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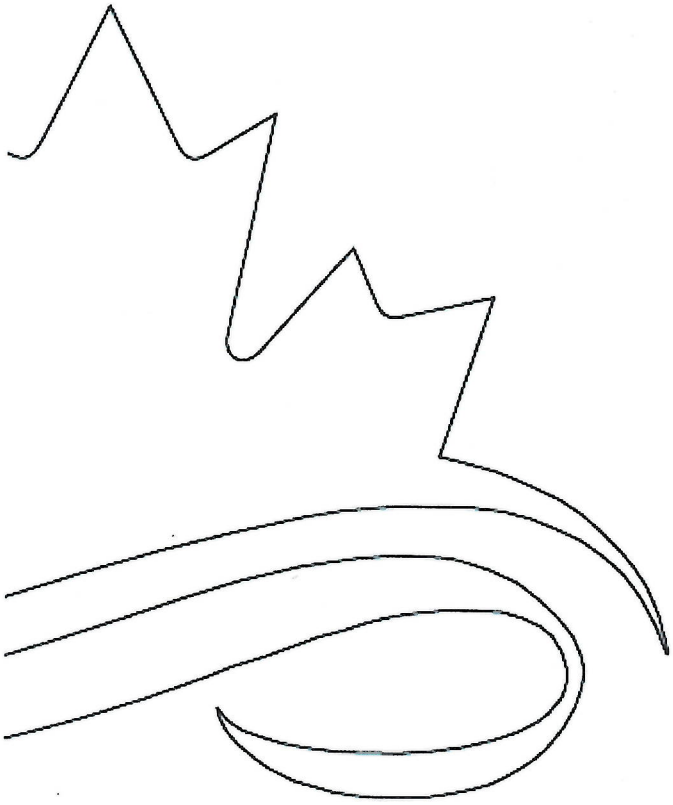

Accommodation in the 21st Century

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March 2012

Aussi offert en français sous le titre
Les accommodements au XXIe siècle

Council of Canadians with Disabilities
A VOICE OF OUR OWN

Conseil des Canadiens avec déficiences
CETTE VOIX QUI EST LA NOTRE

the POVERTY and HUMAN RIGHTS CENTRE

AUTHORS' ACKNOWLEDGEMENTS

Thanks are owed to Maria Sokolova, for research assistance and intellectual company; to Nathan Irving, Debra Parkes, and Kim Stanton, for research and advice provided in the early stages of the project; to the National Project Advisory team and other reviewers for their comments; and to the Canadian Human Rights Reporter for extensive support including the creation of the searchable electronic case book that is a companion to this paper.

The authors acknowledge and thank the Council of Canadians with Disabilities, the Poverty and Human Rights Centre and the Canadian Human Rights Commission, for their collaboration and financial support. The authors also acknowledge and thank the Community University Research Alliance Programme of the Social Sciences and Human Research Council, and the Canadian Bar Association Law for the Future Fund for their financial contributions.

Citation

This paper should be cited as: Gwen Brodsky, Shelagh Day, and Yvonne Peters, *Accommodation in the 21st Century*, (March, 2012), Online: Canadian Human Rights Commission <http://www.chrc-ccdp.gc.ca/proactive_initiatives/default-eng.aspx>

TABLE OF CONTENTS

> group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. *Thus, the question is whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address* [emphasis added].[136]

The B.C. Human Rights Tribunal that ruled in *McGrath* characterized the service at issue as "services to vulnerable children" and concluded that custodial parents were entitled to be paid the same amounts as foster parents.[137] However, the B.C. Supreme Court rejected this definition of the service as too broad. The Tribunal erred "in placing incorrect emphasis on guiding principles and broad policy statements instead of the legislation itself, the benefits it confers and the specific public the services are directed towards."[138]

The B.C. Supreme Court in *McGrath* concluded, "As in *Auton*, [the grandmothers] seek something not contemplated by the legislative scheme: full custodial rights, plus the same payments paid to foster parents — who have no custodial rights."[139] Most of the discrimination claims made by the grandmothers were dismissed.

It is difficult to blame the grandmothers for failing to comprehend why foster parents should receive $500 dollars a month more than they do for providing care for vulnerable children. Unfortunately, the decision of the B.C. Supreme Court does not make it any clearer. The answer seems to be: the government intended to pay foster parents more, and the legislative scheme is constructed to do that. The deference to the legislated *status quo* that is inherent in this analysis, and the lack of grounding in the goals of human rights legislation, or any real analysis, is disturbing.

The *Eldridge/Auton* dichotomy now presents a serious problem in human rights jurisprudence. Determining how the reasoning in *Auton* and *Eldridge* should apply in disability cases is important. Earlier decisions regarding the interpretation of "services customarily available to the public" like *University of British Columbia v. Berg* [140] and *Gould v. Yukon Order of Pioneers*[141] were decided before *Auton* and *Eldridge* and they no longer provide adequate guidance.

For people with disabilities, the *Auton* analysis can present an absolute wall. If challenges are only permitted to discrimination in services that are already provided, human rights protections cannot be used to compel governments to design or implement different or additional services that may be necessary for persons with disabilities. As Isabel Grant and Judith Mosoff have written:

> A true understanding of participation and access to the social world will require some accommodations that are individualized and may make persons with disabilities much like the able-bodied norm, or "like us" [as in *Eldridge* where the plaintiffs required only a modicum of accommodation to access health services on the same bases as the "able" consumer]. However, other accommodations may

> require more far reaching modifications to the mainstream physical and social world in order to enable a person with a disability to participate fully....[142]

The enthusiasm of both government respondents and courts for the *Auton* analysis threatens to gut the meaning of the duty to accommodate because it is a way of relieving governments of any obligation to alter the substance of the services they already provide in order to make a more inclusive, functioning society for people with disabilities.

At the time of writing the *Moore* case is under appeal to the Supreme Court of Canada. *Moore* provides the Court with an opportunity to turn away from *Auton* and to clarify that the identification of the service must be made substantively and contextually with a view to ensuring that public services are adapted to create an inclusive society.