IN THE MATTER OF THE *HUMAN RIGHTS CODE*

R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before the

British Columbia Human Rights Tribunal

BETWEEN:

J AND L obo T

COMPLAINANTS

AND

Saanich School District and the Superintendent –and- Assistant Superintendent –and- Principal

RESPONDENTS

RESPONSE TO APPLICATION TO DISMISS (AMENDED)

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I. Summary of Facts

1. This is the Complainants' response to the Respondents' application to dismiss the Complaint.

2. The Complaint was filed on behalf of T by his mother and grandmother, L and J (the "Complainants"). The Complainants allege that T, who was ten and eleven at the time, was discriminated against by his former school, Middle School on the basis of T electrical hypersensitivity ("EHS").

3. By way of explanation of the terminology used below and in materials relied on by the Complainants, the terms "microwave radiation," "radiofrequency," and "RF" are used interchangeably. Microwave radiation is high frequency electric field radiation, and is used by most forms of wireless communication to transmit information through the air. Microwave radiation, electric field radiation, and magnetic field radiation are all forms of "electromagnetic radiation," also called "EMF."

4. When T was in his last year at his elementary school, the Complainants were considering registering him at Saanich School District, for middle school the following school year. The Middle School was quite far away from the Complainants' residences, but T was unable to attend his home school district due to the proliferation of wireless devices including Wi-Fi, which he is unable to tolerate due to EHS. Prior to registering T at the Middle School, the Complainants approached the Middle School in the Spring of 2015 to ascertain whether T's disability could be accommodated at the school. The Complainants set up a meeting with the Vice Principal, to explore this issue.

5. At the meeting with the vice principal, the Complainants explained that T has debilitating adverse reactions to wireless radiation, and discussed how T could be kept away from wireless devices in the School.

6. The vice principal assured the Complainants that the School had only 25 percent Wi-Fi coverage, that T would be placed in a home room as far away from the routers as possible, and that School policy was that cell phones were not to be brought to class and were to be kept in the students' lockers. A plan was set up for T to leave the classroom when wireless laptops and tablets were in usage.

7. The Middle School was provided with T's medical letter from his general practitioner, Dr. M, as well as a letter from Dr. Gunnar Heuser, an expert in the area of EHS. Both physicians had assessed T's debilitating symptoms as being caused by exposure to wireless radiation, and recommended that T avoid exposure to elevated levels of wireless radiation.

8. On the basis of the discussion with the vice principal, the Complainants registered T at the Middle School, and T was very excited to be attending School with his friends from his previous school in the same district.

9. However, the Middle School did not inform the Complainants that most classrooms utilize a wireless sound system which transmits using radiofrequency ("RF"), did not inform them that the Middle School was contemplating increasing Wi-Fi coverage to 75 percent (effectively 100 percent) the following year, did not inform them that students were actually being encouraged to use their cell phones in class for various purposes, and did not inform them of pilot projects being implemented that year that would require significantly more wireless usage in the classroom. The Middle School also did not inform the Complainants of the Respondents' belief that adverse reactions from wireless devices are impossible, that they disputed T's medical assessments, and that they did not believe they had any obligation to accommodate T. This series of withheld information is collectively referred to

below as (the "Withheld Information"). The Complainants evidence is that they would not have registered T at the Middle School if the Withheld Information had been disclosed to them.

10. Thus, the Complainants were induced to enroll T in the School, and they understood that, in doing so, they would be adhering to the treatment program recommended by T's physicians. Adhering to this program was of fundamental importance to the Complainants and critical for T’s health.

11. As T repeatedly experienced episodes of severe illness, he was removed from his classroom and segregated downstairs in a solitary learning environment with minimal instruction, and was eventually moved primarily to home-based learning. As a consequence, he experienced both forced isolation and loneliness, as well as embarrassment which caused him to further withdraw from his peers.

12. As they struggled to get T through the school year, most of the Withheld Information was still not provided to the Complainants. Some of it they eventually discovered on their own, and some was not revealed until after the Complaint was filed.

13. In the Spring of 2016, the Middle School refused to provide T with a low wireless environment the following school year, essentially making purported undue hardship arguments. They still did not challenge T's medical assessments.

14. T was therefore unable to return to the Middle School the following year. He is schooled at home through distance learning with very little peer contact. He no longer has any friends as he is unable to participate in most community activities.

15. T was very excited to begin middle school, only to have his expectations completely crushed by the Respondents' conduct.

16. As of 2017, not only have multiple adverse health effects from wireless radiation been established in the scientific community, but the physiological mechanisms by which these effects occur has also been discovered. Some individuals are more susceptible to these adverse effects, including fetuses, children, and people with developmental conditions. Not only does T fall into these three high risk groups (having gestated next to a cell tower), but all of his symptoms: headache, nausea, fatigue, insomnia and sleep disorder, feature prominently in publications listing adverse health symptoms from wireless radiation, as do the symptoms he exhibited in infancy while living 100m from the cell tower where his mother also lived when she was pregnant with him. She also experienced pronounced symptoms at the time and subsequently. She did not attribute these symptoms to wireless radiation until after the home was remediated for T and her symptoms also abated.

17. The phenomenon of being extraordinarily sensitive to adverse effects from wireless radiation is called EHS. The fact that some EHS sufferers experience measurable biological changes or consistently report symptoms on exposure has been proven in double-blind provocation studies. What is unknown is what proportion of people who subjectively report having EHS actually do have EHS. The industry-funded provocation studies that suggest that most do not followed highly problematic testing methodologies which are detailed in the Complainants' materials. These studies attribute EHS to the subjective belief of exposure to wireless radiation as opposed to the radiation itself, an explanation referred to as the "nocebo effect." This concept is highly criticized in the scientific literature and does not explain adverse biological effects in animals and young children. As indicated in Dr. Heuser's December 10, 2017 report, the nocebo effect cannot explain T's symptoms because he did not know about the association between wireless and his symptoms until years after they developed.

18. The Respondents have applied to dismiss the Complaint pursuant to s. 27(1)(b) on the basis of their position that T does not have a disability, or if he does, it is

not caused by wireless radiation, and thus the allegations do not constitute a contravention of the *Human Rights Code* (the "*Code*"). The Respondents also apply for dismissal pursuant to s. 27(1)(c) on the basis that there is no reasonable prospect the Complaint will succeed because there is no scientifically established causal connection between T's symptoms and wireless radiation, and on the basis of their assertion that T was accommodated. Third, the Respondents apply to dismiss the Complaint against the individual Respondents pursuant to s. 27(1)(d)(ii) on the basis that the Complaint against them does not further the purposes of the *Code*.

19. The Complainants' response to the Respondents' application is set out below.

II. Evidence

20. The Complainants rely on the following materials in support of the Complaint:

A. The Affidavit #1 of L, which sets out the basic chronology of relevant facts.

B. The Affidavit #1 of J which provides further factual details.

C. Materials filed by the Respondents as indicated.

D. The enclosed December 10, 2017 expert report by Dr. Gunnar Heuser, and Dr. Heuser's CV at tab 26 of the binder.

E. T's medical diagnoses by Dr. M and Dr. Heuser which are attached as Exhibits "B" and "D" to the Affidavit #1 of the principal.

F. Expert report of Dr. Devra Davis, at tabs 11-13 of the binder.

G. Scientific and other evidence consisting of the following:

. i) Two binders containing 54 publications relevant to the issues at hand, and the enclosed Table of Contents to the binders.

. ii) A table, at Appendix 1, summarizing the publications in the submitted binders as well as other publications relied on, some of which are contained in the Respondents' materials.

