THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS IMPLICATIONS FOR THE EQUALITY RIGHTS OF CANADIANS WITH DISABILITIES: THE CASE OF EDUCATION

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In this paper, we examine the history of Article 24 of the United Nations Convention on the Rights of Persons with Disabilities and its implications for the equality rights of people with disabilities in education. We specifically consider leading recent cases in the area such as Eaton, Auton, Wynberg and Moore in order to provide a road map to advocates of people with disabilities as to potential strategies that will empower people with disabilities. While disability rights advocates lost all four cases, we suggest ways in which Article 24 might shift the balance in favour of disability rights advocates.

Dans cet article, les auteurs tracent l'historique de l'article 24 de la Convention des Nations Unies sur les droits des personnes handicapées et examinent ses conséquences sur les droits à l'égalité des personnes handicapées au regard de l'enseignement. Ils examinent tout particulièrement certaines décisions récentes faisant autorité dans le domaine comme Eaton, Auton, Wynberg et Moore pour attirer l'attention des défenseurs des droits des handicapés sur les stratégies susceptibles de renforcer les positions des handicapés. Bien que le tribunal n'ait pas retenu les arguments des défenseurs des droits des handicapés dans aucune de ces quatre causes, les auteurs proposent des façons dont l'article 24 pourrait faire pencher la balance en faveur des défenseurs des droits des handicapés.

I. INTRODUCTION

After several years of international negotiations instigated by a resolution of the United Nations General Assembly on December 19, 2001, the United Nations *Convention on the Rights of Persons with Disabilities* [CRPD]¹ entered into force on May 3, 2008 as the eighth major UN human rights treaty and the first of the

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¹ *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106 (2007) [CRPD].

twenty-first century.² It was the fastest negotiated human rights treaty instrument in history and has already spawned a significant literature in the United States.³

The *CRPD*, which consists of some fifty articles, seeks to promote the equality rights of people with disabilities in a number of areas including rights that protect the person; rights that restore autonomy, choice and independence; rights of access and participation; liberty rights; and economic, social and cultural rights.⁴ It instantiates the core principle of the social model of disablement: that the marginalization of people with disabilities is primarily caused by physical and attitudinal barriers that must be removed.⁵ These barriers are evident in virtually every area of life: employment, transportation, housing, educational institutions and more. At the start of the Paralympic Games in Vancouver on March 11, 2010, the Government of Canada announced Canada's ratification of the *CRPD*.⁶ It remains to be seen what impact the *CRPD* may have upon the course of Canadian

² Gerard Quinn, "A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities" in Gerard Quinn & Lisa Waddington, eds, *European Yearbook of Disability Law, Vol. 1* (Portland: Intersentia, 2009) 89 at 91; Stefan Tromel, "A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities" in Quinn & Waddington, *ibid*, 115 at 116. The first seven Conventions are the *International Covenant on Civil and Political Rights [ICCPR]*, the *International Covenant on Economic, Cultural and Social Rights [ICECSR]*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT]*, the *International Convention on the Elimination of All Forms of Racial Discrimination [ICERD]*, the *Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW]*, the *Convention on the Rights of the Child [CRC]*, and the *International Convention on the Protection of Rights of All Migrant Workers and Members of their Families [ICPMW]*. See also Deborah A. Ziegler, ed, *Inclusion for All: The UN Convention on the Rights of Persons with Disabilities* (New York: International Debate Education Association, 2010).

³ Janet E. Lord & Michael A. Stein, "The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities" (2008) 83 Wash L Rev 449; Arlene S. Kanter, "The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities" (2007) 34 Syracuse J Int'l L & Com 287; Anna Lawson, "The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?" (2007) 34 Syracuse J Int'l L & Com 563; Don MacKay, "The United Nations Convention on the Rights of Persons with Disabilities" (2007) 34 Syracuse J Int'l L & Com 323; Janet E. Lord & Michael A. Stein, "Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation and Play" (2009) 27 BU Int'l LJ 249 (discussing the *CRPD* in the context of sports); Arlene S. Kanter, "The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People under International Law" (2009) 25 Ga St UL Rev 527; Arlene S. Kanter, "The Globalization of Disability Rights Law" (2003) 30 Syracuse J Int'l L & Com 241; Michael L. Perlin "A Change is Gonna Come": The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law" (2009) 29 N Ill UL Rev 483; Michael L. Perlin, "International Human Rights Law and Comparative Mental Disability Law: The Universal Factors" (2007) 34 Syracuse J Int'l L & Com 333; Aaron Dhir, "Human Rights Treaty Drafting through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities" (2005) 41 Stan J Int'l L 181. This is necessarily a selected list.

⁴ Quinn, *supra* note 2 at 104.

⁵ For a canonical account of the social model of disablement, see Michael Oliver, *The Politics of Disablement* (London: Macmillan, 1990). See also Gary L. Albrecht, Katherine D. Seelman & Michael Bury, eds, *Handbook of Disability Studies* (Thousand Oaks, California: Sage, 2001).

⁶ See "Canada ratifies UN treaty for disabled rights" online: CBC <<http://www.c-bc.ca/world/story/2010/03/11/disabled-treaty-011.html>>.

jurisprudence on disability rights. In light of its recent pedigree and uncertain impact, Canadian scholarship on the *CRPD* is sorely needed.⁷

In this paper, we consider how Article 24 of the *CRPD*, focused on education rights for people with disabilities, might be used to buttress legal arguments in two important areas: educational services required by children with autism and services required by children diagnosed with learning disabilities. Both issues have been litigated in Canada in recent years with disappointing results that we argue ought to be reversed. In *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, the Supreme Court of Canada held that the British Columbia government did not violate section 15 of the *Charter of Rights and Freedoms* when it failed to fund specialized treatment required by children with autism.⁸ Similarly, in *Wynberg v Ontario*, the Ontario Court of Appeal allowed an appeal of a decision of a lower court that found a failure of the Ontario government to fund educational services for autistic children violated their *Charter* rights.⁹ The majority of the British Columbia Court of Appeal in *Moore v British Columbia (Ministry of Education)* recently upheld a decision of the British Columbia Supreme Court quashing a human rights tribunal decision which found that a failure to evaluate, monitor and fund special education services for students with learning disabilities violated their rights under the British Columbia *Human Rights Code*. We argue that the issues raised in all of these cases ought to be reconsidered in light of Canada's new obligations under the *CRPD*.¹⁰ Indeed, the Supreme Court of Canada will soon have this opportunity as it has granted leave to appeal in *Moore*.

In Part II, we examine the background and framework of the *CRPD* and specifically the rights to education for people with disabilities contained in Article 24. In Part III, we review how international conventions apply within Canadian law as well as legal strategies to maximize their influence domestically. In Part IV, we explore recent Canadian jurisprudence in the area of education and disability rights. In Part V, we suggest how Article 24 might be used to buttress arguments in support of such rights in future cases. In Part VI, we provide brief concluding thoughts.

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⁷ The *CRPD* has received little attention to date in *Canadian* legal circles. A Quicklaw search in August 2010 produced only *one* hit: Aaron Dhir, "Relationships of Force: Reflections on Law, Psychiatry and Human Rights" (2008) 25 Windsor Rev Legal Soc Issues 103.

⁸ [2004] 3 SCR 657, 2004 SCC 78 [*Auton*].

⁹ [2006] O.J. No. 2732, 82 OR (3d) 561 (CA), leave to appeal refused [2006] SCCA No. 441 (QL) [*Wynberg*].

¹⁰ 2010 BCCA 478, aff'g 2008 BCSC 264, [2008] BCJ No. 348 [*Moore*]. Leave to appeal to the Supreme Court of Canada was granted on June 30, 2011. Leave was sought in December 2010: email correspondence between authors and counsel for the plaintiffs dated January 16, 2011 (on file with authors). There is a fourth Canadian decision bearing on autism; the New Brunswick Court of Appeal recently issued a controversial decision with respect to the New Brunswick government's decision to institutionalize a man with severe autism in Maine rather than within the province. See *New Brunswick Human Rights Commission v Province of New Brunswick (Department of Social Development)* 2010 NBCA 40. However, in our view, this case raises highly complex issues that are not primarily related to education.

II. THE LONG ROAD TO THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

A. Precursors to the Convention

Despite the fact that there are more than six hundred million people with disabilities worldwide, international human rights law has been slow to acknowledge disability as a human rights issue.¹¹ Just as many domestic legal systems have largely ignored disability rights until relatively recently, the use of international human rights instruments to address disability rights law is in its infancy. Historically, the marginalization of people with disabilities was regarded as a technical, medical issue that reflected personal problems to be resolved at the individual level. As other social movements, such as feminism, have politicized what were previously regarded as private troubles,¹² one has seen a dramatic paradigm shift in our understanding of disablement from the medical model, focused on changing the individual to better fit the existing environment, to the social model.¹³

One of the earliest initiatives that marks a transition from the medical model to the social model was the 1971 General Assembly resolution, *Declaration on the Rights of Mentally Retarded Persons*.¹⁴ This short resolution set out the rights of people with intellectual disabilities including their right to be treated the same as others, to the greatest extent possible. It also encompassed a right to medical care, rehabilitation, a preference for deinstitutionalization where feasible, and promoted economic security.¹⁵ While the *Declaration* contained many qualifications to the rights enunciated therein,¹⁶ it was nevertheless a landmark achievement at the time.

A second example from that era is the 1975 General Assembly resolution, the *Declaration on the Rights of Disabled Persons*.¹⁷ This document stipulated certain basic rights for people with disabilities in general, including, *inter alia*, human dignity, economic security, and the right to secure and retain employment in accordance with their capabilities.¹⁸ Both *Declarations* clearly, however, were soft

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¹¹ Quinn, *supra* note 2 at 89.

¹² See e.g., Iris Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) at 72–73 (discussing how feminists had to create an entire language to voice concerns of sexual harassment).

¹³ In the Canadian context, David Lepofsky has provided an insightful and comprehensive history of the movement for disability anti-discrimination legislation in Ontario. See M. David Lepofsky, “The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the *Ontarians with Disabilities Act*—The First chapter” (2004) 15 NJCL 125.

¹⁴ G.A. Res. 2856 (XXVI), U.N. GAOR, Supp. No. 29, at 92, U.N. Doc. A/8429 (1971). Online: United Nations Human Rights <<http://www2.ohchr.org/english/law/pdf/res2856.pdf>>. We use the more contemporary term, people with intellectual disability, throughout this paper except in proper names of historical documents.

¹⁵ *Ibid.*

¹⁶ For instance, the Preamble indicated an awareness that certain developing countries could only direct limited resources toward people with intellectual disabilities. See *ibid.*

¹⁷ G.A. Res. 3447 (XXX), U.N. GAOR, Supp. No. 34, at 88, U.N. Doc. A/10034 (1975), online: United Nations Human Rights <<http://www2.ohchr.org/english/law/res3447.htm>>.

¹⁸ *Ibid.*

law instruments without any legal enforcement mechanism that simply advised states on the most appropriate conduct.¹⁹

A turning point came with the United Nations' declaration of 1981 as the International Year of Disabled Persons [IYDP] that greatly increased awareness among policy makers around the world of the barriers faced by people with disabilities. The IYDP was also important in raising awareness of disability rights issues in Canada and encouraging inclusion of disability discrimination in section 15 of the *Charter*.²⁰ This was quickly followed by two more initiatives: the World Programme of Action for Persons with Disabilities [WPA], that hoped to encourage national action plans to improve accessibility, and the UN Decade of Disabled Persons, 1983-1992.²¹ This has also spawned a number of more recent events modeled on the UN Decade sponsored by regional international organizations such as the African Union, the United Nations Economic Commission for Asia and the Pacific, and the Organization of American States.²² Unfortunately, there was relatively little progress, leading some states such as Italy and Sweden to advocate a new international convention at various times in the late 1980s but bureaucratic inertia and a lack of consensus prevented the Italian and Swedish initiatives from moving forward immediately.²³

Instead, a new soft law regime was created in 1993: the UN Standard Rules for the Equalization of Opportunities for Persons with Disabilities.²⁴ The Standard Rules, a series of twenty-two guidelines, create soft law in a number of areas including employment, education, recreation and sports, and culture. They are divided into three principle sections: rules relating to the pre-conditions for equal participation, target areas for equal participation, and implementation measures.²⁵ A Special Rapporteur with a five-year renewable mandate was also appointed and has published a survey on the implementation of the Standard Rules.²⁶ Rule 6 specifically set out guidelines with respect to the education of children, youth and adults with disabilities. It mandates the integration of students with disabilities as a core component of national education planning, curriculum development and school organization.²⁷ It also mandates the provision of adequate support services to deal with the accommodation needs of students with disabilities,²⁸ and specifically states that parent groups and disability rights organizations should be involved at all levels.²⁹ Furthermore, it stipulates that special attention should be paid to three groups: very young children with disabilities, pre-school children

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¹⁹ Michael A. Stein, "Disability Human Rights" (2007) 95 Calif L Rev 75 at 79.

