Canadian Legal Literature Addressing Social and Economic Rights of People with Disabilities:
An Annotated Bibliography

Nathan Irving, Zilla Maria Jones, Althea Wheeler
Edited by Debra Parkes, Yvonne Peters and Kristine Squires

May 2009

Prepared for the Council of Canadians with Disabilities as part of the “Disabling Poverty/Enabling Citizenship” Community-University Research Alliance funded by the Social Sciences Humanities Research Council of Canada
Canadian Legal Literature Addressing Social and Economic Rights of People with Disabilities: An Annotated Bibliography

This annotated bibliography is part of research project examining the possibilities and challenges of using various legal mechanisms to protect and promote the rights of Canadians with disabilities to social and economic security (i.e., to alleviate poverty and to promote equal substantive citizenship of people with disabilities). It is intended as a resource for academics, students, advocates, and community members interested in the role that law has played – and can play – in remedying poverty experienced by people with disabilities. The bibliography consists of summaries of articles, books, book chapters and reports written between 1985 (the year Canada’s constitutional equality rights came into force) and 2009 addressing themes such as: disability and equality rights, social and economic rights, and key topical areas such as income assistance, employment, housing, health care, and education, among others.

Simply click on the topic in the table of contents below and you will be taken to the corresponding section of bibliography. Summaries in each section are presented in reverse chronological order, beginning with the most recent materials. Readers should exercise caution in relying on older materials since new developments in the law may affect certain arguments and conclusions contained in those materials.

Table of Contents

Disability and Equality Rights...........................................................................................................5

Models of Disability and Equality.................................................................................................5

The Canadian Charter of Rights and Freedoms .................................................................26

Federal/Provincial/Territorial Legislation.....................................................................................43

Gender .......................................................................................................................................47

Children .................................................................................................................................50

Social and Economic Rights .................................................................................................51

The Canadian Charter of Rights and Freedoms .................................................................53
Federal/Provincial/Territorial Legislation .......................................................... 97

Grounds of Discrimination .............................................................................. 100

Implementation/Interpretation of International Law ...................................... 110

Socio-Economic Rights Abroad: Lessons for Canada ..................................... 129

Gender: ........................................................................................................... 131

National Standards/Accountability in Social Welfare ..................................... 135

Income and Social Assistance ......................................................................... 141

Disability Income Supports and Social Assistance: ....................................... 143

Right to Adequate Social Assistance: ............................................................. 149

Tax: Equity and Social Policy ........................................................................... 156

Disability and Employment: ........................................................................... 160

Employment Equity ........................................................................................ 164

The Duty to Accommodate .............................................................................. 169

The Canadian Charter of Rights and Freedoms ........................................... 202

Education: ....................................................................................................... 204

Housing: .......................................................................................................... 232

Health: ............................................................................................................. 243

Disability and Access to Health Care ............................................................... 243

Right to Health Care and the Constitution .................................................... 249
Disability and Personal Supports .............................................................. 257

Disability and Services (Generally) ................................................................ 259

Disability and Child Care: ........................................................................... 261

Disability and Transportation: .................................................................... 263

Access to Justice ........................................................................................ 267

Immigrants/Refugees with disabilities: ......................................................... 272

Relevant Government Reports ..................................................................... 275
Disability and Equality Rights
Models of Disability and Equality


Malhotra argues that a critical disability theory analysis can help explain the Latimer affair, in which a Saskatchewan farmer murdered his twelve year old daughter with cerebral palsy, and the media coverage of it. Malhotra uses concepts from Erving Goffman’s Stigma and Michel Foucault’s notion of governmentality to analyze media coverage of the Latimer case. Malhotra documents how lurid media coverage acted to discipline Tracy Latimer for her impairments and deviations from the norm.

Legislation:
The Sexual Sterilization Act, S.A. 1928, c. 37.

Cases:

Jurisdiction: Canada


Malhotra analyzes and applies philosopher Martha Nussbaum’s theory of equality, which is based on identifying a list of core human entitlements that represent a minimum of what respect for human dignity requires, to re-evaluate the Supreme Court of Canada’s decision in Granovsky. Malhotra argues that use of Nussbaum’s framework for equality might stimulate more expansive readings of the notion of dignity, which have become crucial to the Supreme Court’s equality jurisprudence. Malhotra suggests ways in which Nussbaum’s set of
entitlements might lead to a richer conception of dignity and consequently encompass a right to a public disability pension for workers whose disabilities preclude them from making consistent contributions.

Legislation:

Cases:

Jurisdiction: Canada


Malhotra examines the implications of the social model of disablement, which focuses on structural and attitudinal barriers, for the legal regulation of modern workplace in Canada and the United States. Malhotra demonstrates how all markets have some measure of regulation and that the notion of a self-regulating market is a myth. Malhotra offers an analysis of how principles of contract law and property law disempower workers in general and workers with disabilities specifically. He then provides a detailed critique of the Supreme Court of Canada’s decision in *Meiorin*. He concludes that two implications of the social model are to increase the workers’ conceptual and physical control of the day to day production decisions and the provision of disability supports across the lifespan decoupled from labour market status.

Legislation:
*Wartime Labour Relations Regulations*, P.C. 1003, February 17, 1944

Cases:
*Adkins v. Childrens Hospital* 261 U.S. 525 (1923).
Borkowski v. Valley Central School District, 63 F.3d. 131 (2d. Cir. 1995).
Carter v. Exxon Co. USA, 177 F3d 197 (3d Cir. 1999).
Newfoundland (Treasury Board) v. NAPE, [2004] 3 S.C.R. 381.
Vande Zande v. State of Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995).

**Jurisdiction:** Canada, the United States

Malhotra compares the marginalization of people with disabilities in Canada and the United States. Malhotra specifically contrasts the barriers that people with disabilities face in the two countries in accessing transportation and attendant services. He then explores the state of the law in the two countries, considering leading Supreme Court of Canada decisions and the jurisprudence under Title I of the Americans with Disabilities Act. Malhotra explores the paradox of how Canada has relatively generous policies toward employees with disabilities yet poor environmental and physical accessibility, while the United States has much greater levels of accessibility but relatively harsh policies toward people with disabilities.

Legislation:

Cases:
British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1990] 3 S.C.R. 3

Jurisdiction: Canada, the United States


In this article, Malhotra critiques some of the central concepts of the law and economics school from the perspective of the social model of disablement. He illustrates how cost-benefit analysis, statistical discrimination and the traditional perception of law and economics scholars of unions as monopolies may be usefully critiqued. The author then briefly analyzes how cost-benefit concepts
were used in the majority and dissenting judgments in *Council of Canadians with Disabilities v. Via Rail*.

**Legislation:**
*Canadian Transportation Act*, S.C. 1996, c. 10, s. 5.

**Cases:**

**Jurisdiction:** Canada, United States


Malhotra evaluates different schools of law and economics to determine which are most consonant with the values of the social model of disablement. The extent to which the schools provide robust explanations for labour market policy is explored. Malhotra concludes that neo-institutionalist Law and Economics, feminist Law and Economics and Critical Race Theory Law and Economics hold out the most promise in light of the implications of the social model of disablement.

**Legislation:**

**Cases:**
Cargill Ltd. v. United Food and Commercial Workers International Union, Local 1118 (2004), 76 C.L.A.S. 380 (Arbitrator Power)

Jurisdiction: Canada, United States


This chapter argues that theories of disability and equality matter to our understanding of disablement and the evolution of laws, policies, and practices. The authors discuss four formulations of disability, and the tension between those used by the disability movement and government. Because different theories of disability and views of citizenship and equality lead to different theoretical constructs (civil disability, charitable privilege and citizenship status) judicial and policy decisions are inconsistent. In judicial decisions this interaction between law, social theory, and disability is displayed. Both international and domestic law incorporate disability rights, but actual equality is not always achieved because social, political and economic imbalances affecting full citizenship persist.