. iii) In particular, the Complainants rely on the **entirety of the following key publications** (tab references are to the binders submitted by the Complainants):

a) Video entitled Electromagnetic Health and Children, 2014, by Dr. Erica Mallery-Blythe, online at: https://www.youtube.com/watch?v=GyVSWl_NLOM

b) Video of June 22, 2015 by Dr. Karl Maret, online at https://www.youtube.com/watch?v=-DjIpefiOnc;

c) Pall, tabs 38, 39, 40, and 41;

d) Trower, tab 51;

e) Heuser, tab 27;

f) McCarty, tab 36;

g) Marino, tab 35;

h) Mallery-Blythe, at Exhibit "G" to the Affidavit #1 of Keven Elder at Exhibit p. 220 and following;

i) Starkey, tab 49;

j) Hedendahl, tabs 22 and 23;

k) Tuengler, tab 52;

l) Morgan, tab 37;

m) St. Clair, tab 48;

n) Canadian Press, “Ont. Parents suspect Wi-Fi making kids sick,” tab 7;

. o) Telegraph News, "France to impose total ban on mobile phones in the schools," December 11, 2017, tab 50; and

. p) The enclosed article on a Victoria school that successfully banned cell phones: https://mobilesyrup.com/2017/09/28/victoria-bc-high- school-cellphone-ban/

III. T has a Disability and is Entitled to the Protections of the *Human Rights Code*

21. In *Citizens for Safe Technology Society obo others v. BC Hydro and Power Authority (No. 3)*, 2014 BCHRT 211 ("*BC Hydro*"), the Tribunal considered different articulations of the definition of disability and how they may apply in different contexts.

BC Hydro at paras. 106-114

22. Even applying the most stringent of the definitions canvassed in *BC Hydro*, it cannot be seriously contended that T does not have a disability. The Complainants have clearly demonstrated in their affidavit material that T experiences episodic debilitating physical reactions.

Affidavit #1 of L

Affidavit #1 of J

23. T's symptoms are excruciatingly painful and debilitating, and occur regularly when he participates in environments that most people enjoy on a daily basis. T's symptoms include night terrors, insomnia, nausea, fatigue, vomiting and severe headaches to the point that he cannot be transported home from his grandmother's house.

Affidavit # 1 of L at paras. 19-25, 35-39, 42, and 68-76

Affidavit #1 of J at paras. 6 and 60-65

24. T's symptoms are so severe that they regularly prevent him from enjoying daily living activities, and are so painful that they are difficult to witness.

25. The severity and regularity of T's symptoms are clearly sufficient to establish that T has a disability protected by the *Code*. The *cause* of the disabling symptoms is relevant to some of the accommodations T was seeking, but is not relevant to an assessment of whether T has a disability.

26. The Respondents would have us conclude that, regardless of how disabling a person's symptoms are, from the moment anyone (such as the person themself, a parent, or a physician) attributes the cause of the debilitating symptoms to electromagnetic fields, the symptoms suddenly cease to be a disability, and the individual is thereafter afforded no protection of their dignity and right to fair treatment under the *Code*. With respect, this would be a perplexing interpretation of the *Code*, and it was not accepted by the Tribunal in *BC Hydro*.

BC Hydro at para. 135

27. Indeed, the removal of an entire class of people with disabling conditions from the purview of the *Code* would create a violation of the equality provisions of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), contrary to the Supreme Court of Canada's decision in *Vriend v. Alberta*, [1998] 1 SCR 493.

28. It is true that T's symptoms are caused by exposure to wireless radiation.

Medical letter of Dr. M dated December 2014 at Exhibit"B" to the Affidavit #1 of the principal

29. This component of T's disability is discussed in great detail below.

30. However, the allegations in the Complaint give rise to two distinct forms of discrimination. The first is the Respondents' persistent failure to disclose information that would have allowed the family to exercise their right to informed consent and their fundamental right to make decisions with regard to the management and treatment of T's disability. This aspect of the Complaint does not depend upon the actual cause of T's symptoms.

IV. Discrimination on the Basis of T's Disability: Removal of Fundamental Choices by Withholding Information

Prima Facie Discrimination

31. The right to personal autonomy over healthcare decisions is so fundamental that it is protected by s. 7 of the *Charter*. This right permits the Complainants and T to choose to follow the physicians' recommendations that T avoid wireless radiation regardless of anyone else's opinion about this recommendation. The family's ability to exercise this right was dependent on the Respondents being forthright about the sources of wireless radiation in School (or at least giving notice that they would not provide this information), and being honest about whether T would be accommodated in the normal School setting. In removing this fundamental right from the family by withholding pertinent information, the Respondents discriminated against T on the basis of his disability.

32. A brief discussion regarding the s. 7 right is provided here in order to illustrate the critical importance of the autonomy that the family was denied.

33. The s. 7 right to liberty protects the making of "fundamental personal choices" free from state interference, consistent with conceptions of autonomy and human dignity.

Blencoe v. British Columbia (Human Rights Commission),

[2000] 2 S.C.R. 307 at paras. 49-50

34. Examples of fundamental personal choices engaged by the s. 7 right to liberty have included the right of a woman to terminate a pregnancy (*R. v. Morgentaler*, [1988] 1 S.C.R. 30), and the right of parents to nurture and to choose medical treatments for their children (*R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315):

> I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent. As observed by Dickson J. in *R. v. Big M Drug Mart Ltd*., *supra*, the *Charter* was not enacted in a vacuum or absent a historical context. The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being.

At p. 370

35. The right to security of the person protects bodily integrity in a physical sense. It has been engaged by state action causing a risk to health (*R. v. Morgentaler*, [1988] 1 S.C.R. 30) and by state action restricting an individual's ability to make choices affecting his or her own body (*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519).

36. Limits on access to medical treatments have also engaged the right to security of the person, including prohibitions on the use of a particular medication, pharmaceutical product, or similar substance in a context where there is an established medical therapeutic use.

Chaoulli v. Quebec, [2005] 1 SCR 791

Hitzig v. Canada, 2003 CanLII 30796 (ON CA), [2003] O.J. No. 3873

37. While this is not a *Charter* case, the fact remains that the Respondents' conduct removed the ability of the family to exercise a right that is so fundamental to human dignity that it is enshrined in the *Charter*. This removal occurred in relation to a prohibited ground of discrimination.

38. The removal of fundamental personal choice on the basis of a protected characteristic or ground would violate the equality provisions of the *Charter* and is similarly discriminatory under the *Code*. Similarly, the more fundamental the interest affected or the more serious the consequences of the distinction, the more likely that the impugned distinction will have a discriminatory impact even with respect to groups that occupy a position of advantage in our society.

Justice L'Heureux-Dubé, dissenting in *Egan v. Canada*,

[1995] 2 SCR 513 at para. 65

39. T lived well outside of the Saanich Middle School catchment area. The Respondent school district was not T's home district. Prior to deciding to register T at the Middle School, the Complainants met with the Middle School and advised the Middle School that T has EHS with serious physiological reactions following exposure to wireless radiation and he

therefore cannot not be around wireless devices. The Complainants were inquiring into whether T could be accommodated at the Middle School.

40. The Respondents were well aware of the critical importance of this issue to the Complainants. In their response to the internal appeal submitted by the Complainants later in the school year, the Principal and Assistant Superintendent acknowledge this:

> Our understanding is that the family chose PL [school] because at the time it was not using wireless technology and the absence of Wi-Fi was important to the family.