²⁰ Yvonne Peters, "The Constitution and the Disabled" (1993) 2 Health Law Review 17 at ¶ 24.

²¹ Quinn, *supra* note 2 at 94. The WPA remains in force and the UN Secretariat submits regular reports.

²² *Ibid* at 90-91.

²³ Stein, *supra* note 19 at 83, n 39.

²⁴ UN G.A. Res. 48/96, 20 December, 1993, online: UN Documents <<http://www.un-documents.net/sreopwd.htm>> [*UN Standard Rules*].

²⁵ *Ibid*.

²⁶ Quinn, *supra* note 2 at 94.

²⁷ Rule 6, *UN Standard Rules*, *supra* note 24.

²⁸ *Ibid*.

²⁹ *Ibid*.

with disabilities and adults with disabilities with a particular emphasis on women with disabilities.³⁰ At the same time, it does provide an exception authorizing segregated special education where the general school system does not adequately meet the needs of students with disabilities, but nevertheless encourages the gradual integration of special education services within mainstream educational programming.³¹

Unfortunately, the non-enforceability of the Standard Rules again proved to stymie progress toward accessibility and led advocates, especially those influenced by the success of the *Americans with Disabilities Act* that was enacted by the U.S. Congress in 1990, to urge the creation of a new international convention on disability rights.³² In 1998, an expert group recommended that the Commission on Human Rights create a working group to address particular violations of disability rights and to consider the need for a new international agreement on disability rights.³³ A 2002 study demonstrated how only one General Comment, the 1994 General Comment 5 of the Committee on Economic, Social and Cultural Rights, had been adopted specifically on human rights and disability rights by the various existing treaty monitoring bodies as of that date.³⁴ General Comment 5 analyzes how each ICESCR right applies to disability rights,³⁵ refers to the importance of the Standard Rules as a reference guide for delineating the responsibilities of State Parties,³⁶ and advocates for principles such as “independence, autonomy, and participation.”³⁷ However, this General Comment was never mentioned in a sample of state reports under the ICESCR that were surveyed.³⁸ Typically, the commentaries contained in the reports of most of the treaty monitoring bodies ignored disability rights and seemed to articulate a medical model approach when it was mentioned.³⁹ The study recommended that a new treaty on disability rights be drafted because it would increase the visibility of disability rights issues and

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³⁰ *Ibid.*

³¹ *Ibid.*

³² Quinn, *supra* note 2 at 95.

³³ *Ibid.*

³⁴ See Anna Bruce et al., “Disability and Social Justice: The International Covenant on Economic, Social and Cultural Rights” in Gerard Quinn & Theresia Degener with et al., eds, *Human Rights and Disability—the Current and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (New York and Geneva: Office of the United Nations High Commissioner on Human Rights, 2002) 79 at 130, online: United Nations Human Rights <<http://www.ohchr.org/documents/publications/hrdisabilityen.pdf>>. That said, four General Comments under the *ICCPR* indirectly reference disability on topics ranging from liberty and security of the person to protection of the family, the right to marry and equality of the spouses to the prohibition of torture and inhuman punishment. See Theresia Degener, “Disability and Freedom: The International Covenant on Civil and Political Rights” in *ibid.*, 53 at 61. Furthermore, in 2006, the Committee on the Rights of the Child issued General Comment No. 9 specifically on the rights of children with disabilities. See Quinn, *supra* note 2 at 97.

³⁵ Bruce et al., *ibid* at 86.

³⁶ *Ibid* at 84.

³⁷ *Ibid* at 86.

³⁸ *Ibid* at 130.

³⁹ *Ibid* at 75–77 (discussing weaknesses of reports under the *ICCPR*).

would allow disability rights groups to engage with the UN human rights system.⁴⁰ Between 2002 and December 2006, an Ad Hoc Committee drafted the *CRPD*.⁴¹ It was opened for signature and ratification in March 2007 and came into force in May 2008.⁴² On November 3, 2008, the first Committee on the Rights of Persons with Disabilities was elected.⁴³

B. The Convention on the Rights of Persons with Disabilities

The *CRPD* reflects compromises necessitated by the conflicting visions of its drafters. Some disability rights activists who were actively lobbying for the convention would have preferred a full treaty modeled after the *Convention on the Rights of the Child* that goes beyond simply an anti-discrimination model.⁴⁴ Others would have preferred a very short document that could essentially amount to a protocol on disability appended to an existing convention.⁴⁵ Some developing countries were adamant that economic development was a precondition to providing accessibility for people with disabilities. On the other hand, some State Parties were equally insistent that obligations were confined to citizens of the signatory only.⁴⁶ In the end, a compromise proposal was selected: a hybrid convention that featured elements of each approach. The *CRPD* was drafted as a convention encompassing civil, political, economic, social and cultural rights.⁴⁷ At the same time, the drafters were clear that no new rights were being created. Rather, accessibility would foster the ability of people with disabilities to access existing services.⁴⁸ Nevertheless, certain rights, such as Article 19, which stipulates a right to living independently and being included in the community, are unique to the *CRPD*.⁴⁹ Article 19 incorporates a right to a range of personal attendant services that some people with disabilities require with activities of daily living.⁵⁰ Similarly, Article 20 mandates a right to personal mobility.⁵¹ This includes access to affordable mobility aids and assistive technology that people with mobility impairments may require as well as training in their use.⁵²

Particular attention should be paid to Article 4(2). It stipulates that State Parties undertake to take measures with respect to economic, social and cultural rights in light of the maximum available resources, without prejudice to those obligations in

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⁴⁰ Quinn & Degener, "Expanding the System: The Debate about a Disability-Specific Convention" in Quinn & Degener *ibid.* 293 at 293–97.

⁴¹ G.A. Res. 61/106 (2007) [*CRPD*].

⁴² Quinn, *supra* note 2 at 98–99.

⁴³ Michael A. Stein & Janet E. Lord, "Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities and Future Potential" (2010) 31 Hum Rts Q, online: SSRN <<http://ssrn.com/abstract=1533482>>.

⁴⁴ Quinn, *supra* note 2 at 99.

⁴⁵ *Ibid.*

⁴⁶ Tromel, *supra* note 2 at 119–20.

⁴⁷ Quinn, *supra* note 2 at 99.

⁴⁸ Tromel, *supra* note 2 at 118–19.

⁴⁹ *Ibid.* at 119.

⁵⁰ *CRPD*, *supra* note 41 at Art. 19.

⁵¹ Tromel, *supra* note 2 at 119.

⁵² *CRPD*, *supra* note 41 at Art. 20.

the *Convention* that are immediately applicable according to international law.⁵³ At first glance, this might be regarded as a major limitation for the operationalization of rights under the *CRPD* whereby State Parties can plead poverty. However, the modifying clause that recognizes certain rights take effect immediately has relevance to our analysis below.

Some of the most important provisions relate to basic freedoms such as Article 10's right to life, Article 12's insistence of the equal recognition before the law for people with disabilities, and Article 14's liberty and security of the person.⁵⁴ Others concern socioeconomic rights such as the right to education detailed in Article 24 and the focus of this paper, Article 25 relating to health, Article 26 concerning habilitation and rehabilitation and Article 27 with respect to employment.⁵⁵

The definition of disability contained in the *CRPD* was a result of compromise. Many European State Parties and disability advocacy organizations believed that it would not be possible to reach an acceptable definition.⁵⁶ However, other activists, particularly the International Disability Caucus [IDC], a network of nearly one hundred international, regional and national organizations of people with disabilities that was influential in the final wording of the *CRPD*,⁵⁷ embraced the need for a definition of disability in the *CRPD* because national definitions were more restricted, but added the proviso of maintaining the option of no definition if the proposed ones were too narrow.⁵⁸ Ultimately, definitions of disability were addressed in the Preamble and in Article 1. The Preamble states that disability is an evolving concept and that it results from the interaction of persons with impairments, on the one hand, and attitudinal and environmental barriers on the other.⁵⁹ Article 1 states that "[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."⁶⁰ Collectively, the two provisions exemplify an understanding of the social model of disablement.

Article 24 sets out a series of rights for people with disabilities in education in five clauses. Education rights are fundamentally important because they allow people with disabilities to obtain the skills that will allow them to flourish in the workplace. In the past, many people with disabilities have been too frequently excluded from opportunities in employment, both because of barriers in the workplace and because of a relative lack of education compared to their able bodied counterparts.⁶¹ Article 24 states:

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⁵³ *Ibid* at Art. 4(2).

⁵⁴ *Ibid* at Art. 10, 12, 14.

⁵⁵ *Ibid* at Art. 24–27.

⁵⁶ Tromel, *supra* note 2 at 121.

⁵⁷ *Ibid* at 117.

⁵⁸ *Ibid* at 121. Furthermore, many states did not have either disability rights legislation or accurate statistics about the number of people with disabilities. See Stein & Lord, *supra* note 43 at 11.

⁵⁹ *CRPD*, *supra* note 41 at Preamble.

⁶⁰ *Ibid* at Art. 1.

⁶¹ See e.g. Ravi Malhotra, "A Tale of Marginalization: Comparing Workers with Disabilities in Canada and the United States" (2009) 22 J L & Soc Pol'y 79.

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:
  - a. The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
  - b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
  - c. Enabling persons with disabilities to participate effectively in a free society.
2. In realizing this right, States Parties shall ensure that:
  - a. Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
  - b. Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
  - c. Reasonable accommodation of the individual's requirements is provided;
  - d. Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
  - e. Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.
3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:
  - a. Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
  - b. Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;
  - c. Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of

communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.
5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.⁶²

Article 24 represents a thoughtful synthesis of two distinct philosophies. One school of thought is predicated on the idea that students with disabilities must be mainstreamed with their able-bodied peers because it is only through such interaction that substantive equality can be achieved.⁶³ The undergirding principle of equality is reinforced by the commitment to developing each disabled person's personality, talents and creativity as directed explicitly in Article 24(1)(b).⁶⁴ The provision specifically mandates in Article 24(2)(e) that State Parties provide environments that maximize academic and social development in keeping with the philosophy of "full inclusion."⁶⁵

We would suggest that the use of this language specifically acknowledges the commitment of the signatories to integration of students with disabilities in regular classrooms with peers of the same age. However, others, including some disability rights advocates and parents' groups, have suggested that at least in some contexts, the provision of services in separate settings can generate greater benefits for children with disabilities and that a true understanding of equality mandates separate education in some circumstances.⁶⁶ This can be seen by the language contained in Article 24(3)(c) which specifically states that the education of Deaf⁶⁷ and/or blind children may occur in separate settings.⁶⁸ In our view, Article 24 as a whole clearly mandates integration of students with disabilities, with very specific

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⁶² CRPD, *supra* note 41 at Art. 24.

⁶³ See e.g. Mark C. Weber, "A Nuanced Approach to the Disability Integration Presumption" (2007) 156 U Pa L Rev PENnumbra 174 (discussing debate in American context).

⁶⁴ CRPD, *supra* note 41 at Art. 24(1)(b).

⁶⁵ *Ibid* at Art. 24(2)(e). Reasonable accommodation of students with disabilities is also required in Art. 24(2) (c).