Legislation/International Instruments:

Cases:

Jurisdiction: Canada


Lee discusses the nature of disability and multiculturalism, and argues against the treatment of persons with disabilities as a cultural group. Lee discusses theorists who view disability as cultural (particularly in the deaf community), and
the Canadian multicultural framework which encourages immigrants to freely express their cultural identity while integrating into society at large. The duty to accommodate in employment is achieved through dis-identification: when a person is accommodated they no longer experience socially constructed disability. Lee suggests that if disability is recognised as a socio-political construct that can be eliminated by accommodation, it is a contradiction to also argue that disability creates a cultural identity.

**Legislation/International Instruments:**

**Cases:**  
*British Columbia (Public service Employee Relations Commission) v. BCGSEU,* [1999] 3 S.C.R. 3.  

**Jurisdiction:** Canada


The authors attempt to link disability theory to legal practice. They describe the Biomedical, Economic, Pity/Hero, Social, Feminist, Minority Rights, and Universalist models, and how the models have been applied in various Supreme Court cases. *E (Mrs.) v. Eve* positively applied Social and Minority Rights concepts, although a Feminist perspective would have been appropriate. *Eaton* reverted to the Biomedical approach, while *Eldridge* applied the Social approach, although it was tempered by the Economic model. The Social model was prevalent in *Granovsky*, however the court also suggested the Pity/Hero paradigm. *Martin* applied the Social model, but left open the application of the Biomedical and Economic models, while *Auton* wholly applied these approaches.

**Legislation:**  

**Cases:**  
Jurisdiction: Canada


Pothier describes legal developments in Charter, Human Rights, and common law jurisprudence with significance for persons with disabilities. She chronicles Charter protection against adverse effects under the holding in O’Malley and the unified approach to direct and adverse effects discrimination enunciated in Meiorin and applied in Grismer. Mercier extended the definition of disability to include perceived disabilities. While the social model of disability is evident in Eldridge and Granovsky, it is missing from the Court’s analysis in Auton. The danger of within-disability comparison (in Granovsky), comparison of the disabled from an able-bodied viewpoint (in Eaton), and overly detailed descriptions of comparator groups (in Auton) are discussed. Issues involving criminal law are also canvassed.

Legislation/International Instruments:

Cases:
Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City) (Re Mercier), [2000] 1 S.C.R. 665.

Jurisdiction: Canada

Chadha details the Mercier case (involving three claimants denied employment because of conditions perceived as handicaps by their employers). She emphasizes the importance of Justice L’Heureux Dubé’s decision, and contrasts its approach with that of the United States Supreme Court (U.S.S.C.). In Mercier handicaps were defined as real or perceived—recognizing that individuals can be handicapped by social constructs and perceptions rather than by biomedical characteristics. The test in Mercier does not require the claimant to prove their degree of disability, instead, once the link between disability and the respondent’s conduct is demonstrated the onus rests on the respondent to justify their actions. In contrast, the U.S.S.C. test places the onus on claimants to prove their disability restricts daily activities, and conforms more to an economic/biomedical model of disability, rather than to the social model expressed in Mercier.

**Legislation:**
Quebec Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s.10

**Cases:**
Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City), [2000] 1 S.C.R. 665.

**Jurisdiction:** Canada, United States of America


The authors explore how the framework of section 15 of the Charter that was articulated by the Supreme Court of Canada in Law—particularly the “essential human dignity” part of the analysis—has been interpreted and applied by the Court in two disability cases: Granovsky and Martin. They argue that the Court’s impoverished understanding of “essential human dignity” is grounded in an economic model of disability, which perpetuates economic inequality for people with disabilities. Based on this jurisprudence, the authors conclude that a lifetime of economic disadvantage, resulting from disability, may not be sufficient to ground a successful Charter claim. They urge legal advocates to
advance judicial awareness of the importance of social and economic integrity to human dignity.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


Peters details the history of s.15 of the *Charter* and the struggle of the Coalition of Provincial Organisations of the Handicapped (COPOH) to have mental and physical disability included as prohibited grounds of discrimination in the *Charter*. The emergence of the Disability Rights analysis reinforced the need for Constitutional recognition in the legal framework, and created concerns about two-tiered rights if disability were excluded from s. 15. The COPOH argued persuasively against cost analyses for excluding disability, as these were not considerations for other proposed grounds. Through intense lobbying and political pressure, the Obstacles committee, the International Year of Disabled Persons, the threat of mass protests, and the visibility of people with disabilities at committee hearings, “disability” became a protected ground of discrimination under s. 15.

**Legislation/International Instruments:**

**Jurisdiction:** Canada

**Frazee, Catherine.** *Thumbs Up! Inclusion, Rights and Equality as Experienced by Youth with Disabilities* (Toronto: Laidlaw Foundation, 2003).

This article explores the meaning of social inclusion, from the perspective of young people with disabilities. This perspective reveals the limitations of focusing on rights and legal entitlements. The author argues that rights-based mechanisms combat exclusions from activity and opportunity but they do not remedy restrictions on ‘being’ and ‘belonging’. She concludes that social inclusion should complement legal rights in order to achieve dignity and equality for all.
Cases:

Jurisdiction: Canada


The author notes that, despite the establishment of an array of constitutional and statutory human rights, exclusion from full participation in society persists for many groups including children with disabilities. He outlines the limitations of existing legal mechanisms for promoting social and economic rights, and he argues that institutionalized rights on their own are not sufficient to ensure inclusion and valued recognition. The author calls for a social inclusion public agenda to foster social solidarity and promote a culture where all people are equally valued.

Cases:

Jurisdiction: Canada


Armstrong discusses the criticism of the use of Charter litigation by interest groups. Critics on the left have argued that Charter litigation can undermine the goals of equality seeking groups, while the right fears the “Court Party” has captivated the Supreme Court and led them to an inappropriate policy-making role. Some Court Party members are “Critical Pragmatists”, and view Charter litigation as one of several means to enhance democracy and protect rights. By surveying the history of disability advocacy groups pre-Charter, and in key equality and disability rights Charter cases, Armstrong assess the validity of Charter litigation criticism, and concludes that disability advocacy groups are generally more of the Critical Pragmatist persuasion.

Legislation/International Instruments:

Cases:

Jurisdiction: Canada


This article references Health Law, with disability studies as an “unexpected guest” in a panel discussion. While Health Law typically understands disability as an aspect of an individual which causes their impairments, Frazee promotes the view that disability is extrinsic, and a result of societal failure to accommodate diversity and promote inclusion.

Jurisdiction: Canada


The article reviews various models of disability, the definition of disability adopted by the Supreme Court, and proposes an improved definition. Drawing on the Social Political model, Penney favours the Universalist Approach because it better accords with a purposive and contextual approach to Charter interpretation and substantive justice. Penney suggests that the current Granovsky test for disability under s. 15(1) of the Charter is inadequate. In its place Penney recommends more contextually focused test that considers the interaction between a) bio-physiological conditions and, b) environmental and external conditions. Penney also provides critique and practical examples of his test.

Legislation:

Cases:
Jurisdiction: Canada


This article briefly comments on three cases involving the definition of “handicap” in Québec from the Human Rights Tribunal to Supreme Court levels. The Courts affirmed a broad interpretation of “handicap” which can encompass perceived disabilities, and ailments that do not result in functional limitations (such as HIV). The author praises the decision because of its focus on dignity, and emphasis on social context in which discrimination occurs.

