

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

Discrimination – Recognition, Accommodation and Remedies

Regulators know that they have to accommodate a disability or other protected human rights ground. However, the extent of the duty to accommodate, and the method of achieving it, is not always apparent. For example, is there a positive duty to maintain existing programs to address unequal access to services? For example, if a regulator establishes a program to assist international graduates is it then unable to discontinue the program? Some valuable guidance was provided by the Supreme Court of Canada in *Moore v. British Columbia (Education)*, 2012 SCC 61.

Jeffrey Moore had a severe learning disability. Medical experts said he needed intense special assistance to learn to read and referred him to a diagnostic centre. However, due to funding cutbacks the school district closed the diagnostic centre. Jeffrey's parents complained against both the school district and the province.

The Supreme Court of Canada upheld the human rights Tribunal finding that the school district had discriminated against Jeffrey. It rejected the argument that Jeffrey was treated the same as all students with

learning disabilities. The Court concluded that the duty was to provide all students with effective core educational services and, for Jeffrey, this meant some form of intensive assistance.

The main issue was whether the school district could be excused from accommodating Jeffrey's disability on the basis that it could not afford to provide the intensive services in light of a cutback in funding from the province. On this point the school district had to show "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual". The Court stated:

In Jeffrey's case, the Tribunal accepted that the District faced financial difficulties during the relevant period. Yet it also found that cuts were disproportionately made to special needs programs. Despite their similar cost, the District retained some discretionary programs, such as the Outdoor School — an outdoor campus where students learned about community and the environment — while eliminating the Diagnostic Centre. As Rowles J.A. noted, "without undermining the educational value of the Outdoor School, such specialized and discretionary initiatives cannot be compared with the

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Richard Steinecke
Steinecke Maciura LeBlanc
401 Bay Street, Suite 2308
Toronto, Ontario M5H 2Y4

Telephone: 416-626-6897 Facsimile: 416-593-7867
E-Mail: rsteinecke@sml-law.com

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accommodations necessary in order to make the core curriculum accessible to severely learning disabled students”

More significantly, the Tribunal found, as previously noted, that the District undertook *no* assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed....

The failure to consider financial alternatives completely undermines what is, in essence, the District’s argument, namely that it was justified in providing no meaningful access to an education for Jeffrey because it had no economic choice. In order to decide that it had *no* other choice, it had at least to consider what those other choices were.

Thus, special programs can be eliminated in the following circumstances:

1. They are no longer needed.
2. Other effective alternatives are provided.
3. An analysis reasonably demonstrates that there is no other practical alternative.

Interestingly, the province was not held responsible:

This brings us to the Province’s role. The District’s budgetary crisis was created, at least in part, by the Province’s funding shortfalls. But in light of the Tribunal’s finding that it was the District which failed to properly consider the consequences of closing the Diagnostic Centre or how to accommodate the affected students, it seems to me that the

conclusion that the Province was liable for the District’s discriminatory conduct towards Jeffrey cannot be sustained.

The Tribunal imposed a number of sweeping requirements on the school district in addition to compensating Jeffrey. For example, the Tribunal directed the school district to establish mechanisms and policies to ensure that all severely disabled students receive the education they need. The Tribunal reserved to itself the jurisdiction to monitor compliance with these remedies. The Court set aside those remedies:

But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him.... The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.

Of course, the school district had to address the issue in order to avoid future complaints and compensation orders. But “systemic” remedies are more likely to arise in systemic complaints (i.e., complaints by a group of people in a similar situation).

The key lessons for regulators is, first, to recognize when a special response is necessary and, then, to analyze the options before making a decision. A copy of *Moore* can be found at: www.canlii.org.