⁶⁶ Ruth Colker, "The Disability Integration Presumption: Thirty Years Later" (2006) 154 U Pa L Rev 789 at 824–25. See also Quinn, *supra* note 2 at 110.

⁶⁷ We use a capitalized Deaf to acknowledge that many Deaf people self-identify as a socio-cultural minority.

⁶⁸ CRPD, *supra* note 41, at Art. 24(3) (c).

and narrowly drawn exceptions. It represents an advance toward inclusion when compared to the language contained in Rule 6 of the UN Standard Rules.⁶⁹ However, international law developments are only beneficial if Canadian courts are able to apply them. We now turn to a discussion of how international conventions apply within Canadian law as well as legal strategies to maximize their influence.

III. INTERNATIONAL CONVENTIONS AND CANADIAN LAW

As noted, on March 11, 2010 Canada ratified the *CRPD*.⁷⁰ Canada has neither signed nor ratified the Optional Protocol to the *CRPD*, which establishes an individual complaints process concerning perceived state violations of the treaty.⁷¹ While Canada is now bound under public international law to comply with the terms of the *CRPD*, the question remains: to what extent are Canadian governments bound under *Canadian* law to comply with the terms of the *CRPD*? The extent to which the ratified *CRPD* now forms part of Canadian law, and relatedly, has an impact upon the obligations of Canadian governmental actors, requires further examination. The *CRPD* presents at least four potential modes of domestic legal impact:

- a. Some of the treaty's contents may be regarded as constituting customary international law, forming part of Canada's common law to the extent that contradictory legislation has not been enacted;
- b. The treaty's contents may be regarded to have been (explicitly or implicitly) implemented domestically, thus forming part of Canadian law;
- c. If the treaty's contents are regarded to be unimplemented domestically, they may nonetheless influence the interpretation of Canadian statute, since Canada is presumed to legislate consistently with its international law obligations;
- d. The international obligations found in the ratified treaty may influence courts' interpretation of the *Canadian Charter of Rights and Freedom*, either by setting a minimum content threshold, or via another mode of interpretive significance.

Each of these elements of the interaction between international law obligations and Canadian law will be explored in turn.

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⁶⁹ Rule 6, *UN Standard Rules*, *supra* note 24.

⁷⁰ "Canada Ratifies UN Convention on the Rights of Persons with Disabilities" online: Government of Canada <<http://news.gc.ca/web/article-eng.do?nid=517849?>>. As of December 2010, 147 states have signed the convention and 96 states have ratified it, see "Convention and Optional Protocol Signatures and Ratifications", online: United Nations <<http://www.un.org/disabilities/countries.asp?navid=12&pid=166>>.

⁷¹ See online: United Nations <<http://www.un-n.org/disabilities/countries.asp?navid=12&pid=166#C>>. As of December 2010, the optional protocol has attracted 90 state signatures and 60 state ratifications.

A. Customary International Law and Domestic Law

All elements of the *CRPD* which are also part of customary international law are automatically part of Canadian domestic law, even where implementing legislation is not present. This is because customary international law is regarded to be a part of the Canadian common law.⁷² Parliament is free to modify Canadian law in deviation from customary international law (and the common law generally) but it must be express in its intention to do so.⁷³ Several substantive obligations found in the *CRPD* are already part of customary international law, such as the right to life (at *CRPD* Article 10) and the right to freedom from torture (Article 15).⁷⁴

Most important for the purposes of this paper is the customary international law right to basic education,⁷⁵ which the *CRPD* affirms (Article 24(2)(a)). If the *CRPD*'s prohibition of discrimination on the basis of disability⁷⁶ is part of Canadian law, including as an implemented treaty obligation or an unimplemented but persuasive treaty obligation, this prohibition on discrimination arguably interacts with the customary international law right to basic education to ensure that the customary right to basic education is to be enjoyed by all persons, regardless of disabilities. Moreover, there exists a specific customary international law right to be free from discrimination in access to education,⁷⁷ although the *CRPD* marks the first time treaty language has specifically identified disability as a ground for such discrimination.

Parliament does not appear to have legislated in direct contravention of the customary right to basic education or to be free from discrimination in access to education. Those parts of *CRPD* Article 24 which correspond to the customary rights to basic education and to be free from discrimination are thus common law rights in Canada, enforceable within Canadian law unless legislation can be shown to be irreconcilably contrary to them.

B. Implemented Treaties and Domestic Law

Canada is a dualist rather than monist state in its approach to treaties and in order for international treaty law to be brought within Canadian domestic law,

⁷² *R. v Hape*, [2007] 2 SCR 292, 2007 SCC 26 at ¶ 35–39. See also *Bouzari v Islamic Republic of Iran* (2004), 71 OR (3d) 675 at ¶ 65 (CA), leave to appeal ref'd, [2005] 1 SCR. vi. Currie notes that language inconsistencies within the *Hape* decision itself render uncertain the precise parameters of the adoption rule. John H. Currie, "International Law in the Jurisprudence of the McLachlin Court" in A. Dodek & D.A. Wright, eds, *The McLachlin Court's First Decade: Reflections on the Past and Projections for the Future* (Irwin Law: Toronto, 2011) (forthcoming) at nn 91–93.

⁷³ *Ibid.*

⁷⁴ *Universal Declaration of Human Rights*, Art. 26, online: United Nations <<http://www.un.org/en/documents/u-dhr/>>; see e.g. Martin Dixon & Robert McCorquodale, *Cases & Materials on International Law*, 4th ed. (Oxford: Oxford University Press, 2003) at 202.

⁷⁵ See Klaus Dieter Beiter, *The protection of the right to education by international law*, (Leiden: Martinus Nijhoff Publishers, 2006) at 17; see also Dixon & McCorquodale, *ibid.*

⁷⁶ The *CRPD* prohibits discrimination on the basis of disability and obliges states to recognize the equality of all persons before the law. *CRPD*, *supra* note 41 at Art. 5

⁷⁷ Beiter notes that non-discrimination in access to education is a customary international law right, although he does not address discrimination on the grounds of disability specifically. See Beiter, *supra* note 75 at 45–46.

domestic Canadian law must be in force which serves as a conduit between the two systems and implements international law within the Canadian legal system.⁷⁸ There are at least two prominent rationales for the requirement of domestic implementation. First, one view holds that the executive's treaty-making power should be subject to final scrutiny by the legislature before internationally binding treaties are granted domestic effect.⁷⁹ Second, following the *Labour Conventions* case⁸⁰ implementing legislation is required in order to ensure that the provinces retain full jurisdiction over their areas of competence.

The precise legal procedures required for implementation are subject to debate, however. Simply put, the view of some courts is that explicit implementing legislation, which references or duplicates a treaty's contents, is a requirement for domestic treaty effect.⁸¹ This formalist approach is not in conformity with actual implementation practice, however, since the domestic effect of treaties may take various forms, including pre-ratification legislation.⁸² Furthermore, a formalist approach which requires explicit implementing legislation in all cases conflicts with the longstanding theory that implementation is only required where domestic legal authority *does not already exist* to permit performance of the treaty.⁸³

Canada's official declaration made when ratifying the *CRPD* in fact highlights how domestic implementation is not always achieved through explicit implementing legislation; when ratifying the *CRPD*, Canada expressed that "Canada interprets Article 33 (2) [which concerns national implementation] as accommodating the situation of federal states where the implementation of the Convention will occur at more than one level of government and through a variety

⁷⁸ See e.g., *Capital Cities Communications Inc. v Canadian Radio–Television Commission* [1978] 2 SCR 141, [1977] SCJ. No 119 (QL.).

⁷⁹ See e.g., Armand de Mestral & Evan Fox-Decent, "Rethinking the Relationship between International and Domestic Law" (2008) 53 McGill LJ 573 at 581.

⁸⁰ *Attorney–General of Canada v Attorney–General of Ontario (Labour Conventions)*, [1937] AC 326, [1937] 1 WWR 299. In other words, where a treaty's subject matter involves areas of provincial competency, the federal executive may bind Canada internationally, but before such obligations become part of domestic law, provincial legislatures must approve them through the passage of legislation. See also de Mestral & Fox-Decent, *ibid* at 597–598.

⁸¹ See opinion of Chief Justice Laskin in *Macdonald and Railquip Ltd. v Vapor Canada Ltd.* [1977] 2 SCR 134, [1976] SCJ No. 60 (QL); see also *Ahani v Canada (A.G.)* (2002), 58 OR (3d) 107, 91 CRR (2d) 145 (Ont. C.A.), leave to appeal to SCC refused, [2002] SCCA No. 62 (Q.L.) at ¶ 31–33 [*Ahani*].

⁸² Note the profiling of implementation forms by de Mestral & Fox-Decent: de Mestral & Fox-Decent, *supra* note 79 at 617–622. For instance, explicit implementing legislation is regarded as not needed for many human rights treaties because their substance is already incorporated within Canadian law via the *Charter*. See Elizabeth Eid & Hoori Hamboyan, "Implementation by Canada of Its International Human Rights Treaty Obligations : Making Sense Out of the Nonsensical" in Oonagh E. Fitzgerald, ed, *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto : Irwin Law, 2006) at 450. See also, Laura Barnett, *Canada's Approach to the Treaty-Making Process*, Library of Parliament –PRB 08–45E (24 November 2008) at 6, online: Government of Canada < <http://www2.parl.gc.ca/Content/L-OP/Research-Publications/prb0845-e.htm> > . ("...[M]any treaties and international conventions, particularly international human rights treaties, do not necessarily require specific legislation for implementation. In such cases, the government will state that domestic legislation is already consistent with Canada's international obligations or that the object of the treaty does not require new statutory provisions.")

⁸³ See e.g., *R. v Canada Labour Relations Board, ex parte Federal Electric Corporation*. Man. QB 1964 at 453–456.

of mechanisms, *including existing ones*.⁸⁴ Since Canada has only recently ratified the treaty there is no existing legislation which already explicitly implements the treaty. Canada's ratification statement thus suggests that implementation does not need to be achieved exclusively through explicit implementing legislation. Since existing mechanisms may already adequately implement the treaty, courts ought not to interpret a current lack of conspicuously labeled legislation (perhaps entitled "The Convention on the Rights of Persons with Disabilities Implementation Act") to mean that the convention is unimplemented. Existing legislation should thus be reviewed for its adequacy in implementing the *CRPD* within Canadian law.

The memorandum tabled before the House of Commons prior to the ratification of the treaty⁸⁵ does not appear to express the intention of the current federal Government to introduce explicit implementing legislation which would apply to the treaty in its entirety, or at least to all subject matter provisions within federal competence. Specifically, the explanatory memorandum reads in part:

Implementation:

Obligations under the Convention relating to the right to equality and non-discrimination and to general protections of human rights and fundamental freedoms can be complied with through reliance on the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, and equivalent provincial and territorial legislation. Many obligations can also be complied with progressively through federal, provincial and territorial laws, policies and practices as they are developed over time.

At the federal level, specific obligations relating to promoting equality, dignity and an enabling environment for persons with disabilities can be complied with through additional existing federal legislation, policies, programs and practices. These include: consultations with persons with disabilities, awareness-raising measures, accessibility guidelines and standards, income support and tax measures, the Canada Social Transfer, support for victims of crime, the *Employment Equity Act*, etc.

No changes to federal legislation or policy were identified as required for ratification.⁸⁶

If no explicit implementing legislation is passed, as appears to be the plan judging by the memorandum to Parliament, the question remains whether courts will view current Canadian law as being sufficient to give the treaty domestic effect. Canada's reference in its official ratification statement⁸⁷ to existing mechanisms as being a form of implementation, supports the idea that the treaty is domestically executed, in whole or in part, on the basis of existing Canadian law.

⁸⁴ "Declarations and Reservations", online: United Nations <<http://www.un.org/disabilities/default.asp?id=475>> [emphasis added].

⁸⁵ Explanatory Memorandum on the United Nations *Convention on the Rights of Persons with Disabilities*, 13 December 2006, Sessional Paper No. 8532-402-57 (Tabled before Parliament 3 December 2008), (on file with authors).