Affidavit of Superintendent, Exhibit "J" at p. 398

41. In response to the Complainants' queries in the spring of 2015, the Middle School re-assured the Complainants that T could be accommodated and set up an accommodation plan. Despite having been put on notice of T's needs, the Respondents did not provide the Complainants with the following critical "Withheld Information":

a. They not tell the Complainants before T started attending that the Middle School was considering an increase in Wi-Fi coverage from 25 to 75 (effectively 100) percent the following school year. The first time the Respondents gave notice to the Complainants of the plan to increase Wi-Fi coverage was in the November 30, 2015 email at Exhibit "G" to the Affidavit #1 of L. In its disclosure to the Complainants, that is the first document referencing the increased rollout. However, the Complainants allege that this plan did not suddenly materialize in November 2015, but was, at the very least, in contemplation prior to T starting school in September 2015.

b. The Respondents did not tell the Complainants that most classrooms had wireless voice amplification systems ("audio systems") that emit

radiofrequency. The Respondents persisted in this lack of disclosure even after the Complainants discovered the audio systems in two of T's classrooms and removed him from those classrooms as a result. Nonetheless, the Respondents created a new learning plan that would require T to attend the art room which, unbeknownst to the Complainants at the time, also had the wireless audio system. Thus the Complainants were actively mislead into thinking that they were removing T from classrooms where he would be exposed to the audio system.

c. The Respondents did not tell the Complainants that the teacher would be using an I-pad wirelessly in T's presence.

d. The Respondents did not tell the Complainants that students would be encouraged or required to use their cell phones in class. To the contrary, the vice principal had told the Complainants that School policy was that cell phones were not permitted and had to be kept in lockers during school hours.

e. The Respondents did not tell the Complainants that there was a pilot project that year to test out new wireless applications in order to support student learning, which would result in increased usage of wireless devices in the classroom.

f. They did not tell the Complainants that they disagreed with T's diagnosis and had no intention of accommodating T to the point of undue hardship.

Affidavit #1 of L

Affidavit #1 of J

42. With regard to this last point, it is noteworthy that the Superintendent says, at paragraph 29 of his Affidavit #1: I explained to them that I made no judgment regarding T's medical circumstances and that Wifi would continue to be present in our schools, including the Middle School, because of its importance to education programming -- most importantly, to students whose Individual Education Plans require it.

43. This paragraph reflects the overall conduct of the Respondents with regard to this matter. It was not appropriate for the Respondents to "make no judgment" about T's condition unless it was actually committed to accommodating him to the point of undue hardship. Otherwise, it was imperative that the Respondents make a judgment about the medical evidence expeditiously and candidly, and let the Complainants know in a forthright manner so they could plan accordingly.

44. However, while the Respondents were humouring the Complainants and stringing them along by making no overt judgment, it appears that the Respondents had little respect for T's disability or personal autonomy.

45. Although a formal Individual Education Plan (“IEP”) may feel quite important to the Respondents, the obligation to refrain from discrimination exists regardless of whether a respondent has certified the disability in some way. In fact, the Complainants complain that the Respondents actively discouraged them from seeking the designation and did not facilitate their application for a designation. It is noteworthy that T does have an IEP now with his disability designation approved through the Ministry of Education.

Affidavit #1 of J at paras. 45 and 96-100

46. With respect to paragraphs 31 to 34 of the Affidavit #1 of the Superintendent, although the Respondents say they disputed the existence of EHS, this was never communicated to the Complainants. Rather, the rationale given for not accommodating T was a purported undue hardship argument.

Internal appeal decision at Exhibit “K” to the

Affidavit #1 of the Superintendant

47. As well, in reliance on their outdated and scant research that suggested that wireless radiation does not cause adverse biological effects, the Respondents failed to fulfill their obligation to assess T's circumstances individually, particularly given their knowledge of the existence of contrary scientific opinion on the matter. T had never had an appointment with a medical expert at WHO or Health Canada. He was entitled to have his situation individually assessed by the Respondents. In this regard, the Complainants rely on *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 ("*Grismer*").

48. As a result of information withheld from the Complainants, they were induced to register T at Middle School and continue to send him there. That is, the Middle School mislead the Complainants into thinking that, when attending the Middle School, T would be following his physicians’ recommendations to avoid elevated levels of wireless exposure, which was of fundamental importance to the family. The Complainants' evidence is that they would not have registered T at the Middle School if the Withheld Information had been disclosed to them.

Affidavit #1 of L at paras. 55, 134, 137, and 140

49. A person with a disability has a fundamental right to decide on their own course of treatment, or, in the case of a minor, for their guardian to decide on their treatment. Regardless of whether their physician's assessment can be proven to be correct, a person with a disability has the right to follow the recommendations of a physician they trust.

50. T was assessed as suffering from EHS by two physicians, one of whom has considerable expertise in the area. These assessments reflected the Complainants' experiences with the etiology of T's illness, and the family had a right to follow these physicians' recommendations, which was to avoid exposure to elevated levels of wireless radiation.

51. However, the Respondents withheld pertinent information and provided the Complainant with incorrect information which caused the Complainants to register T and to continue to send him to a school which the Respondents ought to have known he would inevitably be withdrawn from once the family became apprised of the true situation. In misleading the family and in withholding information, the school effectively removed the family's fundamental choice with regard to T's treatment.

52. The result is that T, by virtue of his disability, had the experience of being excited to attend middle school with his friends, then being segregated away from his classmates, then being withdrawn from the school completely. Perhaps most critically, he was placed in an environment which the family did not consent to, and to which they had made their opposition very clear.

53. Even if the Respondents had candidly said in the Spring of 2015: "we don't really know what's going on with wireless in the School, we're not going to bother looking into it, and we make no guarantees," this aspect of the discrimination could have been avoided.

54. It should also be pointed out that, in this nonconsensual environment, T, after having no episodes in a school building environment for three years at his previous schools, suffered numerous debilitating episodes while at the Middle School.

55. In short, T experienced adverse treatment as a result of his disability as a result of the family being repeatedly fed inaccurate and misleading information that the Respondents knew was fundamentally relevant to the treatment program the family was following for T's disability. In effect, the Respondents secretly subverted T's treatment program.

56. Regardless of whether the Complainants had a right to the specific accommodations they were seeking, they, and not the Respondents, had the right to make decisions regarding the management of T's disability.

57. In *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, in discussing the application of s. 15 of the *Charter*, the Supreme Court of Canada stated:

> The true focus of the s. 15(1) disability analysis is not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the state to either or both of these circumstances.
>
> ...
>
> In summary, while the notions of impairment and functional limitation (real or perceived) are important considerations in the disability analysis, the primary focus is on the inappropriate legislative or administrative response (or lack thereof) of the state. Section 15(1) is ultimately concerned with human rights and discriminatory treatment, not with biomedical conditions.

At paras. 26 and 39

Emphasis added.

58. In *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 (at para. 42), Iacobucci J. cited with approval the test advanced by McIntyre J. in *Andrews. v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 171:

> The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings, equally deserving of concern, respect and consideration.

This passage was also cited with approval by the Court in *Granovsky* at para. 57.

59. The Respondents' silent subterfuge of T's treatment program, however unintentional it may have been, had the effect of removing any level of autonomy from the family, and was a direct attack on T's dignity as a person with a disability. This attack on T's dignity as a result of the repeated withholding of crucial information constitutes a violation of the *Code* on the basis of T's disability. The effects of the Respondents' lack of candour were terribly severe for this child, who was only ten and eleven at the time.

60. The following paragraphs from *Moore v. British Columbia (Education)*,

[2012] 3 SCR 360 are apposite:

[33] As the Tribunal properly recognized, to demonstrate *primafacie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent

to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

61. The Respondents' persistent failure to provide the family with information they needed to exercise their fundamental rights in relation to T's disability had the effect of creating adverse consequences to T because of his disability.

No Justification

62. The Respondents have given no explanation or justification for misleading the Complainants in this way. To the contrary, the Respondents have not filed an affidavit from Vice Principal, the very individual whose representations first induced the Complainants to register T at the Middle School.

63. Even if the Respondents had some pressing reason for routinely withholding important information from most parents and denying them informed consent regarding their children's education, the Respondents had a duty to accommodate T by providing the Complainants with the relevant information. It is unimaginable how undue hardship could have resulted from simply providing the Complainants with the Withheld Information in a timely fashion, or simply stating they didn't know and they weren't going to bother to look into it.

64. A child who uses a wheelchair may need a ramp to access the education system. In *Eldridge v*. *British Columbia*, [1997] 3 SCR 624, Deaf individuals required sign language interpreters in order to have equal access to the medical system. What T needed was accurate information in order to create an appropriate plan to allow him to be educated in a manner that respected his disability.

