



New Brunswick Human Rights Commission

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Access to disability care, and defining discrimination

Another case that we had that the Commission members—myself and others—felt very strongly about, was a young man named Arif who lived here in Fredericton. He had autism, and he went through a number of service providers here in New Brunswick and they didn't handle him very successfully. Things did not go well. I won't get into the specifics of the case, but the long and the short of it is, he ended up in the facility down in mid-Maine, operated by a profit-making company. The family couldn't find their way easily to see him. He was provided with one-on-one care and a home all by himself, that, some years, I think the cost was like a half-million dollars a year for his care. And the Commission had a complaint about that. That's one where we really had a tough time with the legal precedent, because the legal analysis was that the government in New Brunswick did not provide a service like the one that this young man needed, and therefore, not providing it to him was not discriminatory, because, in order to have discrimination, you have to have a group where some people get the service and some people don't. Since no one of his type had the service, there's no discrimination. There's simply no service. We found that rather strange and odd, and thought that what his real service need was, was to be treated like a citizen of New Brunswick and given the care and the housing and the personal care that he needed. The fact that he happened to have a form of autism where his behavior was unpredictable shouldn't have been the defining characteristic that shaped what happened with him. So we pursued that quite forcefully. The Department of Social Services, Health and Social Services—whatever it was called at the time—was not happy about it. They were very very unhappy. They fought it tooth and nail. Every step they took to appeals courts, and frankly, we didn't win. But the Commission members—and this is where the sense of fair play—of the citizens who made up the Commission, was that this isn't right. It isn't right that a New Brunswick young man who needs support, should be forced to leave his country. This was at the time when the border was becoming thicker, when the Iraq War was on, when George W Bush was not very popular in Canada, and we were forcing this young man go to another country in order to get service. You know, you could almost see it like incarceration—he didn't have much freedom. It wasn't really prison, but it wasn't really that different either. The members just felt that wasn't right, and it wasn't fair. We had advice saying, “Well, it would be difficult to make an argument, because you don't have any comparative case where you can argue that some people are getting this service and some other people in the same class are not.” We said, “Well, we don't buy that! We want to pursue it anyway.”

And you know, subsequent to that, the Moore v. Education decision in BC—decided by the Supreme Court just a couple years ago—set new ground that was consistent with the Commission members' approach, because this young man had been referred to a specialized learning disability service, and the school district closed the service down before he got into it. So the family put him in a program that they paid for—a private service—and then, after the fact, they sued and wanted the payment for that. Well, it took almost 15 years for this to get to the Supreme Court, and when it finally got there, the Supreme Court said that, comparing him... The District had the same argument as the New Brunswick government did: “We don't provide this service, so we're not discriminating if we don't give it to him.” The Supreme Court of Canada said, “No, no, no, no, no! The comparative group for this young man,

Jeffrey Moore, is the students of the public education system of British Columbia. It's not other children who have his exact profile or label. He must be compared to all those other thousands of children in terms of getting what he needs in order to achieve an education." That decision, as I understand it—I'm not a lawyer—but as I understand it, that was the first decision that countered this "belonging to a class," because, over and over in the Human Rights Commission, I heard over and over, "What's the class of people? Who's the comparative group that you're going to say that he's discriminated against and somebody else isn't?" And that whole argument was overturned by the Moore decision. So, it's kind of nice to know that these ordinary citizens—members of the Commission in New Brunswick—were on the right track. We lost our case, but you know, ten years later, the Moore v. Education decision in British Columbia made that argument, that the comparative group is the citizens—the students, in this case—of British Columbia. It's not the people who are exactly like this child.