⁸⁶ *Ibid.*

⁸⁷ "Declarations and Reservations", *supra* note 84.

However, there is no guarantee that the majority of judges will accept that existing legislation implicitly implements the treaty within Canadian law, giving rise to the usual challenges and ambiguities of implicit implementation of human rights law as a Canadian practice.

With respect to the right to education contained in the *Convention*, it remains to be seen whether Canadian provinces will pass explicit implementing legislation or otherwise alter the existing relevant domestic legal framework. Education is a provincial head of power and it is possible that the provincial governments could choose not to bring in new legislation in relation to the *CRPD*, instead taking the position that the educational rights of children with disabilities guaranteed by the *Convention* are covered under existing law.⁸⁸ However, existing legislative tools have not, as interpreted to date, always provided the legal basis for full educational rights for children with disabilities, and Canada's existing provincial laws must be scrutinized to determine the extent to which the treaty in fact has been implicitly implemented to date.

In sum, treaties which are ratified and are regarded by courts to have been implemented within Canadian law have an impact upon Canadian domestic law because such implementing legislation is directly applicable before the Canadian courts, and such courts will strive to interpret the implementing legislation in a manner consistent with the underlying treaty obligations.⁸⁹ The wording of Article 24 of the *CRPD* supports a comprehensive right to education; if the courts accept that this Article has been implemented, then disability rights advocates have a strengthened claim to a right to education.

It does not appear that recent legislation has been passed⁹⁰ federally or provincially which changes the legislative environment concerning the right to education of persons with disabilities from the laws which were in force at the time of *Auton*, *Wynberg* or *Moore*.⁹¹ Since no post-ratification legislation is apparent that explicitly implements the education provisions of the *CRPD*, there is

⁸⁸ See e.g., *Education Act*, R.S.O. 1990, c. E.2, online: Canadian Legal Information Institute <<http://www.canlii.org/en/on/laws/stat/rso-1990-c-e2/latest/>>; see also *Ontarians with Disabilities Act*, 2001, S.O. 2001, c. 32 at art. 15, online: Canadian Legal Information Institute <<http://www.canlii.org/en/on/laws/stat/so-2001-c-32/latest/>> (on educational facility access)

⁸⁹ *National Corn Growers Assn. v Canada (Import Tribunal)*, [1990] 2 SCR 1324.

⁹⁰ Such legislation might have taken the form of *An Act to Implement the Convention on the Rights of Persons with Disabilities* for instance. The convention has apparently not been explicitly referenced in any provincial or federal legislation to date. It has, however, been noted in three administrative and judicial decisions: *Leobrera v Canada (Citizenship and Immigration)*, 2010 FC 587 (CanLII) (1 June 2010) at ¶ 67, Canadian Legal Information Institute <<http://www.canlii.org/en/ca/fct/doc/2010/2010fc587/2010fc587.html>>, 2010 F.C.J. No. 692 (Q.L.) ("the Court takes note of Canada's ratification of the *CRPD*. The Court is of the opinion that its language does not support the argument that adults with disabilities can be deemed to be "children" for the purposes of the best interests of the child, as it draws a distinction between children with disabilities and adults with disabilities.") [*Leobrera* cited to CanLII]; *National Capital Commission v Brown*, 2008 FC 733 (CanLII) (13 June 2008) at ¶ 144, online: Canadian Legal Information Institute <<http://www.canlii.org/en/ca/fct/doc/2008/2008-fc733/2008-fc733.html>>, 63 CHRRD/359, rev'd 2009 FCA 273, [2009] F.C.J. No. 1196 (QL) ("Counsel for the intervener in ... argued [unsuccessfully] that at the heart of the duty to accommodate lays the presumption of the duty to consult with peoples with disabilities. This presumption stems from Canada's national policies in the field and its international obligations as signatory of the UN Convention on the Rights of Persons with Disabilities.") [*Brown* cited to CanLII]; *Commission des droits de la personne et des droits de la jeunesse c. Coopérative*.

⁹¹ *Auton*, *supra* note 8; *Wynberg*, *supra* note 9; *Moore*, *supra* note 10.

a risk that some courts will not look at the *CRPD* as profoundly changing *through the convention's domestic implementation* the rights of persons with disabilities to education. On the other hand, it is possible that courts will find that the existing legislative regime is indeed sufficient to implement the *CRPD* domestically. For instance, such courts may not require explicit implementation of the *CRPD* since they may note that such implementation is only required where existing domestic law cannot be interpreted as supporting performance of the treaty.⁹²

C. Unimplemented Treaties and Domestic Law

Canadian courts have noted a presumption of compatibility between Canadian law and Canada's international legal obligations which they have a duty to enforce.⁹³ This presumption is applicable to ratified treaties despite questions with regard to their implementation status. For instance, in 1999 the Supreme Court in *Baker*⁹⁴ found the purportedly unimplemented *Convention on the Rights of the Child* to be highly persuasive in the interpretation of Canadian legislation, and established a precedent which regards ratified treaties to be influential before Canadian courts even without their having been implemented domestically.⁹⁵ Writing in 2004, the Supreme Court affirmed that "[s]tatutes should be construed to comply with Canada's international obligations,"⁹⁶ a rule supported by the Court three years later in *R. v Hape*.

The interpretive presumption which holds that Parliament intends to legislate in compliance with Canada's international obligations thus applies to ratified treaties regardless of their perceived implementation status. Therefore, the *CRPD*, including Article 24, is now poised to influence courts' interpretation of Canadian legislation pertinent to the right to education since courts will interpret the relevant statutes in a manner consistent with Canada's obligations under the *CRPD*.

D. The *CRPD* and *Charter* Interpretation

In addition to affecting courts' interpretation of parliamentary intent in the passage of legislation, the *CRPD* is also set to influence courts' interpretation of the *Charter*, which may in turn shape court decisions in *Charter* challenge litigation. In recent years the Supreme Court has approached the relationship between the *Charter* and Canada's international legal obligations in several

⁹² *R. v Canada Labour Relations Board*, *supra* note 83.

⁹³ See e.g., *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] 1 SCR 76 at ¶ 31, [2004] SCJ No. 6(QL). *R. v Hape*, *supra* note 72 at ¶ 53–54; See also de Mestral & Fox–Decent, *supra* note 79 at 598–599. See also Stephen Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) 50 UNBLJ 11 at 15.

⁹⁴ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No. 39.

⁹⁵ The holding in *Baker* is thus important but not undisputed. See *Ahani*, *supra* note 81 at ¶ 31–33. With regard to the *ICCPR*, Laskin J.A. wrote that "Canada has never incorporated either the Covenant or the Protocol into Canadian law by implementing legislation. Absent implementing legislation, neither has any legal effect in Canada." Laskin J.A. also noted that "neither the Committee's [human rights committee] views nor its interim measures requests are binding on Canada as a matter of international law, much less as a matter of domestic law."

⁹⁶ *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, *supra* note 93.

different ways.⁹⁷ First, building on the 1989 decision in *Slaight Communications Inc. v Davidson*,⁹⁸ in 2007 the Supreme Court in *Health Services* characterized Canada's international human rights obligations as providing a minimum standard for the *Charter*'s human rights protection.⁹⁹ This approach suggests that the *CRPD*'s Article 24 provides a new basic benchmark for the right to be free from discrimination in access to education in Canada.

A second and quite different Supreme Court approach to the relationship between international legal obligations and the *Charter* is evident in the 2002 decision, *Suresh*. There, the Court held that international law could inform the *Charter*'s content, but was not determinative, and furthermore held that in exceptional circumstances, the *Charter* may be interpreted in a fashion inconsistent with Canada's international human rights law obligations.¹⁰⁰

A spectrum of views to how the *Charter* relates to Canada's international human rights obligations is also evident in recent case law,¹⁰¹ from decisions which allot considerable weight to international obligations (as in *Health Services*), to those which assign such obligations only optional influence (arguably seen in *Suresh*). It remains to be seen what approach to the relationship between the *Charter* and Canada's international obligations will gain prominence in the courts going forward.

E. Summary

With the ratification of the *CRPD*, Canada is now bound internationally to ensure compliance with obligations concerning the right to education outlined at Article 24. Canada's ratification of the *CRPD* will have an impact upon the Canadian law applicable to this right in four ways. First, with respect to customary international law, if the right to be free from discrimination generally, central to the treaty, is regarded as implemented within Canadian law, then this right to be free from discrimination ensures that persons with disabilities have the customary international law right to basic education that all other individuals hold, considering that this rule of customary international law (the right to education) has not been clearly deviated from in Canadian legislation. Furthermore, the *Convention* arguably affirms the customary international law right to be free from discrimination in access to education, including on the grounds of disability, a customary right that has not been clearly derogated from in domestic legislation, making it applicable within Canadian law.

⁹⁷ See e.g., John Currie, "International Human Rights Law in the Supreme Court's Charter Jurisprudence: Commitment, retrenchment and Retreat – In No Particular Order" (2010) 50 SCLR (2d) 423 at 451–454.

⁹⁸ *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038 at 1056–57.

⁹⁹ *Health Services and Support — Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391, 2007 SCC 27 at 70. ("[T]he *Charter* should be presumed to provide at least as great a level of protection as it found in the international human rights document that Canada has ratified").

¹⁰⁰ *Suresh v Canada* (Minister of Citizenship and Immigration), [2002] 1 SCR 3 at 60, 78.

¹⁰¹ See e.g., *United States v Burns*, [2001] 1 SCR 283, 2001 SCC 7 at ¶ 79 ("international law and opinion is of use to the courts in elucidating the scope of fundamental justice"); *R. v Hape*, *supra* note 72 at ¶ 56 ("In interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction.")

Second, Canada's ratification will have an impact upon Canadian law applicable to the rights of persons with disabilities to education to the extent that this treaty is regarded as implemented (either explicitly or implicitly, including by pre-existing legislation) within Canadian statute. In order to maximize the impact of the treaty on Canadian law through this mode, advocates should look for and highlight examples of legislation (and accompanying regulations) that domestically implement this treaty and its contents.

Third, this treaty's ratification will have an impact upon Canadian law to the extent that it frames the interpretation of existing legislation, according to the interpretive presumption which holds that Parliament intends to legislate in compliance with its international obligations.¹⁰² In order to maximize its impact in this way, advocates may buttress the contents of the treaty text with further descriptive information concerning the intended scope of the rights contained in this treaty, including information from reports issued by the Committee on the Rights of Persons with Disabilities.¹⁰³ This information will help guide courts in their interpretive reference to the *Convention*.¹⁰⁴

Fourth, it is possible that the *CRPD*, including Article 24, will influence courts' interpretation and application of the *Charter* in the future. At a minimum, Canada's obligations under the treaty may be taken into account by courts in their analysis of *Charter* contents. Advocates seeking to advance the right to education in Canada would do well to support the approach taken in *Health Services*,¹⁰⁵ which regarded Canada's international obligations as providing at least a basic threshold level of human rights protection enshrined within the *Charter*. According to this rationale, *CRPD* Article 24 provides a new minimum standard for the constitutionally protected right to education in Canada.

Thus, while a lack of explicit implementing legislation does create some ambiguity and uncertainty concerning the practical effects of Canada's ratification of the *CRPD*, it is clear that implementation alone is not the only method by which the treaty's ratification is poised to influence Canadian law and the right to education specifically, considering the persuasive interpretive value of unimplemented treaties as well as the influence of international obligations in shaping *Charter* analysis.

Even at its mildest influence – as an interpretative aid – the *CRPD* will make a significant impact on recent approaches to education rights of children diagnosed with autism and learning disabilities. The courts' restrictive approach in these cases thus far are explored in Part IV.

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¹⁰² See e.g. *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, *supra* note 93.

¹⁰³ "Committee on the Rights of Persons with Disabilities" online: United Nations Human Rights <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>>.

¹⁰⁴ For an example of treaty interpretation within a Canadian judgment see *Pushpanathan v Canada*, [1998] 1 SCR 982, [1998] SCJ, No 46 at ¶ 52–60.