65. The Complainants' requests for accommodation subsequent to the initial meeting with the Vice Principal were in part, an attempt to hold the school to the promises

it had made when it first induced the Complainants, through Withheld Information, to register T in the first place.

66. In this sense, the Respondents' duty to accommodate T by providing a low wireless environment flows directly from the *representations* The Middle School made to the Complainants, and the terribly discriminatory effect of having induced a child to attend a school he was excited about, only to isolate him and ultimately push him out of the School. Thus, accommodation to the point of undue hardship was required regardless of the actual cause of T's symptoms.

67. The Respondents' failure to accommodate to the point of undue hardship is detailed below. The duty to accommodate also arises from the actual cause of T's disabling symptoms, which is wireless radiation.

V. T has Electrical Hypersensitivity

68. Throughout this section of the argument, the scientific evidence submitted in support of the Complaint is summarized very briefly, in most instances, without references. The propositions advanced in the literature, supporting references, and summaries are set out in the table at Appendix 1. Tab references below and at Appendix 1 are to the binder materials submitted by the Complainants.

Sheean and BC Hydro

69. The Respondents rely on *Sheean v. Ferguson*, 2017 BCHRT 81 ("*Sheean*") and *BC Hydro* in support of their position that T's disability is not caused or exacerbated by exposure to wireless radiation.

70. In *Sheean*, the Tribunal did not necessarily review "the current scientific information" as the Respondents have suggested. Rather, it reviewed the scientific information that was submitted to it. Other than the one article referenced in the

decision, the evidence submitted by Ms. Sheean and considered by the Tribunal is not disclosed in the decision. If, on the basis of *Sheean*, the Tribunal were considering not examining the publications submitted by the Complainants "*de novo*," then, as a matter of procedural fairness, the Complainants submit that the Tribunal would need to disclose the materials relied on by Ms. Sheean and seek submissions from the parties.

71. It is also noteworthy that Ms. Sheean was unrepresented, appears not to have submitted an expert report, and did not submit an assessment by a medical practitioner; rather, she was "self-diagnosed" (para. 21).

72. The Respondents also say that nothing has changed in the scientific evidence since April 2017. Again, this is quite false as per the literature relied on by the Complainants. In addition, the date Olga Sheean's response was actually filed with the Tribunal was December 5, 2016. Thus no publications since that date would have been considered by the Tribunal in *Sheean*, and the Complainants are relying on several such publications, including an extraordinarily relevant study by Dr. Heuser, the very expert who assessed T.

73. The complainants' response to BC Hydro's application to dismiss in the *BC Hydro* case was filed on January 13, 2014, almost four years ago. Since that time, considerable progress has been made in explaining and confirming the adverse biological and health effects of wireless radiation, establishing the precise mechanism by which sub-thermal levels of microwave radiation act on the brain, and in articulating the errors and fallacies through which non-thermal microwave radiation has been concluded not to have biological effects and through which EHS has been dismissed by some as a psychological condition.

74. Given the currency of the issue of the biological effects of non-thermal levels of microwave radiation ("wireless radiation") in the scientific community, the four year time lapse is considerable in terms of the development of the scientific

understanding of these issues. Thus the passage of time and the corresponding developments in the research are significant features that distinguish this case from *BC Hydro*.

75. Pediatric neurologist Dr. Martha Herbert has stated:

> In fact, there are thousands of papers that have accumulated over decades—and are now accumulating at an accelerating pace, as our ability to measure impacts becomes more sensitive—that document adverse health and neurological impacts of EMF/RFR. Children are more vulnerable than adults, and children with chronic illnesses and/or neurodevelopmental disabilities are even more vulnerable.

At tab 25

76. Most significant is the fact that we are considering biological effects in a child, and even more significantly, a child whose gestation occurred 100m away from a cell tower and who was born with development issues. The literature establishes that fetuses, children, and people with developmental disabilities are more vulnerable to adverse effects of microwave radiation.

77. In addition to the above distinctions, this case bears another critical difference from the *BC Hydro* case. In *BC Hydro*, the Tribunal explained:

> [142] The Complaint has a systemic aspect. The remedies sought are to require B.C. Hydro to allow any customer or recipient of power from them to opt out of wireless Smart Meters and that the cost of opting out is not borne by those requiring the accommodation. <u>It is particularly important that a Complaint seeking a remedy on such a grand scale be scrutinized for its ultimate ability to make out a prima facie case.</u>

Emphasis added.

78. In *BC Hydro*, the complainants had to establish that an entire group of people who claimed to have EHS actually do have EHS. That is an extremely tall order, particularly since some literature that is favourable to the existence of EHS concedes that some individuals who claim to have EHS likely do not.

79. Conversely, in the case at hand, what is called for is to examine the case history of this one child who is assessed as having EHS, to determine whether, at this stage, there is adequate information to take the possibility that his symptoms are truly caused by wireless radiation beyond the realm of "conjecture".

80. The materials submitted by the Complainants has s solidly overcome this hurdle.

EHS is Established in Some Individuals

81. The Complainants rely on the expert report of Dr. Gunnar Heuser dated December 10, 2017, as well as the materials summarized at Appendix 1, with emphasis on the materials listed at para. 20(G)(iii) above. What follows here is a very brief summary of the scientific literature. Appendix 1 summarizes the points below in significant detail and with references to the materials.

82. The current safety limits for exposure to microwave radiation were created based on the assumption that the only mechanism by which microwave radiation could adversely affect the human body is by heating tissue. This is what is meant when it is said that the current standards are based on "thermal" levels. However, it is now widely accepted in the scientific community that adverse biological effects occur at non-thermal levels, including upon exposure to wireless radiation emitted by a variety of devices such as wireless routers, cell phones, and other radiofrequency-emitting devices.

83. The Complainants have submitted extensive evidence, much of it recent, that clearly and convincingly establishes that:

a. Adverse biological effects from wireless radiation at non-thermal levels occur in humans. This fact is well established in the relevant scientific community.

b. The nervous system is expected to be the most vulnerable to adverse effects.

c. At least one mechanism by which low level microwave radiation causes biological changes has been recently proven by Dr. Martin Pall, who has also been able to block these changes from occurring by administering substances that that counter the mechanism of harm (note that such substances are not approved for pharmaceutical use).

d. Fetuses, children, and people with developmental problems or neurological issues are more vulnerable to the adverse effects from microwave radiation. (Note that T, having most likely been over- exposed as a fetus, falls into all three of these categories).

e. Objective, double-blind testing of self-identified EHS sufferers shows that at least *some* people do have true EHS, and physiological changes in some such individuals has been objectively measured using medical equipment following exposure. As well, collectively, the epidemiological studies conducted over the years with regard to EHS (also called "microwave syndrome") symptomatology and etiology bear such striking similarities that, collectively, they demonstrate that EHS (or microwave syndrome) exists. Functional brain MRI's of a sample of EHS sufferers showed almost identical brain abnormalities, which further confirms the biological basis of the condition. See, for example:

Dr. Martin Pall, 2016, tab 39

Dr. Gunnar Heuser, 2017, tab 27

Hedendahl, 2015, tab 23

"EHS Established" section at Appendix 1

f. Provocation studies with negative findings with regard to EHS symptoms suffered from testing methodologies that do not accord, on multiple levels, with the etiology of EHS. Linear testing methods were used to test a non- linear condition. The studies that employed non-linear testing strategies or objective biological measurements, not surprisingly, did find a correlation between biological changes and exposure.