Legislation:

Cases:
Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City).

Jurisdiction: Québec


The authors provide an overview of Canada’s constitutional and statutory (both provincial and federal) provisions that protect against discrimination on the basis of disability, as well as leading cases demonstrating how the protections operate. After explaining the legislative context, the authors review case law and the Canadian approach to equality in the areas of eugenics; access to education; access to services; criminal sanctions and protections; institutional care and confinement; and life or death issues in medical treatment. The authors conclude that the Canadian approach to disability rights shows cause for optimism.

Legislation/International Instruments:
Canada Evidence Act, R.S. 1985, c. C-5.
Employment Equity Act, S.O. 1993, ch. 35.
Various other codes and acts that have implications on the equality rights of persons with disabilities.

Cases:

Jurisdiction: Canada


This article identifies factors that impede the realization of legal rights for persons with disabilities. According to McKenna, a significant obstacle is the lack of understanding of/consensus about the socio-political causes of disablement. An additional impediment is the resistance of employers and service providers to acknowledge their duty to accommodate. McKenna argues that the laws’ systemic bias favouring management-rights and freedom of contract, together with the unwillingness of the government, the judiciary, and the public to challenge these doctrines, has the effect of legitimating and encouraging employer/entrepreneurial resistance to disability-rights. McKenna proposes ways to challenge this resistance.

Legislation:
[Federal/ provincial human rights statutes]

Cases:
Canadian Union of Postal Workers v. Canada Post (22 December 1992), 706-88-0029.

Jurisdiction: Canada

Young uses the *Eaton* and *Re Blainey* cases to demonstrate the Court’s entrenchment of a formal equality model that follows popular conceptions of sameness/difference as determinative of similar/different treatment. Blainey was successful in challenging her ineligibility for the boy’s hockey team because of her gender (other than which she was the “same” as the boys). The court denied Eaton’s claim to integrated education by focusing on her “true” characteristics (her disability) as the cause of difference, rather than examining how institutions/practices construct difference. Using this paradigm, the concept of accommodation can justify differential treatment and exclusion, rather than requiring systemic changes to environments which have created the “difference”.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


Tremain critiques Dworkin’s concept of redistribution of resources to compensate handicaps (as expressed by an insurance scheme where non-disabled immigrants insure against disability). By upholding the validity of the disability insurance scheme, while denying its application to skills (which Dworkin views as the result of life narrative and not events), Dworkin denies the ability of disability to shape narratives, and the ambitions of persons with disabilities. The opinion of individuals with, and without, disabilities on disability issues vary widely, and can be tempered by denigrating cultural stereotypes. Tremain argues that Dworkin’s scheme violates egalitarian liberalism by perpetuating inequitable treatment of people with disabilities by viewing disability as a biomedical rather than socio-political.

**Jurisdiction:** International


Rioux discusses traditional modes of equality and their insufficiency to ensure equality of individuals with intellectual disabilities. She explains the historical connection between “biological inequality” and the socio-political interpretation that legitimises inequitable state treatment/social relations based on biological conditions. Rioux explains how both formal equality and affirmative action to
provide equal opportunity are not sufficient means to achieve substantive equality for persons with intellectual disabilities. The author instead proposes an “Equality of Well-Being” that is not dependent on economic/market contribution as a basis for distributive justice, ensuring rights of citizenship and equal participation regardless of social or economic propensities.

**Jurisdiction:** Canada


The author discusses the struggle of people with disabilities to “shake off the bonds of paternalism” and achieve equality and full citizenship. After reviewing the historical and social context of disability discrimination, she outlines the basic features of a disability-rights model, emphasizing that social barriers are the most detrimental form of discrimination faced by people with disabilities. The author highlights advances in the legal recognition of rights, noting the important role that human rights legislation and the Charter’s equality provisions have played in promoting awareness of how people with disabilities experience discrimination. The challenge now, she argues, is to develop a theory of equality that will produce substantive solutions. Citing the limitations of models of accommodation, the author advocates a model of substantive equality that treats diversity as a societal norm.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada

**Robertson, Gerald B. “Mental Disability and Canadian Law” (1993) 2 Health L. Rev. No. 1, 23-27.**

Robertson considers the law as a reflection of social policy and as a means of social change for persons with mental disabilities. Robertson identifies areas in which negative societal attitudes towards mental disability are exposed, and provides examples of cases and legislation that have created positive social change. Issues surveyed include: fear of persons with mental disabilities; marriage prohibitions; forced sterilization; viewing the mentally disabled as “children”, or as “less than human”; viewing mental disability as global/all
encompassing; paternalism; making distinctions between physical and mental disabilities; and the rights of persons with mental disabilities. Robertson credits the Charter and disability advocacy groups for many positive legal and social changes.

Legislation:
British Columbia Marriage Act, R.S.B.C. 1979, c. 251.

Cases:

Jurisdiction: Alberta, British Columbia, Canada.


Sobsey writes about definitional and statistical issues in disability law as in 1993. He explains the difference between impairments, disability and handicap, and the fluidity of these concepts depending on environmental conditions, accommodation, and societal definitions. Key legal issues faced by people with disabilities include: reasonable accommodation in the workplace; medical discrimination (based on society’s burden, quality of life, and the family’s burden); access to education; the right to refuse treatment; disabled offenders; the responsibility of agencies providing services to persons with disabilities; and equal protection in the legal system. Sobsey also discusses a proposed Albertan Vulnerable Persons Protection Act.

Legislation/International Instruments:

Jurisdiction: Alberta, Canada


Lepofsky assesses the Canadian Courts’ approach to equality rights from the “earliest years” to the early 1990s, and the rollercoaster highs and lows equality
seekers have experienced. Despite an initial ascent in the 1970s from the traditional downward route, subsequent Supreme Court doctrines robbed the *Bill of Rights* of its potential, and human rights legislation pre-1981 was construed narrowly. In the 1980s the Supreme Court heightened equality by holding human rights legislation as quasi-constitutional, and by creating the *Oakes* test and generous *Andrews/Turpin* s. 15 approach. Lepofsky critiques cases from the early 1990s as an unexpected downturn in the Supreme Court’s equality jurisprudence, and concludes that the Court can continue along this downward route or again ascend to the *Andrews/Turpin* path. [NOTE: does not specifically address disability]

**Legislation/International Instruments:**

**Cases:**
Various other mandatory retirement and *Charter* cases.

**Jurisdiction**: Canada


Drawing on her own experiences with visual disability in legal education and employment, Pothier provides concrete examples to illuminate the social construction of disability, and the able bodied norms which anchor it. She isolates three key areas: other’s discomfort with disability burdening the person with a disability, assessing the ability of an individual with a disability from an able-bodied perspective, and accommodation of a disability by burdening others (rather than systemically and equitably remediying discrimination). Pothier also coins the term “disabilityism” to refer to discrimination against people with disabilities, and argues that the absence of this term reflects the able-bodied worldview.

**Jurisdiction**: Canada

**Menard, Cheryl. “Exploring equality provisions abroad”** (Spring, 1988) 5 Just Cause 14-16.
Menard examines how Australia learned from the American example when crafting their equality legislation, which overcomes similar problems experienced under the Canadian Charter. The Australian legislation follows a “bottom-up” approach, which provides the means (support services) to ensure a right, while not expressly guaranteeing the right, while the Canadian approach is the opposite.

**Legislation:**

**Jurisdiction:** Canada, Australia

---


Echenberg discusses the historical distinction between deserving and non-deserving (the unemployable and employable, respectively), and discusses provincial policy that follows this trend with two tier assistance based on perceived worthiness.