¹⁰⁵ *Health Services and Support*, *supra* note 99.

IV. RECENT CANADIAN CASE LAW ON EDUCATION RIGHTS AND STUDENTS WITH DISABILITIES

Children with disabilities, whether physical or intellectual, have historically been placed in segregated educational settings in Canada such as various training institutions for students with intellectual disabilities or crippled children's schools for students with mobility impairments.¹⁰⁶ Indeed, prior to 1980, school boards in Ontario were not required to accept a particular pupil at all if the educational authorities concluded she or he would not profit from an elementary education.¹⁰⁷ This compares unfavourably to the American regime where Congress mandated integration for pupils with disabilities in the least restrictive environment in the *Education for All Handicapped Children Act of 1975*.¹⁰⁸ While the quality of education in segregated settings varied, they at best were not focused on providing academic skills but on correcting perceived deficits.¹⁰⁹ At worst, they were a pure example of the medical model engaged in degrading practices such as using school gymnasiums for regularly scheduled medical examinations where students with disabilities were compelled to strip for group examinations that facilitated learning by medical students.¹¹⁰ Such explicit and systematic regulation and surveillance of the disabled student's body in an educational context is strikingly similar to the regulation of prisoners famously analyzed by Michel Foucault.¹¹¹ Connor notes how, in fact, the special education system resembled Foucault's famous panoptical system of regulation: students with disabilities are regulated and observed by teachers, who in turn are regulated administrators who are governed by school boards who are governed by provincial ministries.¹¹²

There is also clear evidence from American scholars that racialized working class youth have been far more likely to be labeled as having learning disabilities and placed in restrictive settings than their white middle class counterparts.¹¹³ Eugenics as an ontological framework based on racial hierarchies and a phobia about the polluting influence of immigration, deeply influenced thinking in

¹⁰⁶ See e.g. Sandra Goundry & Yvonne Peters, *Litigating for Disability Equality Rights: The Promises and the Pitfalls* (Winnipeg: Canadian Disability Rights Council, 1994) at 5.

¹⁰⁷ *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at ¶ 57, (1997) 142 DLR (4th) 385 [*Eaton* cited to S.C.R.].

¹⁰⁸ Pub. L. No. 94–142. For an account of recent developments and a critique of the scope of integration in the United States, see Colker, *supra* note 66.

¹⁰⁹ Nancy Hansen, "Spaces of Education: Finding a Place That Fits" (2005) 1:3 Review of Disability Studies 22 at 22 ["Spaces"].

¹¹⁰ See Nancy Hansen, "Surmounting Perfect Body Syndrome: Women with Disabilities and the Medical Profession" in Houston Stewart, Beth Percival & Elizabeth R. Epperly, eds, *The More We Get Together...* (Charlottetown: Gynergy Books, 1992) 49 at 51 ["Surmounting"]; Dick Sobsey, *Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance?* (Baltimore: Paul H. Brookes, 1994).

¹¹¹ See generally Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Vintage, 1995). See also Edward W. Said, *Orientalism* (New York: Random House, 1978) (discussing how Western thinkers constructed an exotic Orient through which Third World peoples were viewed).

¹¹² See David J. Connor, *Urban Narratives: Portraits in Progress—Life at the Intersections of Learning Disability, Race & Social Class* (New York: Peter Lang, 2008) at 321. I have adapted Connor's terminology for the Canadian context.

¹¹³ *Ibid* at 48–51.

education philosophy in both the United States and Canada.¹¹⁴ Finally, it is important to appreciate that special education systems have tended to evolve into bureaucracies which defend their own interests and are extremely resistant to change. This is not surprising because special education is premised on the notion that disability is pathological and needs to be fixed through objective scientific treatment that is determined through special education testing.¹¹⁵ As Connor argues, in Foucauldian terms, the normalizing practices of schooling produce students with disabilities by labeling certain students as abnormal and pathological who must be corrected through scientific methods and closely monitored through testing.¹¹⁶

Even when the *Charter* came into force and amendments to the various provincial human rights codes mandated inclusion of students with disabilities, school boards have not been pro-active in promoting equality and inclusion, leading to the phenomenon whereby students with disabilities have been merely tolerated: physically present in the integrated classroom but isolated, vulnerable to bullying and excluded from the social activities of the school.¹¹⁷ A 2004 commentary states that more than forty percent of students with intellectual disabilities in Canada remain in segregated classes or schools.¹¹⁸ Yet the topic has been sparsely addressed in Canadian law reviews, unlike the copious treatment in the United States.¹¹⁹ The few authors to engage in this topic have sounded the alarm. While writing about the post-secondary educational context, for example, Hibbs and Pothier are stinging in their account of the provisions of accommodations for students with disabilities at the University of Victoria, a population at least in theory far better equipped to self-advocate for change than public school students. Hibbs and Pothier describe through a Foucauldian lens of disciplinary power how the university's policies are reactive and rigidly require documentation before services are provided.¹²⁰ These accounts suggest that there is a long way to go on this issue.

¹¹⁴ See Beth Ferri & David Connor, *Reading Resistance: Discourses of Exclusion in Desegregation and Inclusion Debates* (New York: Peter Lang, 2006); Fiona A. Miller, "Making Citizens, Banishing Immigrants: The Discipline of Deportation Investigations, 1908–1913" (2000) 7:1 *Left History* 62 at 67, 83. See also Douglas C. Baynton, "Bodies and Environments: The Cultural Construction of Disability" in Peter D. Blanck, ed, *Employment, Disability and the Americans with Disabilities Act: Issues in Law, Public Policy and Research* (Evanston: Northwestern University Press, 2000) 387 at 404–06.

¹¹⁵ Connor, *supra* note 112 at 318.

¹¹⁶ *Ibid* at 313–18.

¹¹⁷ Hansen, "Spaces", *supra* note 109 at 24–27. See also Ravi Malhotra, "Finding a Voice of Their Own: Exploring Disability Identity and the Articulation of Disability Rights through the Narratives of Young Adults with Physical Disabilities" [unpublished, available on file with the Windsor Yearbook of Access to Justice]

¹¹⁸ Gordon L. Porter, "Meeting the Challenge: Inclusion and Diversity in Canadian Schools" (Toronto: Canadian Education Association, 2004), online: Inclusion Europe <<http://www.inclusion-europe.org/documents/GL-%20Porter-%20ViewPoint-%20%20Education-%20Canada-%20Winter-%202004.pdf>>. See also Gordon L. Porter, "Making Canadian Schools Inclusive: A Call for Action" (Toronto, Canadian Education Association, 2008), online: <<http://www.inclusive-education.ca/documents/2-Making-Canadian-Schools-Inclusive-G-Porter.pdf>> (noting Article 24 of the *CRPD*).

¹¹⁹ A Quicklaw search for "special education tribunal" produces only five hits.

¹²⁰ Teri Hibbs & Dianne Pothier, "Post-Secondary Education and Disabled Students: Mining a Level Playing Field or Playing in a Minefield?" in Dianne Pothier & Richard Devlin, eds, *Critical*

A. Eaton

Recent developments in the law regarding education and disability rights can best be understood in the historical context of the Supreme Court of Canada's 1997 holding in *Eaton v Brant County Board of Education*.¹²¹ Emily Eaton was a child with cerebral palsy who primarily used a wheelchair, had some visual impairment, was unable to speak and who had no established method of communication.¹²² Her parents challenged a decision of the school board's Identification, Placement and Review Committee (IPRC) that concluded, after a period of experimentation with integrated education, that she was more appropriately suited to special education classes. Her parents appealed to the Special Education Appeal Board which unanimously confirmed the decision of the IPRC. They then appealed this decision to the Special Education Tribunal which again unanimously confirmed the decision of the IPRC.¹²³

The Tribunal evaluated Emily's needs on a number of parameters including her intellectual and academic needs, her communication needs, emotional and social needs, physical and personal safety needs and her three years of experience as a student in an integrated setting. The Tribunal concluded that an integrated setting was not appropriate because the adapted curriculum was so different from that followed by the regular students that it merely served to isolate the student with intellectual disabilities.¹²⁴ Similarly, it found that Emily's communication needs required individualized and intensive attention that could only be provided in a segregated setting because she was not yet able to effectively communicate through Sign language.¹²⁵ It also found that there was little if any interaction between other pupils and Emily, although it acknowledged that it was difficult to determine Emily's reactions and possible emotional benefits given her communication difficulties.¹²⁶ The Tribunal also expressed concerns over Emily's tendency to place objects in her mouth as a potential safety issue.¹²⁷ Finally, the Tribunal concluded that the evidence indicated that Emily's intellectual, physical and emotional needs were not met in the years when she attended school in an integrated environment.¹²⁸ It therefore found no violation of the Ontario *Human Rights Code* or the *Charter* in the Board's decision to place Emily in a segregated setting, despite her parents' wishes to the contrary.¹²⁹

The parents then sought judicial review of the Tribunal's decision and were unsuccessful in Divisional Court where the Court rejected the idea that the *Charter*

Disability Theory: Essays in Philosophy, Politics, Policy and Law (Vancouver: University of British Columbia Press, 2006) 195 at 199–203. For an example of a very recent disability accommodations case at the University of British Columbia where the disabled student's appeal for judicial review was dismissed, see *Singh v University of British Columbia*, 2010 BCCA 485.

¹²¹ *Eaton*, *supra* note 107.

¹²² *Ibid* at ¶ 6.

¹²³ *Ibid* at ¶ 7–8.

¹²⁴ *Ibid* at ¶ 17.

¹²⁵ *Ibid* at ¶ 18.

¹²⁶ *Ibid* at ¶ 19.

¹²⁷ *Ibid* at ¶ 20.

¹²⁸ *Ibid* at ¶ 21–22.

¹²⁹ *Ibid* at ¶ 23.

created a presumption in favour of integration of students with disabilities.¹³⁰ However, the Ontario Court of Appeal allowed their appeal and set aside the Tribunal's order, finding a violation of section 15 of the *Charter* in the *Education Act*.¹³¹ Arbour J.A., as she then was, ruled that s. 8 of the *Education Act*¹³² should be read to include a direction that the least exclusionary option should be selected that provides an environment that can accommodate the student's needs, unless the parents consent to a segregated placement.¹³³ In her view, a segregated placement ought only to be considered as a last resort.¹³⁴

On further appeal to the Supreme Court of Canada, the Court allowed the school board's appeal and held that the decision of the Tribunal did not violate section 15.¹³⁵ The Court held that a presumption of integration would work to the disadvantage of those pupils for whom special educational settings is required in order for them to flourish.¹³⁶ The Court explained that it identified two purposes to s. 15's prohibition of discrimination on the basis of disability. First, it was to prohibit the attribution of untrue stereotypes relating to immutable characteristics.¹³⁷ Second, however, it stressed that reasonable accommodation may be required for some individuals to participate fully in society.¹³⁸ Therefore, it concluded that determining the best interests of the student with a disability should not be encumbered with a presumption in favour of integration.¹³⁹ In reaching this conclusion, enormously disappointing to many in the disability rights community and effectively setting a clear precedent that separate education constitutes equality under the *Charter*,¹⁴⁰ the Court did not consider any of the international agreements on disability rights then in force such as the Standard Rules.¹⁴¹

Paradoxically, the Eatons subsequently placed their daughter in an integrated setting in the Catholic School Board system, even while seeking judicial review of the Tribunal's decision.¹⁴² This underscores the capricious nature of decisions about integrating students with disabilities. Whatever the legal construction of Emily Eaton's impairments, in the real world, a school board was able to integrate her.

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¹³⁰ *Ibid* at ¶ 24–28.

¹³¹ *Ibid* at ¶ 34.

¹³² *Education Act*, *supra* note 88, s. 8.

¹³³ *Eaton*, *supra* note 107 at ¶ 40.

¹³⁴ *Ibid* at ¶ 41.

¹³⁵ *Ibid* at ¶ 80.

¹³⁶ *Ibid* at ¶ 79.

¹³⁷ *Ibid* at ¶ 67.

¹³⁸ *Ibid*.

¹³⁹ *Ibid* at ¶ 79.