84. By way elaboration on this last point, opponents to the concept of EHS, such as James Rubin, have tried to explain EHS away as being what is known as a "nocebo effect," that is, that symptoms are psychosomatically produced by the individual's own subjective belief that they are being exposed. The Rubin article relied on by the Respondents takes this position. However, these studies have been widely criticized as being unresponsive to the actual etiology of EHS. For instance, many people with EHS are sensitive to specific frequencies, but in provocation studies supposedly refuting EHS, all subjects were exposed to the same frequency. This would be like testing someone who claimed to have a food allergy to see whether they reacted to grapefruits, and if they did not, then concluding that they do not suffer from food allergies. Another criticism has been with regard to the assumed timing of the onset of symptoms following exposure, which was typically wrongly assumed to be immediate and uniform among subjects, whereas in fact, timing of symptom onset following exposure can vary widely. As well, dirty electricity, some of which is in the microwave range, was

likely produced by devices used in "sham" exposures. Environmental factors in the labs may also have been provoking reactions in some individuals. With some individuals, the provocation needed to produce a reaction might be multi-factorial. Finally, many of these provocation studies were funded by industry, and the significantly greater likelihood of industry-funded studies to show no effect has been repeatedly documented in the literature. This is just a sample of the types of critiques that have been leveled against the provocation studies.

Appendix 1, EHS: Nocebo effect invalid

85. In any event, as explained by Dr. Heuser, the nocebo effect could not explain T's symptoms. Due to his young age, and as per the affidavit evidence, he had no subject belief about or awareness of exposure to wireless radiation.

Affidavit #1 of L at paras. 56-57 (see also paras. 21-41)

Affidavit #1 of J at paras. 41-42 (see also paras. 7-27)

Expert report of Dr. Heuser

86. It is also noteworthy that none of the EHS studies were carried out on children. As children are more vulnerable to adverse effects of wireless radiation, EHS in a child is not disproven even if it did not exist in adults. The fact that EHS has been established in some adults suggests that an even larger proportion of children would have EHS. As well, the Complainants are not aware of any study demonstrating the safety of wireless radiation for children and the Respondents have not referenced any.

See the Affidavit of Barrie Trower, tab 51

87. As a consequence of the methodological difficulties with the provocation studies, other studies have been more carefully designed to take into account the individual and non-linear nature of EHS and have made positive findings. As well, there has been a shift in the studies to attempting to objectively measure actual physiological changes in people with EHS following provocation. These experiments confirm biological changes in people with EHS following exposure.

Appendix 1, EHS Established

88. Most recently, Dr. Gunnar Heuser, who assessed T has having EHS, just published a study demonstrating almost identical abnormalities in brain functional magnetic resonance imaging of people he had previously assessed as having EHS.

At tab 27

T has EHS

89. In T's case, he had no knowledge of the presence or absence of wireless radiation, but his symptoms were consistently observed to be produced following exposure to wireless radiation, and to abate when removed from wireless radiation.

Affidavit #1 of L at paras. 21-41 and 56-57

Affidavit #1 of J at paras. 7-27 and 41-42

90. However, there are a number of other uncanny features to T's history.

91. It has been established that wireless radiation produces adverse biological effects. That being the case, it is inevitable that some people will experience these effects as a result of being more vulnerable to them. T carries a number of

vulnerabilities that have been identified in the scientific literature. This fact, in combination with T's case history which is detailed in the affidavits of L and J, and his specific symptoms which feature prominently in almost every study documenting adverse health effects from microwave radiation, one would be hard-pressed to explain all of this away as coincidental.

Appendix 1, Symptoms Associated with Exposure to Non-Thermal Levels

92. Embryos and fetuses are likely the most vulnerable group identified in the literature.

93. The Affidavit #1 of J indicates that T's mother resided in a condo 100m away from a cell tower when she became pregnant with T. L resided there throughout the pregnancy and she and T lived there until T was almost two.

94. T had developmental delays in infancy and as a young child.

95. During their time in that home, T's mother developed a series of health issues, all of which have been associated in the literature with cell tower exposure, and these health issues abated entirely upon her living in a wireless-free environment. However, she was oblivious to the connection at the time.

Affidavit #1 of L at paras. 5-17

Affidavit #1 of J at paras. 3, 22

96. Based on the table at p. 181 of the Marinescu article (at tab 33), radiation levels in the condo would likely have been around 18,000 microwatts per square meter, whereas 1,000 microwatts per meter is considered the average threshold value for non-thermal biological effects from long-term exposure (p. 183).

97. Eight out of ten studies report increased prevalence of neurobehavioural symptoms or cancer in populations living at distances of less than 500m from towers (Gómez-Perretta, tab 17, at p.1). A number of other studies associating symptoms with cell tower proximity are summarized at Appendix 1.

98. The Complainants had no awareness or concerns about wireless radiation prior to being made aware that T's headache symptoms coincided with the installation of the industrial-strength Wi-Fi routers at his school when he was seven (these symptoms abated when he was pulled out of school). And in fact, the Complainants owned and used wireless devices and T had had some lesser issues in the home prior to the installation of industrial-strength Wi-Fi routers at school.

Affidavit #1 of L at paras. 6 and 21-32

Affidavit #1 of J at paras. 7 and 8-21

99. Upon the removal of all of these sources of radiation, T recovered, and his recurrences have been associated with re-exposure.

Affidavit#1 of L at paras. 30-41

Affidavit #1 of J at paras. 8-21 and 23-26

100. Throughout the literature, T's specific symptoms of headache, nausea, fatigue, insomnia, and disrupted sleep have all consistently been associated with wireless exposure. His earlier issues of visual/sensory hypersensitivity and developmental delays are also associated with exposure.

101. Throughout Appendix 1, symptoms from various publications are listed. There is an uncanny correspondence with T's symptoms. See for example, the

Affidavit of Barrie Trower at tab 51 in which he indicates that he always sees headaches, nausea and fatigue when Wi-Fi has been installed in a school. Martin Pall (tab 39) confirms that microwave syndrome/EHS exists, and the symptoms he confirms as flowing from this disorder include T's symptoms. The Complainants refer the Tribunal to the section of Appendix 1 detailing symptoms specifically associated with Wi-Fi in schools. A few key quotes and summaries from the literature with regard to symptoms associated with Wi-Fi in schools are reproduced here:

"In all of the schools I have visited around the world with Wi-Fi, every one has reported the same symptoms in students: fatigue, headaches, nausea..."

Trower, tab 51

Case study of teacher: severe head pain, nausea, dizziness, insomnia...

Tressider in Rosch, tab 44

Wi-Fi in schools has been followed by reports of teachers and children experiencing tiredness, headaches, dizziness, difficulty with concentration and memory, problems sleeping at night.

Case Study 1: headaches, tired at school.

Case Study 2: severe headaches, tired, sleep problems, stomach problems, balance, memory, dizziness.

Hedendahl, tab 23

12-year old with headaches. EHS child responded with headaches to high exposure consistently.

Maret video

Increased headaches in children (tab 11, p. 44)

Sleep problems (tab 11, p.5, 49)

Neurological effects (tab 11, p. 44)

Sleep problems (tab 11, p. 49).

Davis, tab 13 and tab 11 at p. 5, 11, 49

Some parents in the Barrie, Ont., area say their children are showing a host of symptoms, ranging from headaches to dizziness and nausea and even racing heart rates....

The symptoms, which also include memory loss, trouble concentrating, skin rashes, hyperactivity, night sweats and insomnia, have been reported in 14 Ontario schools in Barrie, Bradford, Collingwood, Orillia and Wasaga Beach since the board decided to go wireless, Palmer said. "These kids are getting sick at school but not at home," he said.

Canadian Press, tab 7

102. There is a plethora of evidence specifically addressing the dangers of Wi-Fi radiation for children and establishing harms at Wi-Fi frequencies. It should be noted that the industrial strength Wi-Fi access points used in schools are many times stronger than home routers.

Appendix 1: Wi-Fi is harmful to children

Pall at tab 41

Carpenter, tab 9

Trower, tab 51

103. All scientists appear to be in agreement that children are much more vulnerable to adverse effects of wireless radiation.

104. People with developmental delays are also expected to be more vulnerable to wireless radiation.

105. In summary, T has multiple risk factors for the development EHS; his symptoms have repeatedly been observed to develop following exposure and to abate in the absence of exposure; and there is currently no other proposed explanation for his symptoms. T's specific symptoms are well documented in the literature as being associated with exposure to wireless radiation.