**Jurisdiction:** Québec, Canada

---


Writing in 1986, Ratushny considers regulation-making as a means for achieving compliance with section 15 of the *Charter*. He maintains that the adoption of regulations may be useful for establishing standards of reasonable accommodation/accessibility for persons with disabilities. In particular, Ratushny explores the potential value of regulation-making for setting accessibility standards in air transportation.

**Legislation:**
*Air Carrier Regulations*, Consolidated Reg. of Canada, 1978, c. 3.

**Jurisdiction:** Canada
Torjman, Sherri. “Canada’s Federal Regime and Persons with Disabilities” in Cameron, David & Valentine, Fraser eds. Disability and Federalism: Comparing Different Approaches to Full Participation (Montreal: Published for the Institute of Intergovernmental Relations, Queen’s University by McGill–Queen’s University Press, 2001).

Torjman discusses the characteristics of Canada’s federal structure, and its impact on persons with disabilities. She outlines Canada’s constitutional framework and institutional figures, and profiles the social and demographic make-up of Canadians with disabilities and political disability organizations. Torjman examines the type of support available in three service areas (employment, income, and personal supports). Perspectives of persons with disabilities on pressing issues (such as high unemployment) are reported. The legacy of federal/provincial working groups and disability studies, and more recent social policy reforms under the Social Union Framework Agreement are also discussed. Key issues from the In Unison paper are featured, as are future disability policy challenges.

Legislation/International Instruments:
Québec Pension Plan, An Act respecting the, R.S.Q. c. R-9

Jurisdiction: Canada


This document contains summaries of sixty articles relating to disability rights issues between the period from 1978-1992. The documents are arranged under the categories: Canadian Statutes, the Charter and the Disabled; American Legislative Policies and the Disabled; International Human Rights; Employment and the Disabled; Multiple Disadvantages; and Miscellaneous.

Legislation/International Instruments:
Employment Equity Act, S.C. 1986, c. 31
Various Canadian Human Rights Codes.

Cases:
Mahon v. Canadian Pacific Ltd. (1986), 7 C.H.R.R. D 3278 (Fed.).

Jurisdiction: British Columbia, Manitoba, Ontario, Québec, Canada, Australia, United Kingdom, United States of America, and International.


This report details socio-economic issues facing persons with disabilities, including the definition of disability, employability, and disentangling eligibility for disability related supports from income benefits. The evolution of disability related supports and government initiatives from the early 1900s to present day (circa 1996) programs are outlined. Current tax, employment, and income security/pension provisions are discussed, as are possible proposals for their reform. Parliamentary action, through reports on disability issues by various standing committees, is also highlighted. A chronology of disability related initiatives from the International Year of Disabled Persons in 1981, to restored funding for national disability organizations in 1997, is included. [NOTE: the online version of this document is regularly updated. The last update was in 2002]

Legislation/International Instruments:
Various income and support service legislation that impacts persons with disabilities.

Jurisdiction: Canada

Réaume discusses human dignity and equality, the necessity of a more robust definition of human dignity, and the need for increased understanding of dignity in equality analyses. Using case law, Réaume provides a re-articulation of the Law test focusing on three forms of indignity: stereotyping, prejudice, and exclusion for benefits/opportunities integral to societal concepts of personhood and living with dignity. Eldridge exemplifies the third concept of dignity, where exclusion from benefits deprived deaf individuals of autonomy and full participation in the medical system. Following her analysis, Réaume submits that the reduction of social assistance benefits was a violation of dignity in Gosselin.

Legislation:

Cases:

Jurisdiction: Canada

While the authors acknowledge that comparison is essential to equality analyses, they elaborate on the problems inherent to the current comparator group framework by examining Granovsky, Auton and Falkiner. The authors identify difficulties with the overemphasis on comparator groups; restrictiveness of single, rather than multi-grounded/intersectional comparator groups; reliance on legislative purpose, rather than impact; refusal to acknowledge temporary disability (as opposed to permanent); “dooming” a claim by re-categorising the comparator group; and the re-emergence of the similarly situated test which favours formal, over substantive, equality. Supporting a contextual analysis, the authors point to human rights analysis (as in Meiorin), and the work of several authors, as a conducive framework for substantive equality.

Legislation:

Cases:
Falkiner v. Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services), 212 D.L.R. (4th) 633, 59 O.R. (3d) 481.
Hodge v. Canada (Minister of Resources and Development), [2004] 1 S.C.R. 497, 244 D.L.R. (4th) 257.

Jurisdiction: Canada


According to Keene, there is a growing concern among advocates that the Supreme Court of Canada is endorsing a restrictive approach to equality rights under section 15 of the Charter—an approach owing largely to the equality framework endorsed by the Court in Law. In this chapter, Keene provides a detailed review of various judgments in Gosselin to illustrate how the utility of the Law analysis for advancing substantive equality depends entirely on each judge’s appreciation of, and commitment to, a substantive equality model. The majority decision, she explains, reveals how the Law analysis may be used to “define substantive inequality out of existence.” Keene then outlines a more generous and liberal approach to equality applied by the Supreme Court in dealing with human rights legislation, illustrating the effect of this approach in two cases which, like Gosselin, involved allegations of discrimination in respect of government benefits. Lastly, Keene summarizes the current difficulties with the Court’s treatment of section 15 and provides suggestions for arguments in future cases. [NOTE: does not specifically address disability]

Legislation:
[Human rights legislation, generally]

Cases:
Hutchinson v. B.C. (Ministry of Health), 2004 BCHRT 58.

Jurisdiction: Canada

The author proposes an explanation to account for the Supreme Court’s recent refusals to find violations of section 15 in cases involving economic rights. He argues that dignity—held by the Court to be the underlying interest grounding equality claims—is not an appropriate conceptual basis on which to ground economic rights claims. After reviewing the jurisprudence on dignity, the author explains the distinction between rhetorical and strict egalitarianism, and argues that a dignity-based conception of equality is an example of the former. Section 15 economic rights claims, in contrast, are more aptly grounded in the strict egalitarian principle of membership. The author concludes by considering how a strict egalitarian conception of economic rights can fit within the existing Supreme Court jurisprudence.

Legislation:

Cases:

Jurisdiction: Canada

Denike, Margaret Ann & Stephenson, M. Kate. Twenty years of equality rights: the eternal return of the "same". (S.I: 20th Anniversary Committee on the Equality Clause, 2005).

The authors survey and provide commentary on Supreme Court interpretations of equality rights under the Bill of Rights; early s. 15 litigation, and the Andrews/Turpin approach; the 1995 equality trilogy (Miron, Egan and Thibudeau); substantive equality cases (Eldridge and Vriend); Law; and post-Law outcomes (in Gosselin, Walsh and Trociuk). They argue that the Court has essentially reversed the onus in s. 15 litigation by focusing on the “functional values” of the law, “irrelevant personal characteristics”, the “without discrimination” qualifier, and legitimate feelings of indignity instead of social disadvantage (which should be the primary focus).

Legislation:

Cases:

Jurisdiction: Canada


Sampson reviews the Granovskv decision, in which the Supreme Court of Canada held that disability related “drop out” provisions in the CPP did not discriminate against Granovskv. Sampson notes the analytical tensions between applying the social construction and bio-medical models of disability. She sees faults in the Court’s comparator analysis, including assessing the purpose of the legislation in s. 15 (rather than s. 1), and the choice of permanently disabled individuals as the appropriate comparator group. Sampson also expresses concern over the hierarchy of disadvantage implicit in the Court’s reasoning (wherein a person with a temporary disability that becomes permanent is “better off” than someone with a pre-existing permanent disability) as a contravention of equality law.