¹⁴⁰ Dianne Pothier makes this point eloquently in her critique of the decision. See Dianne Pothier, "Eaton v Brant County Board of Education" (2006) 18 CJWL 121 at ¶ 26–41.

¹⁴¹ See *supra* note 24, and accompanying text

¹⁴² Pothier, *supra* note 140 at ¶ 7.

B. *Auton*

Although litigated as a matter of access to health services, *Auton*¹⁴³ is a key decision in disability and education rights jurisprudence. In *Auton*, the Supreme Court of Canada was asked to consider whether section 15 of the *Charter* was violated by the British Columbia government's refusal to fund a specialized treatment known as Applied Behavioural Analysis or Intensive Behavioural Intervention [ABA-IBI] for pre-school autistic children.¹⁴⁴ Autism, or more accurately Autism Spectrum Disorder, is a neurological condition that affects communication and social interaction and causes repetitive behaviour.¹⁴⁵ The parents believed that this treatment was appropriate and beneficial for their children and sought funding.¹⁴⁶ The cost was considerable: between \$45,000 and \$60,000 per year due to its intensive nature.¹⁴⁷ They eventually sought a declaration that the failure to fund ABA-IBI treatment violated the equality guarantee in section 15 of the *Charter* and could not be saved by section 1.¹⁴⁸ Although the *Auton* claimants characterized ABA-IBI treatment as a health service, it could equally be considered an educational service.

The trial judge held that ABA/IBI therapy was medically necessary for children with autism, and that the failure to fund the therapy in British Columbia, while funding other medically necessary services, violated the plaintiffs' equality rights pursuant to section 15. Justice Allen went on to conclude that this violation could not be saved by section 1 as universal health care was the prime objective and ordered the Crown to fund the ABA/IBI therapy for children with autism.¹⁴⁹ On appeal, the British Columbia Court of Appeal upheld the trial judgment. The Court of Appeal found that the failure to fund the treatment to assist the complainants effectively created a "social handicap" that further marginalized an already disadvantaged group.¹⁵⁰ Moreover, this violation of section 15 was not justified under section 1 because there was neither a rational connection nor proportionality between the objective of the fair allocation of limited resources and the denial of ABA/IBI therapy to children with autism.¹⁵¹ It allowed the parents'

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¹⁴³ *Auton*, *supra* note 8.

¹⁴⁴ *Ibid* at ¶ 1–13.

¹⁴⁵ Natasha Bakht, "Furthering an Economic/Social Right to Health Care: The Failure of *Auton v British Columbia*" (2005) 4 JL & Equality 241 at ¶ 5.

¹⁴⁶ *Auton*, *supra* note 8 at ¶ 8–12. It should be noted that some in the Autism community find ABA-IBI treatment objectionable because it seeks to provide therapy to alter characteristics that they simply regard as a difference or what they call biodiversity. Michelle Dawson, a woman with autism, was granted intervener status at the Supreme Court of Canada and made such arguments. See Martha Jackman, "Health Care and Equality: Is There a Cure?" (2007) 15 Health L J 87 at ¶ 67–68. We take no position on this controversy or the efficacy of ABA-IBI treatment. For a lucid analysis of some of the problems raised by identity politics within the autism community, see generally Francisco Ortega, "The Cerebral Subject and the Challenge of Neurodiversity" (2009) 4 BioSocieties 425.

¹⁴⁷ *Auton*, *supra* note 8 at ¶ 6.

¹⁴⁸ *Ibid* at ¶ 15.

¹⁴⁹ *Auton (Guardian ad litem of) v British Columbia (Minister of Health)*, 2000 BCSC 1142, [2000] BCJ No. 1547 at ¶ 140–52 [*Auton v Minister of Health*].

¹⁵⁰ *Auton*, *supra* note 8 at ¶ 16.

¹⁵¹ *Ibid* at ¶ 17.

cross-appeal and added funding for ABA/IBI therapy pursuant to medical opinion.¹⁵²

Unfortunately for advocates of ABA/IBI therapy, the Supreme Court of Canada reversed the lower courts and found that because ABA/IBI treatment was not a benefit provided under the law it was not subject to the equality analysis pursuant to section 15.¹⁵³ The Court held that the *Canada Health Act*¹⁵⁴ did not guarantee that all medically required services would be provided to Canadians. Rather, only core services were mandated and the remaining non-core services were up to the province's discretion.¹⁵⁵ It distinguished the Supreme Court's earlier ruling in *Eldridge v British Columbia (Attorney General)*,¹⁵⁶ a case about the funding of sign language interpreters for Deaf patients receiving physician care and maternity care, by observing that *Eldridge* concerned equal access to a benefit that was already conferred by law.¹⁵⁷ Consequently, there could be no administrative duty to distribute non-existent benefits equally.¹⁵⁸

Moreover, the Court went on to hold that even if ABA/IBI therapy were found to be a benefit provided by law, the claim would still fail because differential treatment was not demonstrated once the Court used the appropriate comparator group.¹⁵⁹ The Court held that the appropriate comparator group was neither able bodied children and their parents nor adults with psychiatric illness, as the petitioners suggested. Rather, the Court concluded that the appropriate comparator group was a non-disabled person or a person with a disability other than a mental disability seeking funding for a non-core therapy which is emerging and only recently becoming recognized as medically required.¹⁶⁰ Not surprisingly, when it analyzed the petitioners' claim in light of its extremely narrow comparator group, the Court found that there was no violation of section 15 as it concluded there was no evidence that the government acted differently with respect to the funding of other emerging therapies.¹⁶¹ Again, the Supreme Court of Canada did not consider relevant international human rights law before dismissing the parents' claim.¹⁶²

C. Wynberg

Faced with this defeat, advocates for children with autism tried a different approach in *Wynberg v Ontario*.¹⁶³ In *Wynberg*, parents of children with autism

¹⁵² *Ibid.*

¹⁵³ *Ibid* at ¶ 3.

¹⁵⁴ R.S.C. 1985, c. C-6.

¹⁵⁵ *Auton*, *supra* note 8 at ¶ 35.

¹⁵⁶ [1997] 3 SCR 624, [1997] SCJ No 86 [*Eldridge*].

¹⁵⁷ *Auton*, *supra* note 8 at ¶ 38.

¹⁵⁸ *Ibid* at ¶ 46.

¹⁵⁹ *Ibid* at ¶ 62. Supreme Court jurisprudence has dictated that determining the appropriate comparator group is a matter of law. See *Hodge v Canada (Minister of Resources and Development)*, [2004] 3 SCR 357, 244 DLR (4th) 257.

¹⁶⁰ *Auton*, *supra* note 8 at ¶ 49-55.

¹⁶¹ *Ibid* at ¶ 62.

¹⁶² See *supra* note 24 and accompanying text.

¹⁶³ *Wynberg*, *supra* note 9. A similar case involving educational services for children with autism that was also largely unsuccessful is *Hewko v B.C.* 2006 BCSC 1638, [2006] BCJ No. 2877 (finding gap in infrastructure in the educational system does not constitute a basis for a *Charter* breach).

alleged that the Ontario government discriminated against their children in violation of section 15 by failing to provide in school intensive therapy services, known as an Intensive Early Intervention Program (IEIP), that would benefit their children after the age of six. The program created by the Ontario government for children with autism, established pursuant to the *Child and Family Services Act*¹⁶⁴ and the *Education Act*,¹⁶⁵ used an age cut-off of six years.¹⁶⁶ The trial judge held that the parents' equality rights under the *Charter* were violated on the basis of both age and disability and the violation could not be justified under s. 1.¹⁶⁷ The trial judge ordered declaratory relief and damages to the plaintiffs.¹⁶⁸

The Ontario Court of Appeal unanimously allowed the government's appeal and held that there was no *Charter* violation. The Court of Appeal applied the threepart test set out in *Law v Canada (Minister of Employment and Immigration)*¹⁶⁹ and focused on the dignity test. It concluded that most of the contextual factors suggested that there was no section 15 violation on the basis of age.¹⁷⁰ The Court held that there was simply no evidence to suggest that children with autism older than age six experienced greater stigma or discrimination than children younger than six. Moreover, the treatment in question appeared to be more effective when administered to children under six.¹⁷¹ Even if there were a *Charter* violation, the Court of Appeal held that the age limit was rationally connected to some of the identified objectives of the IEIP, such as providing intensive behavioural intervention during a time horizon that experts regarded as providing the maximum benefits and allocating limited resources in a manner that optimizes outcomes for children with autism. It also only minimally impaired the rights of the claimants, especially given the Court's historic policy of deference to the legislature's choices in crafting complex distributive programs.¹⁷² Therefore, there were no grounds for alleging discrimination on the basis of age.

With respect to disability discrimination, the Court of Appeal held that the claim must also fail because it was not at all clear that the requested behaviour

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¹⁶⁴ R.S.O. 1990, c. C.11.

¹⁶⁵ *Education Act*, *supra* note 88, at s. 8(3). This provision requires the Minister to ensure all exceptional children have available to them special education programs and services and to ensure parents and guardians are able to appeal the appropriateness of the placement.

¹⁶⁶ *Wynberg*, *supra* note 9 at ¶ 10–13.

¹⁶⁷ *Ibid* at ¶ 10.

¹⁶⁸ *Ibid*.

¹⁶⁹ [1999] 1 SCR 497, [1999] SCJ No 12 [*Law*]. The test asks is the claimant accorded differential treatment under the law; second, is that treatment based on one of the prohibited grounds listed in s. 15(1) or a ground analogous to them; and third, does the differential treatment discriminate in a substantive sense. Four contextual factors used to evaluate whether a complainant's dignity has been harmed are (i) pre-existing disadvantage, stereotyping, prejudice or vulnerability; (ii) the correspondence, or lack thereof, between the grounds on which the claim is based and the actual needs, capacity or circumstances of the claimant or those he or she is properly compared to; (iii) the ameliorative purpose or effect of the impugned law, program or activity upon a more disadvantaged person or group in society; and (iv) the nature and scope of the interest affected by the impugned governmental activity.

¹⁷⁰ *Wynberg*, *supra* note 9 at ¶ 79–80.

¹⁷¹ *Ibid* at ¶ 52–59. The Court of Appeal acknowledged that children with autism over the age of six were denied the ability to acquire life skills, but held that the effect was relatively muted because the IEIP program was specifically tailored for children under six. See *ibid* at ¶ 75–77.

¹⁷² *Ibid* at ¶ 174–85.

interventions could feasibly be implemented within the regular school day. Ironically, the Court cited the fact that the IEIP guidelines require mastery of particular skills before integration of a student with autism is contemplated as inconsistent with Regulation 181/98 that requires school boards *first* consider integration in a regular classroom setting.¹⁷³ Furthermore, the Court concluded that the trial judge wrongly reversed the onus of proof that was the responsibility of the plaintiffs by holding that the IEIP was the only appropriate intervention for students with autism, given the lack of information available to parents on the efficacy of other treatment models. It also found that there was simply insufficient information about the experiences of students with other types of disabilities to do a proper comparator group analysis that is essential to reach a finding of discrimination.¹⁷⁴ As a result, the Court found that neither the claim of age discrimination nor disability discrimination could stand and allowed the appeal. Again, the Court of Appeal did not cite any international human rights law relating to disability rights.¹⁷⁵

D. *Moore v British Columbia*

Finally, in *Moore v British Columbia*,¹⁷⁶ the British Columbia Supreme Court quashed a human rights tribunal decision finding both systemic and individual discrimination in violation of s. 8 of the British Columbia *Human Rights Code*.¹⁷⁷ Unlike other cases considered in this article, *Moore* was not argued as a *Charter* case. The Tribunal had held that Jeffrey Moore, a child with dyslexia, was discriminated against because the school district and the Ministry failed to provide him with sufficiently intensive supports early enough for him to prosper as a student.¹⁷⁸ Early intervention and screening for children with learning disabilities and specific services such as phonemic awareness training typically result in dramatically greater academic success.¹⁷⁹ In Moore's case, he entered Grade 8 with a reading proficiency of children many years younger than him.¹⁸⁰ Second, the Tribunal had found that students with learning disabilities were systemically discriminated against by a decision to disproportionately cut funding to services required by students with severe learning disabilities.¹⁸¹ Funding cuts resulted in the closure of a specialized program, known as DC1, in the plaintiff's district

¹⁷³ *Ibid* at ¶ 122–27. The fact that this point seems to contradict the Supreme Court of Canada's ruling in *Eaton* does not draw any analysis from the Court of Appeal.