106. The Complainants rely on the expert report of December 10, 2017 submitted by Dr. Gunnar Heuser, which explains his assessment of T, also makes many of the points set out above.

107. The Complainants also rely on Dr. Heuser's previous assessment of January 7, 2015 and Dr. M' letter of December 2014, at Exhibits "B" and "D" to the Affidavit #1 of the Principal.

108. Should the Complaint proceed to a full hearing on the merits, the Complainants intend to call an expert to assist the Tribunal in understanding the medical and scientific research into the issue of EHS.

Response to ATD

109. At paragraph 19 of their Argument, the Respondents complain that they had received “scant” information with regard to T’s diagnosis. However, the Respondents have submitted zero evidence of any request for further medical information. The Complainants submit that further medical evidence was never requested. As far as the Complainants were aware, T’s diagnosis was never questioned up until after the Complaint was filed. So there would have been no reason for them to seek out further documentation. That said, in the

circumstances, providing two medical letters, including one from a practitioner with expertise in the area of EMF, was substantial documentation in the circumstances.

110. In his December 10, 2017 report, Dr. Heuser has submitted further explanation as to the reasons for his diagnosis. His letter must be read in conjunction with the Complainants' literature review, which supports the statements in Dr. Heuser's report, and in conjunction with the Complainants affidavits which provide a more fulsome picture of the type of case history that would have been communicated to Dr. Heuser. T's pattern of reaction to exposure was observed over a period of years, in the home, school, and a variety of other settings.

111. As indicated in Dr. Heuser's report as well as in materials cited at Appendix 1 under "EHS, Diagnosis & Treatment", a case history is currently the accepted method for assessing EHS. This would be especially the case for a child, where provocation testing would be unethical, and other forms of testing would be unnecessarily invasive.

Public Policy Considerations in the Degree of Proof Required

112. To the extent that the Tribunal has any remaining doubts with regard to the causation of T's symptoms, in order to further the purposes of the *Code*, the Complainants submit that this issue be considered from a public policy perspective.

113. At minimum, we know that wireless radiation has never been shown to be safe for children--the safety of these devices was never tested on children. In light of the extensive and growing body of scientific literature establishing adverse biological effects of wireless radiation, and the concomitant full-scale rollout of these devices in schools, the schools are, in effect, conducting the experiment on children at the current moment.

114. However, this experiment is uncontrolled, and there is no evidence that the schools are doing anything to track possible symptoms and health effects in students that may arise as a result of wireless exposure, whereas the schools are uniquely placed to do so.

115. As indicated in the affidavits filed on behalf of the Complainants', the Home school district refused to even power off a router that was not in use to see whether that would improve T's symptoms.

Affidavit #1 of L at para. 27

Affidavit #1 of J at para. 12

116. The best proof with regard to this issue could be being developed by the Respondent school district, but it has apparently chosen not to collect any data.

117. Pediatric neurologist Martha Herbert specifically addresses the critical importance of the collection of data to monitor the effects of Wi-Fi in schools.

At tab 24

118. As the schools are not cooperating in ascertaining the causes of student illness, nor tracking the possible consequences if its current large-scale experiment on children, they are not in a position to complain about any imperfections in the evidence with respect to causation.

Respondents' Materials

119. With respect, the materials relied on by the Respondents are extremely scant and out of date. Given the plethora of recent studies and developments in scientific understanding of the biological effects of wireless radiation, it is quite surprising

that the Respondents rely exclusively on studies current only to 2012, and make no reference or explanation with regard to the scientific developments since that time.

120. Although he is an epidemiologist, Dr. Stanwick appears to have no particular experience or expertise with regard to wireless radiation.

121. Dr. Stanwick says he relies on the best quality research, but he does not indicate why the plethora of independent research establishing adverse health effects and EHS is not of such quality in his view.

Affidavit #1 of Dr. Richard Stanwick at para. 31

122. The dated Radiofrequency Toolkit relied on by Dr. Stanwick contains evidence which is helpful to the Complainants. This is summarized by Una St. Clair at tab 48.

123. There are considerable pitfalls to relying on evidence by governments and international bodies, including the World Health Organization ("WHO") and Health Canada. The studies on which these bodies rely have been assessed by scientists and found to contain serious errors, and to have been conducted by individuals with industry affiliations and other conflicts of interest.

Appendix 1, Study Bias

124. For this reason, as well as the importance of the Tribunal's independence from government, the Complainants implore the Tribunal to make its own assessment of the evidence rather than relying on the positions of organizations like WHO and Health Canada.

VI. Discrimination Against T on the Basis of EHS

Prima Facie Discrimination

125. The medical and scientific evidence establishes that T has a disability, and that his symptoms are triggered by exposure to wireless radiation, a phenomenon known as EHS.

126. T suffered both physical and emotional adverse treatment by the Respondents on the basis of his EHS. The Complainants were not provided the information they needed to make an informed decision about whether T's EHS would be accommodated at the Middle School. Consequently, T was registered in a school he would subsequently be pushed out of by the Respondents. This aspect of discrimination was discussed in detail above.

127. As a result of the Withheld Information, the failure to communicate with T's teachers, the failure to turn off or replace the wireless audio systems, the undisclosed increase in student wireless usage, the encouragement of students to use their cell phones in class, and the failure to power off Wi-Fi in the library, T experienced severe physical suffering on several occasions. These experiences were inflicted on T by the Respondents.

128. Rather than remediate the wireless radiation in the areas of the school T needed to attend, the Respondents opted to remove T from the classroom and isolate him by himself in a room downstairs. This caused T to experience social isolation, loneliness, and feelings of embarrassment.

129. Rather than remediate the wireless radiation in the areas of the school T needed to attend, the Respondents opted instead to increase it rather than wait two more years until T graduated.

130. The Respondents' actions pushed T out of the school. As result, T now lives in almost complete isolation from his peers. He is schooled at home through a distant learning program through a private school funded by the Ministry of Education.

131. School had been the one place that T could go. Given the proliferation of wireless radiation in society, T now has to lead a life of isolation, and is precluded from enjoying aspects of life that most people take for granted. He is unable to go most places and participate in most social activities. As a result of his life circumstances, “he has not one friend.”

EHS has been described by patients as a ‘loner's disease’. Due to the prevalence of ubiquitous EMR in the contemporary urban environment, EHS causes patients to experience extreme social isolation. The serious symptoms confine them to their home. Venturing out to shopping malls, libraries, theaters, hospitals, and doctors' offices is often precarious because of the prevalence of wireless routers, cell phones, antennas, and other sources of EMR.

Genius, tab 16, p. 7

132. The following discussion in *Moore* addresses the issue of meaningful access to education and *prima facie* discrimination:

[34] There is no dispute that Jeffrey’s dyslexia is a disability. There is equally no question that any adverse impact he suffered is related to his membership in this group. The question then is whether Jeffrey has, without reasonable justification, been denied access to the general education available to the public in British Columbia based on his disability, access that must be “meaningful”....

[36] But if the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied meaningful access to the service based on a protected ground, this will justify a finding of *prima facie* discrimination.

...

[43] The Tribunal found that when the decision to close the Diagnostic Centre was made, the District did so without knowing how the needs of students like Jeffrey would be addressed, and without "undertak[ing] a needs- based analysis, consider[ing] what might replace [Diagnostic Centre], or assess[ing] the effect of the closure on [Severe Learning Disabilities] students".

133. Similarly, when the Respondents decided to rollout Wi-Fi, they made no provisions for students with EHS, failing to adhere to their own promise to provide Wi-Fi free environments for students who requested it.

134. It is as a result of undisclosed wireless radiation in the School that T experienced what the Complainants describe as a number of injuries. It was thus as a result of his disability that T was first pushed into isolation within the School, and then pushed out of the School altogether. This cannot amount to meaningful access to education.

135. The United Nations Convention on the Rights of Persons with Disabilities was ratified by Canada in March 2010. It provides, in part:

Article 17-Protecting the Integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

...