Legislation:
Canada Pension Plan Act, R.S.C, 1985, c. C-8

Cases:
Granovskv v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703

Jurisdiction: Canada

Peters describes the fight to include mental and physical disability as a ground of discrimination under the Charter by the Coalition of Provincial Organizations of the Handicapped (now the Council of Canadians with Disabilities), and analyses the effect of leading human rights and equality cases on the rights of persons with disabilities. The legal approach to determining discrimination and violations of equality are detailed, and the dignity component of the s. 15 analysis is identified as a problematic area. She reviews the current human rights framework as promising (including the potential for a spectrum of accommodation), and while the Charter’s interpretive framework is likewise encouraging, to date gains have been more symbolic than substantive. Peters also suggests future litigation strategies advancing a substantive theory of equality and presents the results of a survey of key concepts for Charter litigation strategies.

Legislation:  

Cases:  

Jurisdiction: Canada


Moreau premises this article upon the notion that unequal treatment is not objectionable per se; such treatment is objectionable only when, and to the extent that, it is also unfair. Accordingly, the question faced by the courts and legal academics in interpreting section 15 of the Charter is, what is the nature of the wrong or wrongs done to persons when they are unfairly treated unequally? Moreau describes one abstract and four substantive conceptions of this wrong. Next, she critiques the Supreme Court of Canada’s approach to section 15 as set out in Law. The Law test, she argues, conflates the distinct wrongs, thus rendering it conceptually problematic and less capable of recognizing
discrimination when a claimant has suffered one or more the wrongs underlying section 15. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Canada

---


Provincial variations in disability-related support services can present barriers for Canadians with disabilities in choosing where to live and work in Canada. The author discusses mobility rights, contained in section 6 of the *Charter*, and considers how these rights could be used to achieve adequate supports across the country. She also considers the role of federal initiatives in supporting mobility rights. Although the jurisprudence does not recognize a government duty to provide the necessary resources for people to realize their mobility rights, the author maintains the possibility of successfully challenging the courts’ narrow interpretation of section 6.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada

---


This article begins by examining the efforts of the Supreme Court of Canada to comprehend the interests lying beneath the right to equality under section 15 of
the Charter. The author chronicles the development of the equality jurisprudence leading up to the Court’s identification of human dignity as the substantive foundation of equality rights. While recognizing that the Court has much work to do in fleshing out this concept of dignity, the author maintains that this dignity-based analysis has the potential to provide real substance to equality rights law. The author explores the concept of dignity, its relevance to equality rights, as well as the question of what constitutes a violation of dignity. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Canada

---


This report poses and answers three questions about the potential negative impact of the *Law* decision (particularly on the concepts of “dignity” and the “reasonable person”) on people with intellectual disabilities and their families. McCallum details the holding of the court in *Law*, its application in *Winko* (which challenged provisions of the *Criminal Code*), and the need to revisit the *Eldridge* and *Eaton* decisions. The focus on dignity and the reasonable person test are viewed as generally helpful developments, while *Winko* suggests caution when choosing which state actions to challenge. Future strategies, including appropriate comparator groups and their usefulness, are also discussed.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada

The authors review the Eldridge case, paying particular attention to “able bodied” measurements of equality, and limits imposed by the Court under s. 1. In the able-bodied framework accommodation “fixes” others problems so they can conform to the able-bodied norm. When individuals are further from this norm, the Court is less likely to find their obstacles can be fixed than for someone who more easily assimilates to the norm. While praising the inclusion of undue hardship under s. 1, the authors argue it would be more appropriate under the proportionality component of the Oakes test, rather than under the minimal impairment factor. They also censure using cost as a controlling factor under s. 1.

Legislation:

Cases:

Jurisdiction: Canada


Jackman provides an overview of the Eldridge and Vriend decisions from the lower Courts to the Supreme Court. She reviews the major principles clarified in the decisions: the rejection of the formal equality/identical treatment model, the affirmation that s. 15 can be engaged regardless of social circumstances that result in the discrimination experienced, and the affirmation that state action and inaction can violate the Charter. Jackman also comments on the media backlash to the Supreme Court’s decisions, and the appropriateness of the Courts as adjudicators of individual and democratic rights.

Legislation:

Cases:

Jurisdiction: Canada

The article reviews the stereotypes and barriers that disadvantage people with disabilities; Parliament’s choice to include disability in s. 15; the changing conception of equality from similarly situated individuals treated similarly, to the right to full inclusion and participation in society; and norms at international law. Lepofsky explains the benefits of the Andrews/Turpin approach, and notes some disturbing features of a series of cases from 1995. He reviews outcomes in various areas of disability litigation, and discusses the Eaton case in depth. While the Supreme Court’s decision in Eaton was disappointing in some respects, Lepofsky interprets it as a mixed result. [NOTE: this article is a truncated/updated version of “A Report Card on the Charter’s Guarantee of Equality to Persons with Disabilities after 10 Years”]

Legislation:

Cases:

Jurisdiction: Ontario, Canada


Pothier reviews the Eldridge decision, and comments on its implications for promoting equality of persons with disabilities. The Court’s s. 15 adverse-effects analysis rejected the able bodied assumption that the Charter was not violated because sign language interpretation was an ancillary service unavailable to everyone. Although the decision has strong equality implications, it is tempered by the Eaton decision which more closely conformed to an able-bodied viewpoint. The difference in outcome may also signal greater governmental deference if accommodating measures have been taken, as their appropriateness was considered under s. 15 in Eaton, rather than in s. 1 as in Eldridge.

Legislation:

Cases:

Jurisdiction: Canada


This article contains a comprehensive review of the Charter’s equality provision for persons with disabilities, and highlights achievements and interpretive obstacles in the first decade of Charter jurisprudence. Throughout the article Lepofsky places particular emphasis on the higher level Court decisions in Eaton, praising the analysis of the Court of Appeal, while cautiously optimistic about the Supreme Court. Lepofsky reviews the decision to include disability as a protected ground in the Charter, the Andrews/Turpin approach, and the outcomes of disability litigation in several areas (including access to education, community living, access to health care, and freedom from discrimination because of disability-based income supports). He discusses the definition of disability, adverse effects discrimination, the right to accommodation, s. 15(2) exemptions for affirmative action programs, and s. 1 analyses in disability jurisprudence. Lepofsky also makes several recommendations to clarify equality rights principles under the Andrews/Turpin approach.

Legislation:

Cases:
Various cases in areas listed above, as well as coerced sterilization, civil detention, equality for persons with disabilities in the criminal justice system, access to civil justice, and equal access to licenses.