¹⁷⁴ *Ibid* at ¶ 128–46. The use of “typically developing students” as a comparator group was rejected.

¹⁷⁵ See *supra* note 24, and accompanying text.

¹⁷⁶ *Moore*, *supra* note 10. We disclose that Ravi Malhotra serves on the Human Rights Committee of the Council of Canadians with Disabilities [CCD] which intervened in the appeal before the British Columbia Court of Appeal. See “CCD Factum in the *Moore* Case” at ¶ 1, online: Council of Canadian with Disabilities <<http://www.ccdonline.ca/en/humanrights/litigation/moore-factum>> [CCD].

¹⁷⁷ R.S.B.C. 1996, c. 210.

¹⁷⁸ *Moore*, *supra* note 10 at ¶ 4. The Tribunal's very lengthy reasons may be found at 2005 BCHRT 580.

¹⁷⁹ *Ibid* at ¶ 11.

¹⁸⁰ *Ibid* at ¶ 26.

¹⁸¹ *Ibid* at ¶ 4.

which offered intensive, remedial and individualized instruction in a separate setting.¹⁸²

The Court held that the Tribunal erred because it mischaracterized the service customarily available to the public at issue in the case as education services, rather than the provision of special education.¹⁸³ The Court engaged in a detailed analysis of Supreme Court *Charter* jurisprudence that it felt would be of relevance in determining the scope of the human rights claim. The Court concluded that the plaintiff's claim was analogous to *Auton* rather than *Eldridge*. In other words, Moore was not completely denied access to services for students with learning disabilities. Rather, the claim was about the timing and quality of the specific services available to students with learning disabilities. Therefore, the service in question here was the provision of special education services, not education services generally as the Tribunal wrongly concluded.¹⁸⁴

Second, the trial judge found that the Tribunal erred in ignoring a comparative group analysis.¹⁸⁵ The Tribunal focused on whether Moore had been appropriately accommodated and not on engaging in a comparative group analysis. However, the Tribunal had held that, in the alternative, if a comparative group analysis was absolutely mandatory, it would compare Moore's services with those received by able-bodied students.¹⁸⁶ The Court, however, stressed the importance of a comparator group analysis. It concluded that the plaintiff simply failed to demonstrate that similarly situated students who require special education services were granted accommodations that the plaintiff was not.¹⁸⁷ Furthermore, as in *Auton*, the Court placed emphasis on the fact that during the long course of the litigation, there was simply not much existing research on the best practices with respect to students with learning disabilities.¹⁸⁸ Again, the Court did not consider international human rights law relating to disability in reaching its decision.¹⁸⁹

On appeal, the majority of the Court of Appeal upheld the B.C. Supreme Court in a short judgment. The majority found that the trial judge correctly concluded that the service customarily available to the public was, in fact, special education.¹⁹⁰ The majority also stressed that special education students such as Moore are not entitled to services at a standard of perfection, but merely a conscientious and reasonable effort to meet his needs.¹⁹¹ While the majority

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¹⁸² *Ibid* at ¶ 21, 24. While such services may seem to be counter to the social model narrative of inclusion of people with disabilities, it appears clear that the idea is to provide distinct specialized services so as to maximize the academic potential of students with learning disabilities in order to further long-term integration in society.

¹⁸³ *Ibid* at ¶ 122.

¹⁸⁴ *Ibid* at ¶ 90–122.

¹⁸⁵ *Ibid* at ¶ 133 (“To find discrimination, there must first be a distinction drawn between the claimant and others. There must be substantial differential treatment between the claimant and a comparator group.”)

¹⁸⁶ *Ibid* at ¶ 125.

¹⁸⁷ *Ibid* at ¶ 146–47.

¹⁸⁸ *Ibid* at ¶ 8–14. The fact that the DC1 program was completely unique in the province did not assist the plaintiff's case.

¹⁸⁹ See *supra* note 24, and accompanying text.

¹⁹⁰ *Moore*, *supra* note 10 at ¶ 168.

¹⁹¹ *Ibid* at ¶ 177.

concluded that no further analysis was necessary, it went on to conclude that the trial judge was correct in analyzing the comparator group as other students with disabilities who require services.¹⁹²

In a lengthy dissent, Madam Justice Rowles held that the case ought to be analogized to *Eldridge* rather than *Auton*. Rowles J.A. reasoned that, in light of the Ministry of Education's own policy manual, accommodations relating to reading were simply services that enabled students with dyslexia to participate in educational programs generally.¹⁹³ She noted correctly that having an excessively narrow conception of the service makes it more difficult to demonstrate that a complainant has experienced discrimination. She asserted that this is inconsistent with principles of substantive equality that undergird human rights law in Canada.¹⁹⁴ Second, Rowles J.A. found that *Auton* could be distinguished with respect to the issue of comparator groups because it involved access to public benefit schemes. Where the accommodation is required to make the existing service at all accessible to a person with a disability, she held that it was appropriate to compare people with disabilities with able-bodied people.¹⁹⁵ She went on to conclude that the Tribunal had correctly determined that the School District had discriminated against Moore by cutting specialized services that he required because of his dyslexia and that this was in keeping with the vision of substantive equality that was required in Canadian human rights law. The fact that certain requested accommodations are novel in that they were not in effect in British Columbia schools does not automatically defeat the claim.¹⁹⁶ She noted the enormous lengths the Tribunal had gone to make its findings (10,000 pages of evidence).¹⁹⁷

Rowles J.A. also concluded that the Tribunal was correct in concluding that the School District, given the finding of discrimination against Moore, also systemically discriminated against students with severe learning disabilities by disproportionately cutting services to existing and future learning disabled students to address fiscal priorities, and by closing the DC1 program.¹⁹⁸ She found that keeping the DC1 program open would not constitute an undue hardship, notwithstanding the financial constraints faced by the district school board, because the evidence demonstrated that at least one discretionary program was shielded from cuts and the Tribunal noted that no analysis of the impact of the closure on students with severe learning disabilities was undertaken.¹⁹⁹ With respect to the liability of the Ministry, Rowles J.A. upheld the Tribunal's finding that both discrimination against Moore and systemic discrimination against students with learning disabilities occurred.²⁰⁰

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¹⁹² *Ibid* at ¶ 178–83.

¹⁹³ *Ibid* at ¶ 94.

¹⁹⁴ *Ibid* at ¶ 108.

¹⁹⁵ *Ibid* at ¶ 117–21.

¹⁹⁶ *Ibid* at ¶ 127–31. This makes eminent sense or else innovative accommodations could never be implemented.

¹⁹⁷ *Ibid* at ¶ 129.

¹⁹⁸ *Ibid* at ¶ 133–35.

¹⁹⁹ *Ibid* at ¶ 143–53.

²⁰⁰ *Ibid* at ¶ 159–60.

Once again, neither the majority nor the dissent in the Court of Appeal considered international human rights laws. Nor did the facts of either the complainant or the intervener, Council of Canadians with Disabilities, raise such arguments.²⁰¹ Clearly, these cases have been disappointments for disability rights advocates. They have applied formalistic reasoning to deny equality to people with disabilities. As we will argue in Part V, however, Article 24 of the *CRPD* can be used effectively to construct arguments that may transform the jurisprudence in this area to more closely reflect the values of equality and inclusion for people with disabilities.

V. APPLYING ARTICLE 24 OF THE *CRPD*: POTENTIAL STRATEGIES

As far back as 1987, shortly after the enactment of the *Charter*, MacKay and Krinke suggested that advocates of education rights and inclusion for students with intellectual disabilities should not restrict their arguments to statutory provisions. As they correctly observed, legislatures may well amend these statutes at any time and statutory frameworks gave the final say to bureaucratic administrators who may be hostile or insensitive to the needs of children with disabilities and their parents. Instead, such arguments needed to be grounded in human rights principles.²⁰² They explored philosophical arguments such as, *inter alia*, using social contract theory, the relationship between duties and rights requiring the state to offer inclusive education to students with disabilities in order that they may carry out their duties as citizens, or the practice of societal conventions as justifying education to establish the principle of inclusion for students with disabilities.²⁰³ Although only mentioned briefly, Sussel and Manley-Casimir, also writing in 1987, allude to the *Universal Declaration of Human Rights*, the *Declaration of the Rights of the Child* and the ICESCR in making the case for a moral commitment on behalf of the federal and provincial governments to provide every child with an appropriate education.²⁰⁴

The world has changed dramatically since 1987 as has judicial willingness at all levels to seriously consider international law arguments.²⁰⁵ In this section, we

²⁰¹ CCD, *supra* note 176; Factum of Frederick Moore on Behalf of *Jeffrey P. Moore v The Board of Trustees School Division No. 44* (on file with Windsor Yearbook of Access to Justice); Factum of Frederick Moore on Behalf of *Jeffrey P. Moore v Ministry of Education* (on file with Windsor Yearbook of Access to Justice).

²⁰² Wayne MacKay & Gordon Krinke, "Education as a Basic Human Right: A Response to Special Education and the *Charter*" (1987) 2 C.J.L.S. 73 at 73.

²⁰³ *Ibid* at 74–76. This application of social contract theory would involve recognition that individuals surrender to majority rule in modern democracies but nevertheless retain certain fundamental rights such as a right to education. Its most famous modern exposition is John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971). For a compelling if ultimately flawed critique of social contract theory, see Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationalism, Species Membership* (Cambridge: Harvard University Press, 2006).

²⁰⁴ Terri Sussel & Michael Manley-Casimir "Special Education and the *Charter*: The Right to Equal Benefit of the Law" (1987) 2 C.J.L.S. 45 at 48. Curiously, they fail to mention the *Declaration of the Rights of Disabled Persons* which was already in place in 1987 and specifically addressed disability rights issues.

²⁰⁵ See Irwin Cotler, "The *Canadian Charter of Rights and Freedoms* 25 Years Later: A Revolution in Five Acts" in Joseph Eliot Magnet & Bernard Adell, eds, *The Canadian Charter of Rights and Freedoms after Twenty-Five Years* (Markham: LexisNexis, 2009) 323 at 336.

suggest how international law generally and the *CRPD* specifically might be used to bolster arguments in future cases. We argue that the holdings in *Eaton*, *Auton*, *Wynberg* and *Moore* are wrong when regarded through the prism of the values contained in the *CRPD*. In doing so, we embrace the notion of transnational judicial dialogue that suggests that there is a potential two way relationship between domestic courts and international human rights norms as embodied in conventions such as the *CRPD*.²⁰⁶ Inspired by Law and Society scholars, this approach regards domestic courts and international law bodies as co-constitutive of a dynamic international law jurisprudence.²⁰⁷ Waters identifies a three phase transnational legal process of interaction, interpretation and internalization by which domestic courts engage with international law to develop international legal norms.²⁰⁸ While the cases reviewed here have mostly been inimical to the interests of people with disabilities, the dissent by Rowles J.A. in *Moore*²⁰⁹ illustrates that a domestic decision can fruitfully push the interpretation of international disability rights law forward. But how might international disability rights law transform legal norms at the domestic level?

There are five possible arguments to be made. First, the holding in *Eaton* arguably is contradicted by both the letter and spirit of the emerging international disability rights law. As we noted above, the Supreme Court of Canada ruled in *Eaton* that there was to be no presumption in favour of integrating students with disabilities. Rather, courts, tribunals and school boards would assess the individual merits of each case.²¹⁰ As Dianne Pothier has noted, this is highly problematic because if segregated education is a better choice for the student with a disability simply because of the inadequate supports available in the integrated classroom, then both environments have failed the student with a disability.²¹¹ Moreover, there is great risk of ignorance and prejudice undermining opportunities for children with disabilities. Research suggests that educators often equate physical disabilities with learning or intellectual disabilities so that there is a presumption that a child with physical disabilities also has some kind of intellectual disability.²¹² In light of the clear language mandating integration and inclusion contained in Article 24(2)(e) of the *CRPD*,²¹³ it would appear that, in the vast majority of cases, there in fact ought to be a presumption in favour of integration. While it is true that Article 24 contains specific reference to certain situations where separate

²⁰⁶ Melissa A. Waters, "Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law" (2005) 93 Geo LJ 487 at 490.

