of Comparator Groups” (2006) 5 JL & Equality 82 at 86.