Jurisdiction: Canada


This article reviews four s. 15 cases, and critiques the analysis and outcomes of the decisions. Pothier criticises the relevancy and s. 1 analyses in Miron and Egan because they respectively reinforce traditional anti-egalitarian viewpoints (rather than challenging assumptions underlying the legislation), and focused on objectives included in legislation (rather than the discriminatory exclusions). Pothier discusses the reluctant and confusing stance taken by the Court with respect to adverse effects discrimination (as exemplified by Thibaudeau). The
Court of Appeal decision in *Eldridge* is also surveyed as an example of adverse effects discrimination, based upon disability, which the Court had difficulty acknowledging because of able-bodied conventions, and inapplicable language concerns.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


Writing in 1996, Beatty examines the decisions of the Supreme Court of Canada in *Egan* and *Large* so as to illustrate the Court’s impoverished appreciation of equality and discrimination. According to Beatty, the underlying premise of these decisions is that the possibility of avoiding a discriminatory rule or practice does not create a legal obligation to do so. Beatty goes on to demonstrate that not only does the Court’s toleration of avoidable acts of discrimination defy common sense; it is also indefensible as a matter of law. While the Court claimed that these decisions simply followed past precedents, the author shows how this claim cannot withstand close scrutiny. [NOTE: does not specifically address disability]

**Cases:**

**Jurisdiction:** Canada

The author criticizes a feature that is common to all equality rights laws in Canada: they are premised upon a notion that equality is mere freedom from discrimination based on specified grounds. She argues that this categorical approach to equality obscures the complexity of social identity in ways that are harmful both to rights claimants and to the larger social goal of redressing inequality; it does not matter how many prohibited grounds of discrimination are included, this approach cannot adequately redress inequality. The author suggests ways of moving towards an improved model of equality rights law. [NOTE: does not specifically address disability]

**Legislation:**
[Canadian human rights laws, generally.]

**Cases:**

**Jurisdiction:** Canada


Writing in 1995, the author critically evaluates the approaches taken by members of the Supreme Court of Canada towards section 15 of the Charter in a trilogy of equality cases: Egan, Miron, and Thibaudeau. After reviewing the Court’s differing approaches to section 15 in this trilogy, the author concludes that relevance should be a key consideration when determining whether a distinction amounts to discrimination. However, the appropriate referents in the analysis is not the values underlying a law in question; the focus should be on determining whether a distinction is relevant to the set of values that underlie the section 15 equality guarantees. The author shows how this approach was, in part, espoused by certain members of the Court in the trilogy. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Canada

Robertson, Gerald B. “Discrimination” in Mental Disability and the Law in Canada, 2d ed. (Scarborough, Ontario: Carswell, 1994).
Written in 1994, this chapter provides a general overview of Canadian law with respect to discrimination on the ground of mental disability. It discusses the equality rights of people with mental disabilities that are enshrined in section 15 of the Charter, as well as general principles for determining whether these rights have been infringed. Examples are given of laws relating to mental incapacity, employment, and education, which could be challenged for violating section 15. This chapter also discusses the protections afforded by federal and provincial human rights statutes to people with mental disabilities.

**Legislation:**

**Cases:**


**Jurisdiction:** Canada


Writing in 1990, the author notes that Canada, still in the early years of the Charter era, is at a defining moment in its legal history. She maintains that in the wake of *Andrews*, Canada stands at the threshold of a new notion of equality—one that includes substantive equality of condition, acknowledges group identity and the retention of differences, and accepts that equality may in some circumstances require differential treatment. It remains to be seen, however, whether Canada will fully embrace this new vision. The purpose of this article is to examine the historical development and application of legal equality in the United States, so that Canada does not make the same mistakes. The author explains how the individualistic, sameness of treatment approach to equality in the United States has proven inadequate for ameliorating today’s conditions of inequality. She encourages Canada to continue to pursue and flesh out its alternative vision of equality advanced in *Andrews*. [NOTE: does not specifically address disability]

**Legislation:**
Cases:
Plessy v. Ferguson, 163 U.S. 537 (1896).

Jurisdiction: Canada, United States


Colvin reviews competing theories that s. 7 of the Charter permits procedural and substantive review, and argues that s. 7 protects against Charter violations of the means by which social objectives are achieved, rather than protecting the substantive objectives themselves. Colvin argues that in recent cases the Court has forged a middle path between strict procedural fairness and substantive review, although the judiciary only has authority over the legal means, rather than ends (and social objectives) of the legislation. Using Hart’s theory and terminology, Colvin suggests that the primary rules (the behavioural regulatory “ends”) rather than just the secondary rules (the “means”) can be reviewed by the court in relation to their conformity with the rule of law with respect to their ascertainability and comprehensiveness, but not with respect to their objectives. Colvin also submits that the scope of s. 7 extends beyond the regulatory and criminal context. [NOTE: does not specifically address disability]

Legislation/International Instruments:

Cases:
Reference Re s. 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486.

Jurisdiction: Canada


Writing in the late 1980s—before the Supreme Court had its first opportunity to consider the equality rights of people with disabilities—Bickenbach outlines jurisprudential developments that offer reasons for optimism and cause for concern as to whether section 15 will promote equality for people with disabilities. Bickenbach cautions that the Charter’s capacity to promote equality significantly depends on the Supreme Court’s willingness to reject a “similarly
situated” analysis and an approach that requires complainants to prove that a law is unfair or unreasonable.

**Legislation:**

**Jurisdiction:** Canada

---

**Canadian Legal Advocacy, Information and Research Association of the Disabled “The People’s Charter (The Canadian Charter of Rights and Freedoms as Interpreted by and for People with Disabilities)” (1987) 5:3 Just Cause 4.**

The People’s Charter is the product of an ad hoc group of activists who reviewed the *Charter* and translated its abstract words into language that embodies a positive understanding of what the *Charter* means for Canadians with disabilities. Pertinent *Charter* sections are presented alongside interpretations of their practical significance for disabled Canadians.

**Legislation:**

**Jurisdiction:** Canada

---

**Carver, Peter “Exploring the Potential of the Charter” (Excerpt from the research report “The Canadian Charter of Rights and Freedoms and Disabled Persons”) (1987) 5:3 Just Cause 9.**

This excerpt considers *Charter* rights other than section 15 equality rights that might be invoked to improve the lives of people with disabilities in Canada. These rights include: freedom of expression (s. 2(b)); democratic rights (s. 3); mobility rights (s. 6(2)(a)); right to life, liberty and security of the person (s. 7); right not to be arbitrarily detained (s. 9); right not to be subjected to cruel and unusual treatment (s. 12); right to interpreters for the deaf (s. 14); right to communications with federal institutions (s. 20(1)); and minority language education rights (s. 23(1) & (2)).

**Legislation:**

**Jurisdiction:** Canada
Robertson, Gerald B. “Discrimination” in Mental Disability and the Law in Canada (Toronto: Carswell, 1987).

This chapter provides a general discussion of issues surrounding discrimination based upon mental disability, while aware that other literature provides more detailed accounts. Robertson discusses mental capacity in its various legal forms (from corporate to testamentary); discriminatory legislation which authorizes paying disabled employees less than minimum wage; s. 15(1) and equality of opportunity in education; and Human Rights Legislation prohibiting discrimination in employment.

**Legislation:**
Various Human Rights Acts.

**Cases:**

**Jurisdiction:** Canada


The authors (writing in the mid-1980s) identify issues affecting people with mental/psychiatric disabilities, which are likely to be topics of Charter litigation. In particular, they consider the possibility that Charter litigation could achieve recognition of a “right to treatment.” The authors conclude that the Charter may be an important tool, not only for challenging oppressive laws, but also for achieving adequate community supports for people with disabilities.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


In this brief excerpt, the author outlines the two ways that the Charter can be used to challenge rights violations: by incorporating Charter arguments in other
actions and by initiating actions solely on Charter grounds. She contends that because the Charter is a powerful instrument for challenging coercive legislation and violations of autonomy, it has the potential to fundamentally change mental health law and the psychiatric system in Canada.

**Legislation:**

**Jurisdiction:** Canada
Federal/Provincial/Territorial Legislation


This article compares disability-rights legislation and enforcement mechanisms in three countries: Australia, Canada, and the United States. The authors examine the legislation at the constitutional, federal, and state or provincial levels in each country, and provide a comparative analysis of their legal mechanisms for promoting the rights of people with disabilities. The authors criticize the overreliance in all three countries on the individual-complaint model for rights enforcement; they urge individuals, communities, and governments to take ownership for creating an accessible society.