Article 24-Education

States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

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;

In realizing this right, States Parties shall ensure that:

(e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

Emphasis added.

136. T was not "included." To the contrary, he was isolated and pushed out.

137. The Complainants have clearly established *prima facie* discrimination against T on the basis of his disability.

No Bona Fide Justification

138. The *Human Rights Code* is quasi-constitutional law which enshrines and promotes critical rights with the objective of moving society towards substantive equality for all, and of providing remedies in relation to individual complaints where discrimination has occurred. The *Code's* purposes support both individual and public interests. To achieve the objectives of the *Code*, the protections in the

Code must be given a broad and liberal interpretation. Complaints are the only means by which the objectives of the *Code* are realized.

139. Defences and exceptions to the protections of the *Code* must be construed as narrowly as possible to protect the objectives of the *Code* in responding to and removing discrimination.

Dickason v. University of Alberta, [1992] S.C.R. 1103 at 1121

140. Once the Complainants establish a *prima facie* case of discrimination, the onus passes to the Respondents to establish, on a balance of probabilities, the defence of justification for their actions and decisions. Their decisions and actions will only be found to be justified if their actions and decisions were reasonably necessary to accomplish their purpose or goal in the sense that they could not accommodate T without incurring undue hardship.

British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.,[1999] 3 S.C.R. ("*Meiorin"*)

Grismer

141. The Supreme Court of Canada noted in *Grismer* that "Exclusion is only justifiable where the employer or service provider has made every possible accommodation short of undue hardship".

At para. 21

142. The factors set out in *Meiorin* and *Grismer* were modified and applied to the circumstances in *Moore*:

[28] I agree with Rowles J.A. that for students with learning disabilities like Jeffrey's, special education is not the service, it is the *means* by which

> those students get meaningful access to the general education services available to all of British Columbia's students:
>
> It is accepted that students with disabilities require accommodation of their differences in order to benefit from educational services. Jeffrey is seeking accommodation, in the form of special education through intensive remediation, to enable him equal access to the "mainstream" benefit of education available to all. . . . *In Jeffrey's case, the specific accommodation sought is analogous to the interpreters in* Eldridge: *it is not an extra "ancillary" service, but rather the manner by which meaningful access to the provided benefit can be achieved*. Without such special education, the disabled simply cannot receive equal benefit from the underlying service of public education. [Emphasis added; para. 103.]

[31] If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to. This, as Rowles J.A. noted, "risks perpetuating the very disadvantage and exclusion from mainstream society the *Code* is intended to remedy" (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1237; Gwen Brodsky, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (2012) (online), at p. 41).

...

[49] The next question is whether the District's conduct was justified. At this stage in the analysis, it must be shown that alternative approaches were investigated (British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3 ("Meiorin"), at para. 65).... In other words, an employer or service provider must show "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual"....

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

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

Emphasis added

143. It is clear that, in T's case, the Respondents have not established a *bona fide* justification. They did not individually assess T's disability, they did not explore alternatives to wireless usage, they have provided no rationale for withholding essential information, and finally, mere inconvenience does not amount to undue hardship.

144. Applying the Court's analysis in *Grismer*, as per the Affidavit #1 of Superintendent at paras. 26 and 32, the Respondents refused accommodation pursuant to a previously undisclosed blanket policy to refuse to accept a medical diagnosis of EHS, and without individually assessing T's relevant clinical history. As well, the Respondents applied studies and information on adults to T's situation. None of the safety standards or evidence relied on by the Respondents makes any reference to any studies conducted on child safety.

145. In its November 2015 announcement indicating that increased Wi-Fi coverage may be rolled out the following year, the Middle School committed to providing Wi-Fi free

learning environments to those students who requested it. This belies the Respondents' assertion that providing classrooms with no or minimal coverage would pose an undue hardship.

Affidavit #1 of L at Exhibit "G"

146. The fact that the Respondents had managed all the way up until 2016 with 25 percent coverage (or less) contradicts the assertion that maintaining 25 percent coverage for two more years (until after T's graduation) suddenly posed undue hardship as opposed to mere inconvenience. 25 percent coverage is the Respondent school district's normal policy. If that imposed undue (as opposed to minimal) hardship, the Complainants submit that coverage would long since have been increased and the policy changed.

Affidavit #1 of the Superintendent at Exhibit "L"

147. Applying the Court's analysis in *Moore*, the Complainants submit that the Respondents have given no evidence regarding what, if any, alternatives to the wireless sound system were explored. Most significantly, the Respondents appear not to have explored any wired alternatives and they have given no evidence in this regard.

148. The Respondents have provided no details with regard to the other students and teachers with disabilities and their specific needs so that viable alternatives could be considered in assessing the Respondents' undue hardship argument. It is therefore impossible for the Tribunal, at this stage, to engage in a process of assessing how to appropriately balance competing rights.

149. The Respondents have failed to explore obvious non-wireless alternatives to accommodating other disabilities and learning needs in general, such as purchasing physical dictionaries and calculators, using cameras to take pictures, and installing wired connections. Many of us grew up with these devices and the

Respondents would be hard-pressed to establish that this experience constitutes undue hardship.

150. The Respondents have provided no explanation for why it was necessary to repeatedly mislead the Complainants with regard to the true state of affairs at the Middle School.

151. The Respondents have provided no explanation as to why they ignored the Complainants' repeated requests for a building biologist to measure the actual levels and sources of radiation in the School to help understand the issues in the School that were affecting T and the areas in the School that were safe for him.

152. Many of the Respondents' arguments are really about convenience, such as the convenience of students being able to move around with their computers. However, this is not a necessity. The stationary computer terminals that have previously been used in the School environment did not pose a hardship. The Respondents have not provided an adequate explanation as to why its learning objectives could not be achieved by hardwiring internet access, nor an assessment of the cost of hardwiring. In fact, hardwiring does not appear to be costly.

Affidavit of J at para. 89 and Exhibit "I"

153. The Respondents' preference throughout has been to respond to T's disability by excluding him, not even making any efforts to try to include him in School events such as Halloween or Remembrance Day.

Affidavit #1 of L at paras. 82-84

Affidavit #1 of J at para. 75

154. Essentially, the Respondents have sent T the message that his presence is expendable in favour of the convenience of wireless technology, whereas wired technology, up until recent years, has been considered more than adequate to meet learning needs.

155. The Respondents appear to pretend that the fact that they cannot reduce wireless levels to nil excuses them from taking any measures. However, it is clear that the Respondents were on notice that the main issue for T is the signal strength as opposed to the complete absence of a signal. See the Learning Plan of September 5, 2015 which acknowledges that the issue is strong signals as opposed to the presence or absence of a signal. This would also have been clear from the measurements the Complainant's took during their meeting with the vice principal.

Affidavit #1 of Principal at Exhibit "F"

Affidavit #1 of J at paras. 33-35

156. Similarly, the Health Canada document at Exhibit "E" to the Affidavit #1 of Dr. Stanwick explains that the amount of radiation the body absorbs depends upon proximity to the source of radiation.

157. The exact strength of the signals that were "bleeding" in is unknown because of the Respondents' failure to bring in a building biologist despite repeated requests. However, J did take readings of the wireless levels in the hallways in certain areas away from routers, and the Complainant felt that the levels were acceptable for T.

Affidavit #1 of J at paras. 33-35

158. The psychological impact of the Respondents’ conduct on T was immense, and he experiences it still today. Rather than being integrated and included, T

was induced, based on Withheld Information, to attend the School, and then his presence was simply disposed of in favour of convenient technology. With respect, the Complainants submit that this is an appalling and unjustifiable way to treat a child and that it could never amount to accommodation to the point of undue hardship.

159. A final and significant consideration with regard to *bona fide* justification and the issue of undue hardship is the impact on wireless radiation and wireless devices on the student body overall. Although some children are clearly more vulnerable, the Complainants have submitted compelling evidence that the industrial strength Wi-Fi routers used in schools pose an extraordinary risk to the health of all children and should be removed from schools in the best interests of all children.