²⁰⁷ *Ibid* at 501–05.

²⁰⁸ *Ibid* at 499–500. Waters is influenced by Harold Hongju Koh's theories of transnational legal process. See Harold Hongju Koh, "Transnational Legal Process" (1996) 75 Neb L Rev 181.

²⁰⁹ See *supra* notes 193–200 and accompanying text.

²¹⁰ See *supra* note 136 and accompanying text.

²¹¹ Pothier, *supra* note 140 at ¶ 40. Many earlier cases concerned students with physical disabilities who had no intellectual impairments whatsoever but simply required physical access and/or attendant services.

²¹² Samuel R. Bagenstos, "Subordination, Stigma and 'Disability'" (2000) 86 Va L Rev 397 at 423–24.

²¹³ *CRPD*, *supra* note 41, Art. 24(2)(e).

education may be warranted by State Parties,²¹⁴ the overall thrust is clearly in favour of integration. Therefore, in future litigation on integrating students with disabilities, advocates for either plaintiffs or interveners could argue persuasively that Article 24 mandates a policy of inclusion. This is in keeping with the values articulated in the public sphere by many advocates, both in Canada and internationally. Thus, Autism Europe, The Arc, and the American Association on Intellectual and Developmental Disabilities all embrace a position of inclusion where students with intellectual disabilities receive education with able-bodied students.²¹⁵

Second, we noted earlier that in order to instantiate international disability rights law, it would be best to identify existing legislation or other laws that may be regarded as implementing international disability law principles.²¹⁶ In addition to highlighting the extent to which the treaty has been implemented within Canadian law, we noted that even unimplemented (but ratified) treaties hold persuasive value before the courts, since statutes are to be interpreted in a manner consistent with Canada's international obligations.²¹⁷ It is very likely that customary international law also supports the recognition of the right to education of persons with disabilities, since the right to education is undoubtedly part of customary international law, and is thus part of the common law of Canada. Finally, we noted that Canada's international human rights obligations are relevant to the interpreted scope of the *Charter* and may provide a minimum threshold of guaranteed rights.²¹⁸

Third, while disability rights advocates should certainly press for the adoption of the position that a right to full inclusion for children with disabilities in integrated settings currently constitutes customary international law, and also stress the presumption of statutory compliance with Canada's international obligations, there remain strong arguments that the *CRPD* has been implemented within Canadian domestic law. By referencing specific provisions in domestic statutes that provide evidence that implementation of the *CRPD* in international law, the binding nature of the *CRPD* is strengthened. For instance, in British Columbia, Ministerial Order 150/89, also known as the Special Needs Student Order and enacted pursuant to the *School Act*,²¹⁹ states in part:

A board must provide a student with special needs with an educational program in a classroom where that student is integrated with other students who do not have special needs

²¹⁴ *Ibid* at Art. 24(3)(c). These exceptions relate primarily to the education of Deaf and/or blind children.

²¹⁵ See Autism Europe, "Autism and Inclusion" in Ziegler, *supra* note 2, 43 at 43–45; The Arc and the American Association on Intellectual and Developmental Disabilities, "Position Statement on Inclusion", in Ziegler, *supra* note 2, 46 at 46–48. The precise details vary and the European advocates make allowances for segregated settings in the case of certain individuals. The Arc is a community organization promoting supports and services for people with intellectual disabilities.

²¹⁶ See *supra* note 89 and accompanying text.

²¹⁷ *Baker v Canada (Minister of Citizenship and Immigration)*, *supra* note 94; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, *supra* note 93; *R. v Hape*, *supra* note 72 at ¶ 53–54.

²¹⁸ *Health Services and Support*, *supra* note 99.

²¹⁹ R.S.B.C. 1996, c. 412.

unless the educational needs of the student with special needs or other students indicate that the educational program for the student with special needs should be provided otherwise.²²⁰

Similarly, Ontario Regulation 181/98, passed pursuant to the *Education Act*,²²¹ states at s. 17 that the Identification, Placement and Review Committee shall consider placing students in a regular classroom with special education services first before exploring segregated options.²²² Such regulations provide evidence of a commitment on the part of governments to integration in keeping with the principles of Article 24 of the *CRPD*. Statutory regulations reflect the considered view of the legislative assembly and ought to be accorded due weight when interpreting Canada's compliance with its international law responsibilities.

Fourth, one may wish to revisit decisions such as *Auton* in light of Article 24. In *Auton*, the Supreme Court of Canada held that ABA/IBI therapy was not a benefit conferred by law and therefore there was no *Charter* violation in the British Columbia government's decision not to fund the therapy as part of its publicly funded health care services.²²³ To the extent that Article 24 mandates full inclusion of people with autism, the lack of funding for services, whether they are characterized as a health issue (*Auton*) or as an educational issue (*Wynberg*), is deeply troubling. We submit that these cases were wrongly decided. As Martha Jackman has pointed out, the Supreme Court's reasons in *Auton* distinguish sharply between the principle of universality, or coverage for core medical services to all Canadians, and comprehensiveness, or the extent to which particular services are covered.²²⁴ While courts are willing to intervene to defend universality once the legislative branch has reached an agreement with the respective provincial medical association that deems a particular service as covered, the issue of what will be deemed a core service, comprehensiveness, is essentially being placed beyond *Charter* review.²²⁵ Yet the trial judge in *Auton* who found in favour of the plaintiffs clearly noted that there was a relationship between the timely provision of the therapy and the long term educational flourishing of children with autism that might avoid the need for costly as well as isolating institutionalization.²²⁶ Such findings of fact are crucial when relying on Article 24. Establishing a nexus between the requested therapy and education performance increases the legitimacy of Article 24 by operationalizing the language in ways that will make sense to judges and counsel.

A fifth issue that must be addressed is the misuse of comparator group analysis to defeat equality claims for people with disabilities. The dysfunctionality of comparator group analysis, which has become central and essential in adjudicating such claims, and its pernicious effects have been noted in the legal literature

²²⁰ *Special Needs Student Order*, B.C. Reg. M150/89, s. 2(2), online: Government of British Columbia <<http://www.bced.govbc.ca/legislation/schoollaw/e/m150-89.pdf>>.

²²¹ *Education Act*, *supra* note 88.

²²² Regulation 181/98, s. 17.

²²³ See *supra* note 153 and accompanying text.

²²⁴ Jackman, *supra* note 146 at ¶ 26.

²²⁵ *Ibid* at ¶ 23–26.

²²⁶ *Auton v Minister of Health*, *supra* note 149 at ¶ 147.

before.²²⁷ We submit that Article 24 assists in analyzing the comparator group issues and suggests that the formalistic comparator groups used by the courts in *Auton*, *Wynberg* and *Moore* are inconsistent with the values contained in Article 24 that, in our view, mandate a comparison between able-bodied people and people with disabilities. Without a direct comparison of the educational opportunities available to both able-bodied children and children with disabilities, the underlying notion of equality for people with disabilities becomes meaningless.

The Supreme Court has held that the selection of the appropriate comparator group is a matter of law and the Court may substitute its own group where appropriate.²²⁸ In *Auton*, the substitution of an exceedingly complex comparator group not only had the effect of making it virtually impossible for the plaintiffs to succeed but obscured the fact that the claim involved the rights of children.²²⁹ Similarly, in *Wynberg*, the Ontario Court of Appeal ruled that there was no *Charter* violation on the basis of either age discrimination or disability discrimination largely because it rejected the lower court's comparison of the experiences of children with autism with the educational experiences of able-bodied children.²³⁰ In *Moore*, the trial judge, in quashing the human rights tribunal decision, again held that the Tribunal erred because, *inter alia*, it ought to have compared the accommodation requests for students with learning disabilities with services available to other students with disabilities.²³¹

Article 24 will buttress arguments that the appropriate comparator group when pursuing equality claims in education is *always* able-bodied children. Article 24(1)(b) requires State Parties to develop the personality, talents, and creativity of people with disabilities to their fullest potential.²³² By demanding inclusion as a mandate in international human rights law, this principle can only be substantiated by recognizing that the dignity interests of people with disabilities require comparison with able-bodied children. This also avoids the complex technical difficulties with gathering evidence of the treatment of children with other disabilities because the comparator group will be able-bodied children. Justice Rowles in dissent embraced such an approach in *Moore*. In the long term, this approach will facilitate arguments that a comparator group analysis informed by Article 24 will be the better view.

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²²⁷ See e.g. Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada DooMS Section 15" (2006) 24 Windsor YB Access Just 111 at 115–16 (noting the Supreme Court of Canada's emphasis that the wrong comparator group may doom the claim). See also Andrea Wright, "Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate" in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 409. This was acknowledged by the Supreme Court in *R. v Kapp* [2008] 2 SCR 483, 2008 SCC 41 at ¶ 22.

²²⁸ *Hodge*, *supra* note 159 at ¶ 21.

²²⁹ Gilbert & Majury, *supra* note 227 at 130–32.

²³⁰ *Wynberg*, *supra* note 9 at ¶ 109, 111–12.

²³¹ *Moore*, *supra* note 10 at ¶ 146–47. Given how recently *Moore* was decided, this is particularly troubling as one has to wonder how much difference *Kapp* will make.

²³² *CRPD*, *supra* note 41, at Art. 24(1)(b).

Furthermore, Article 24 assists arguments maintaining that rigid comparator group analysis simply re-introduces the long discredited “similarly situated” test.²³³ In their intervener factum submitted to the British Columbia Court of Appeal in *Moore*, the Council of Canadians with Disabilities maintained that the duty to accommodate inherently entails a comparative analysis because of the individualized nature of disability accommodations. The comparison is inevitably between people with disabilities and able-bodied people.²³⁴ No two children with disabilities are identical. Jessica might have a diagnosis of cerebral palsy and walk with a limp, have no learning disabilities and excel in all subjects such that she is academically competitive with her able-bodied peers. Erica might also have a diagnosis of cerebral palsy, use a power wheelchair, require attendant services for eating, dressing and toileting as well as significant academic accommodations for learning disabilities and also have speech impairments requiring the use of alternative communication systems. Each will require individualized accommodations. Consequently, there is no need to encumber disability accommodation cases with an artificial comparator group analysis.²³⁵ We agree and maintain that Article 24(2) (c)’s requirement for reasonable accommodation bolsters the warranted critique of unduly formalistic comparator group analysis.

VI. CONCLUDING THOUGHTS

In this paper we have tried to illustrate the importance of Article 24 of the United Nations *Convention on the Rights of Persons with Disabilities* for current policy issues in disability law. The drafting, signing and ratification of the *CRPD* took many years of tireless advocacy by people with disabilities and their organizations in a number of countries around the world to become international human rights law. It is likely that it will take many more years before judges and counsel become conversant with its intricacies and arguments regarding implementation are more readily accepted. The reports of the Committee on the Rights of Persons with Disabilities should offer a rich source of material that counsel can shape into effective advocacy. Article 24 and the *CRPD* more broadly can provide an effective tool kit to further legal arguments relating to the lack of presumption of integration for children with disabilities and to the flaws of comparator group analysis. At a time when the Supreme Court has largely taken a troubling turn toward more formalistic reasoning, Article 24 provides another avenue of support for advocates, enriches our arguments, and thereby promotes social justice for people with disabilities.

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²³³ The Supreme Court of Canada rejected the “similarly situated” test in *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143, [1989] SCJ No 6 at ¶ 25–30.

²³⁴ CCD, *supra* note 176 at ¶ 34–37.

²³⁵ *Ibid* at ¶ 34.