Legislation:
Accessibility for Ontarians with Disabilities Act, S.O. 2005, c. 11.
Disability Discrimination Act 1992 (Cth.), s. 3.
Fair Employment and Housing Act, CA Civ. Code§§ 12900-12996.
Victoria Equal Opportunity Act 1995, s. 3.

Jurisdiction: Canada, Australia, United States of America


Lepofsky recounts the history of the informal grassroots Ontarians with Disabilities Act (ODA) movement over the period from 1994 to 2003. He provides a detailed description of the changing political atmosphere; the goals of the movement; why legislation was required to remove and prevent barriers; and the campaigning lessons the movement learned. Although The Ontarians with Disabilities Act, 2001 was a disappointment in some respects (it fulfilled only 1 of the 11 principles put forward by the ODA Committee), it did contain broad definitions of “disability” and “barrier”. Lepofsky also contemplates future courses of action to strengthen the ODA.

Legislation:

Jurisdiction: Canada

The authors survey the development of the *Ontarians with Disabilities Act, 2001* (including the American precedent), and its successes and short-fallings. The *ODA* can be typified more as political rhetoric than effective barrier removal, as most provisions only call for policy and guidelines, the Act contains broad exclusionary powers, there are no duties to retrofit, and there is no enforcement mechanism to ensure compliance with the Act. The authors highlight areas for community involvement in policy decisions, interpretive conflicts with the *Human Rights Code*, and methods to challenge inaction (or interpretations that promote inequality) under the *ODA* by means of the *Charter, Code*, and judicial review.

**Legislation:**

**Jurisdiction:** Ontario

---


Mosoff analyses the results of human rights decisions from four jurisdictions to determine who was winning what kind of cases, and why. The most striking of Mosoff’s findings include that while women file fewer complaints than men, they are more successful; individuals with severe disabilities file fewer complaints; stereotypes factor in decision making; complaints of discrimination based on disability combined with another ground were more favourable; and familiar situations with inexpensive remedies were more successful than generalised, systemic complaints with costly remedies. Mosoff notes the lack of data on complaints that were settled or dropped in advance of litigation.

**Legislation:**

**Cases:**
Various *Charter* and human rights cases.

**Jurisdiction:** British Columbia, Ontario, Nova Scotia, Canada (Federal)

In this keynote address Madam Justice L’Heureux-Dubé argues that contrary to popular opinion, protecting equality rights can be justified by a cost analysis as inclusive measures increase the labour market’s economic potential. Dignity encompasses both rights and responsibilities, and the costs of inclusion should not justify excluding individuals from participation in society. L’Heureux-Dubé also explains the importance of Human Rights Commissions in the equality process.

Jurisdiction: Canada


Writing in 1993, Taylor provides an overview of Alberta’s human rights legislation, namely the Individual Right’s Protection Act. She begins by outlining the intent of this legislation and the jurisdiction/role of the Alberta Human Rights Commission. She then considers what constitutes a prima facie case of discrimination under the legislation, as well as defences that are available to respondents. She discusses the scope of the legislation’s application, the prohibited grounds of discrimination, and the different types of discrimination (i.e. direct discrimination and adverse impact discrimination). Finally, Taylor considers the emerging law on the duty to accommodate and its application to cases involving disability.

Legislation:

Cases:

Jurisdiction: Alberta

Writing in the mid-1980s, Lemonde discusses the Québec Charter’s capacity to protect the equality rights of people with disabilities. After considering the distinctive features of Québec’s human rights system and statistics on the nature of the complaints being filed, she details the failures of the judiciary to employ broad and liberal interpretations of the Québec Charter’s principles. She concludes that the Québec Charter is an essential instrument for protecting the equality rights of people with disabilities, and urges that it be used to its full potential.

Legislation:

Cases:
Que (Commission des droits de la personne) v. Société d’Ingenierie Combustion Ltée (Settled out of Court).

Jurisdiction: Québec
Gender


Sampson discusses how globalisation and privatisation affects the economic inequalities experienced by women with disabilities. As corporations take on responsibilities traditionally associated with government, democratic citizenship is replaced by consumerism, which adversely affects low-income individuals who cannot participate with the economic force of their advantaged counterparts. Changes to Employment Insurance entrench full-year employment as necessary for benefits, yet women with disabilities are the least likely to be engaged in this type of employment. The most disadvantaged individuals are blamed for their exclusion, rather than pointing to systemic exclusions which threaten the very autonomy of women with disabilities. Future priorities for women with disabilities are also suggested.

Legislation:

Jurisdiction: Canada


This report focuses on women with disabilities, the women who provide caregiving supports to them, and how equality can be fostered in this relationship. As contextual background to the report, the authors review feminist and disability theory before discussing statistics, policy, and profiles of the women who participated in case studies and focus groups. The report develops new approaches to equality centred on equality of well-being, and six factors: promoting self-determination; fostering mutual recognition; encouraging respectful interdependence; ensuring security; democratizing the decision-making process; and promoting citizenship. Analysis of inequalities in the caregiving relationships, factors that promoting equality, and possible policy directions are also included.

Jurisdiction: Canada


Doucette surveys statistics that demonstrate the disproportionate poverty experienced by women with disabilities, and the double oppression they
experience on these grounds. She encourages participation and organization of
women with disabilities to decrease poverty.

**Jurisdiction**: Canada

---


Sampson critiques the Law test’s comparator group and dignity analysis components, and the complications they pose for equality claims from a gendered disability perspective, as is typified by *Auton*. In the comparator group analysis emphasis is placed on the difference between the claimant and the dominant norm, rather than on the inequality and disadvantage the claimant experiences. Sampson argues that the focus on legislative purpose in the dignity analysis is better suited to s. 1, rather than to s. 15 violations. The subjective component of the test is also problematic, since not all claimants display victimhood, and the objective component reinforces dominant norms. In *Auton* the Court unilaterally changed the comparator group, and, discouragingly, failed to address the issue of gendered disability inequality.

**Legislation/International Instruments:**

**Cases:**

Various cases elaborating on the Law test.

**Jurisdiction**: Canada

---


Building on feminist and disability scholarship, the authors discuss the relationship between law, policy, and personal identity. Focus groups were
conducted with women who experience disability on topics such as socio-economic concerns and health issues. Despite legally required confidentiality, the privacy rights of women who experience disability are frequently violated. This is especially true when benefits programs use the medical model of disability and compel disclosure of medical and financial information to confirm benefits and detect fraud. Women who experience disability often also experience poverty, making them vulnerable to income assistance cutbacks, and the opinions of medical professionals (which are often less informed than those of individuals living with disabilities).

**Legislation/International Instruments:**

**Cases:**

**Jurisdiction:** Ontario, Canada
Children


The author notes that, despite the establishment of an array of constitutional and statutory human rights, exclusion from full participation in society persists for many groups including children with disabilities. He outlines the limitations of existing legal mechanisms for promoting social and economic rights, and he argues that institutionalized rights on their own are not sufficient to ensure inclusion and valued recognition. The author calls for a social inclusion public agenda to foster social solidarity and promote a culture where all people are equally valued.

**Cases:**


**Jurisdiction:** Canada


Richler considers reports of the government of Canada on the *Convention on the Rights of the Child*, and its assertion that the *Charter* is the basis for children’s rights in Canada, as compared to the lived experience of children with disabilities. She relates inequitable treatment of children with disabilities in the areas of health care (where children with disabilities have been refused treatment resulting in death); education (non-inclusive education); non-consensual sterilization of minors; access to the courts and protection from unusual treatment; immigration (being denied access to the immigration process); and abortion (as it has been suggested foetuses with disabilities may be aborted later in a pregnancy than “healthy” foetuses).