Appendix 1 at pp. 33-39, especially Starkey at pp. 34-35 and Pall at p. 33-34

160. Central Middle School in Victoria has banned cell phones and reports that the change has been extremely positive. This belies the notion that cell phones are generally required for learning in a middle school.

Enclosed article: "Victoria, BC high school bans cellphone use, says it's 'gone very well'"

VII. Naming Individual Respondents

161. The *Code* is quasi-constitutional legislation which must be given a large and liberal interpretation so as to advance the broad policy considerations underlying it. The rights enunciated in the *Code* must be given full recognition and effect consistent with the dictates of the *Interpretation Act* that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects.

Robichaud v. Canada (Treasury Board),
[1987] 2 SCR 84 at para. 8

162. The prohibitions against discrimination in the *Code* are directed to individual actions. For example, section 8(1) provides:

> A person must not, without a bona fide and reasonable justification,
>
> a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public
>
> because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or class of persons.

Emphasis added

163. The law with regard to naming individual respondents is thoroughly canvassed in *Brar and others v. B.C. Veterinary Medical Association and Osborne*, 2015 BCHRT 151 ("*Brar*"):

> [526] In ss. 7, 8 and 43 of the *Code* a "person" is precluded from discriminating in those areas identified. A person is defined in s. 1 as including other institutions, such as occupational associations. On a plain reading of the section, a person clearly includes individuals.

[527] There is nothing in the wording of the *Code* that would suggest that individuals are not subject to ss. 7, 8 and 43 of the *Code*. ... I am unable to conclude that if an individual acts contrary to the *Code*, even if they are acting within their scope of authority and the institution acts [*sic*] liability, they should not be subject to the *Code*.

[528] If there are proven allegations that individuals acted in a manner that breached the *Code*, the purposes of the *Code* mandate that they should be subject to its provisions. The purposes of the *Code* include also include that there should be no impediments to the full and free participation in the economic, social, political and cultural life of BC and that the *Code* serves to foster a climate of understanding and mutual respect. If the *Code's* provisions are breached, a complaint is entitled to remedial relief. It is unclear to me how the *Code's* purposes could be fully met if the individual's actions were shielded from liability merely because an institution, for which they work or represent, is subject to the *Code*.

Decisions of the Tribunal

[529] The parties referred to a number of cases and I review those decisions here.

...

[531] In *Kayne,* Mr. Kayne sought to add certain members of the Owners' Strata as party respondents to the complaint. The Tribunal applied the test set out in *Payne v*. *Otsuka Pharmaceutical Co*., (2001) 41 C.H.R.R. D/52 (Ont. Bd. of Inq.), dealing with adding respondent to a complaint, which required that there be "some reliable evidence" upon which a finding of liability could be found. (para. 34; see also *Munroe v*. *C.A*. *Boom Residential Engineering and other*, 2004 BCHRT 12 (CanLII)) The Tribunal noted that individuals should not be able to "hide behind a corporate veil" and thwart the purposes of the *Code*. Further, it said that

the "potential of personal liability is an important factor that serves to ensure compliance with the *Code*."

....

[535] Similarly, in *J and J obo R v. BC (Min. of Children and Family Development) and Havens*, 2006 BCHRT 449 (CanLII), the Tribunal refused to dismiss the complaint against Ms. Havens pursuant to s. 27(1) concluding that there was some information suggesting that Ms. Havens was "primarily or significantly" responsible for the application of the impugned criteria to R and as such was the "directing" mind, or at least one of two of the directing minds involved in the alleged discrimination. (paras. 52 and 55)

...

[541] In my view, the Tribunal should proceed with caution when dismissing complaints against individual respondents based on the factors set out in *Daley*. Clearly the Tribunal in *Daley* took such a cautious approach.

...

[546] I find that individuals are subject to the *Code's* provisions, where allegations are made that could constitute a breach, despite an institution also being named. There is no basis to read down the *Code* to come to a different conclusion.

Emphasis added.

164. The Tribunal's approach in *Brar* is reinforced by the reasoning in the majority decision of the Supreme Court of Canada in *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 ("*Schrenk*"). The issue in *Schrenk* was whether an employee could complain against an individual in his work environment who was employed by a different employer. Writing for the majority, Rowe J. confirmed that he could:

[47] Considering the patterns of expression in the Code further reinforces the interpretation of s. 13(1)(b) as applying beyond the confines of employer-employee relationships. In particular, where the Code seeks to limit the class of actors against whom a particular prohibition applies, it employs specific language rather than barring a "person" from engaging in discriminatory conduct...

[54] ... Under a narrow approach, the employer would be exclusively responsible for ensuring a discrimination-free workplace. In other words, if you suffer discrimination at the hands of a colleague, your only remedy under the Code would lie against your employer. This would oblige your employer to intervene by disciplining the perpetrator or terminating his or her employment, for example, but it would not allow you to seek a remedy against the perpetrator *directly*.

[55] ... Respectfully, this narrow focus misses the mark set by the Code's remedial purposes (and, in the context of employment discrimination, ignores how the Code "trains its regulatory guns" on a "person" and not "those responsible for intervening" (s. 13(1))....

[56] ... This means that, in addition to bringing a claim against their employer, the complainant may also bring a claim against the individual perpetrator. The existence of this additional claim is especially relevant when the discriminatory conduct of a co-worker persists despite the employer having taken all possible steps to stop it.

Emphasis added

165. Although *Schrenk* is an employment case, the same principles are applicable to a complaint alleging discrimination in the provision of a service against both the institutional service provider as well as individual employees. Thus the reasoning

in *Schrenk* confirms the Tribunal's conclusion in *Brar* that, where allegations are made against an individual respondent that could constitute a breach of the *Code*, the complaint can proceed against the individual respondent despite an institution also being named.

166. In the case at hand, the Principal was directly involved in withholding pertinent information from the Complainants in multiple respects. As discussed above, she has, in her affidavit, disclosed considerable information that should have been disclosed to the Complainants when T was at the School. The principal was directly involved in creating the education plan that isolated T, and it was she who was responsible for the inadequate teacher instruction T received when he was isolated. As principal, she was responsible for a number of operational decisions at the School level that discriminated against T including the rollout of additional Wi-Fi coverage, the implementation of pilot projects increasing radiation in the classroom, the refusal to disable the audio systems, the placement of T in another classroom with the audio system, the failure to have a building biologist come to the school to assess wireless levels, and, overall, the refusal to accommodate T to the point of undue hardship within the School environment.

167. Thus, the Complainants submit that the Principal is appropriately named as an individual respondent.

168. The Assistant Superintendent, made the decision in March 2016, in collaboration with the Principal, that Middle School would not restrict T's exposure to radiofrequency from the audio systems nor his exposure to Wi-Fi. It was also the assistant Superintendent who failed to disclose the fact that the audio system emits radiofrequency, but rather, tried to assure the Complainants to the contrary.

Affidavit #1 of the Superintendant at Exhibit "J" at pp. 400 and 431

Affidavit #1 of J at para. 50 and Exhibit "D"

169. The Superintendent designated the Middle School to increase Wi-Fi coverage from 25 to effectively 100 percent despite the fact that T was enrolled there.

Affidavit #1 of the Superintendent at para. 54

170. In view of the above, the Complainants submit that they appropriately named the individual Respondents, and there is no basis for the Tribunal to dismiss the Complaint as against them.

Conclusion

171. In view of the above, the Complainants submit that they have sufficiently illustrated that their Complaint does allege facts that, if proven, would constitute a violation of the *Code*.

172. The Complainants further submit that they have demonstrated, well beyond the realm of conjecture, that their Complaint has a reasonable prospect of success.

173. The Complainants allege that the each of the individual Respondents made decisions and took actions that would constitute a breach of the *Code*.

174. For these reasons, the Complainants submit that no portion of the Complaint should be dismissed.

All of which is respectfully submitted.

January 8, 2018

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Ros Salvador
Counsel for the Complainants