**Cases:**


**Jurisdiction:** Canada
Social and Economic Rights


The Draft Social Charter was written with the input of various anti-poverty groups and constitutional experts during the Canadian constitutional negotiations of 1992. It includes the right to an adequate standard of living, comprehensive health care, public education, access to employment, and just and favourable conditions of work including collective bargaining rights. Cost sharing programs and special attention to traditionally disadvantaged groups are also contemplated. The Charter requires that a Social Rights Council and a Social Rights Tribunal be established to assess compliance with, and hear complaints of unfair treatment under, the Social Charter. Environmental rights are also included.

Jurisdiction: Canada.


Porter discusses the power struggle between the provincial and federal governments over standards and principles in social and economic programming that neglects the voices of the disadvantaged and the democratic human rights basis that should be involved in the decision making process. Governmental “Social Union” proposals involve “commitments”, not “rights”, and Porter reviews the “Alternative Social Charter” as a tool to guarantee rights. Porter enunciates key Social Charter principles as: referencing international human rights instruments, the indivisibility of human rights, the primacy of human rights over corporate rights, and joint responsibility between the federal and provincial governments. Concerned with the “Americanization” of Canadian political culture, Porter suggests it is time for a consolidated social rights movement. [NOTE: does not specifically address disability]

Cases:

Jurisdiction: Canada

The author considers the ongoing debate about the status of social rights: do social rights qualify as human rights? This debate has focused heavily on the ways that social rights are said to differ from political rights with respect to costs, universality, and the correlativity of rights and duties. In this article, the author explores the veracity of these alleged differences and the cogency of the arguments to which they have given rise. The author maintains that while there are differences between social and political rights, these differences are of degree and not of kind. Thus, social rights have the essential features of human rights and should be recognized as genuine human rights. [NOTE: does not specifically address disability]

**Legislation:**

**Jurisdiction:** N/A
The Canadian Charter of Rights and Freedoms


The authors provide an overview of social and economic rights protections in Canada, with a particular focus on how the courts are interpreting and enforcing these rights. They identify the Charter and international human rights law as sources of socio-economic rights protections, and discuss the developing jurisprudence. After examining the approach that the courts are taking toward balancing competing interests, placing justifiable limits on rights, and imposing positive and negative obligations on government, the authors canvass the jurisprudence on the principle areas of socio-economic rights litigation, including: housing rights, health rights, the rights to an adequate standard of living and social security, the right to work, and the right to education. [NOTE: does not specifically address disability]

Legislation:

Cases:
Newfoundland (Treasury Board) v. NAPE, [2004] 3 S.C.R. 381.
Alcohol Foundation of Manitoba et al. v. Winnipeg (City), (1990) 6 W.W.R 232 (Man. CA).

Kinsella contends that the time has come for Canada to adopt a social charter. After considering the development of social rights in Canada, and past proposals for a national social charter, he proposes a model for its implementation in Canada. Anticipating significant opposition to constitutional entrenchment, Kinsella proposes that a social charter should take the form of a federal-provincial agreement, or in the alternative, federal legislation. In terms of content, he argues that the *ICESCR* should serve as the minimum standard of rights. Finally, he rejects judicial enforcement of the social charter in favour of social auditing; an Office of the Social Auditor could enforce the charter by responding to government reports with recommendations for improving compliance. [NOTE: does not specifically address disability]

**Agreements:**

**Legislation:**
*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11, s. 36.

**Jurisdiction:** Canada


This article reports the results of the authors’ empirical research on the social/economic rights jurisprudence. The authors reviewed all Canadian cases over the past 15 years in which the courts addressed a section 7 and/or 15(1) claim for a publicly funded benefit. The study’s goal was to determine whether the jurisprudence is evolving toward or away from recognition of rights to state funding (in general and in the context of particular benefits). The authors found that the frequency of these claims and their rate of success (about one-third of cases) have remained relatively consistent over time. Section 15 has been used more often, and with more success, than section 7, which has only been used
successfully for claims to state-funded legal counsel. At a more theoretical level, the authors distinguish between claims of “access” to existing public benefits, and claims of “entitlement” to benefits themselves. They conclude that the jurisprudence reveals no progress toward recognition of rights of entitlement. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**
*G. (J.) v. New Brunswick (Minister of Health and Community Services), [1999] 3 S.C.R. 46.*

**Jurisdiction:** Canada


Brodsky discusses a robust reading of the Charter, guaranteeing an adequate standard of living to Canadians, and the obstacles to this interpretation. Judicial preference for Classical Constitutionalism is ill suited to claims of substantive inequality, and creates a barrier to these claims. At the same time the government subverts rights by inadequately funding civil legal aid (thus restricting anti-poverty claims), and arguing against international obligations to social and economic rights in Constitutional litigation (while claiming compliance with these rights on the international stage). Increased government leadership, national standards, and commitment to public services, are means to recognizing social programs as components of Charter rights. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Canada

Buckley examines the challenges of anti-poverty advocacy, and test-case litigation enlarging the scope of legal aid. Buckley suggests the use of a principled analysis focusing on the seriousness of the interest at stake in civil and criminal matters. She argues that the right to counsel inheres to the rule of law as a Constitutional principle; that international human rights obligations demand equal access to justice; and that s. 7 and s. 15(1) of the Charter require non-discriminatory access to legal aid when liberty is engaged. Buckley provides a framework to establish discrimination against the poor in legal aid regimes, and methods to fashion responsive remedies. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


McIvor describes Aboriginal women’s struggles to achieve recognition of their sex equality rights through litigation. She outlines Aboriginal women’s challenges—both before and after the advent of the Charter—to the Indian Acts’ discriminatory provisions, as well as Aboriginal women’s efforts to achieve matrimonial property rights and recognition of their right to participate in decision making. McIvor contends that success in these struggles is not contingent upon the outcomes of court cases; instead, success is manifest in the willingness of Aboriginal women to stand up for their rights and take advantage of various avenues for promoting equality. Therefore, despite numerous adverse court rulings, McIvor maintains hope that justice will be done for Aboriginal women in Canada. [NOTE: does not specifically address disability]

Legislation:
Indian Act, R.S.C. 1985, c. I-5.

Cases:

Jurisdiction: Canada


Norman discusses liberal democratic theory and John Rawl’s concept of “justice as fairness” with Charter values. In particular, Norman contends that fundamental social institutions as a Charter value are akin to Rawlsian background institutions which support the social inclusion of disadvantaged individuals. Case law demonstrates that the Court tends to find Charter violations when fundamental social institutions experience "rollbacks", leaving vulnerable individuals unable to participate equally in society. By understanding the Gosselin decision as narrowly limited to the facts of the case, Norman contends that Rawlsian concepts may yet provide a useful framework for finding welfare a fundamental institution, and rollbacks as Charter violations. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada
This article explores how the domestic recognition/enforcement of socio-economic rights, together with civil and political rights, may prevent the use of the latter to thwart government efforts to promote social objectives; enhancing the status of social and economic rights may legitimize acts of social reform and insulate these measures from being defeated for their interference with civil liberties. The author considers the significance of health-related rights in the South African Constitution for enabling government to facilitate access to health services in spite of their infringement on civil liberties. She explores the possibility that the outcome in Chaoulli might have been different if socio-economic rights had greater status in Canada. [NOTE: does not specifically address disability]

Legislation:

Cases:
Tshabalala-Msimang 2005 (2) SA 530 (C).

Jurisdiction: Canada, South Africa


Porter’s article surveys the victories of anti-poverty litigation not in their outcomes, but in the recognition that anti-poverty claims deserve adjudicative space. The Finlay and Gosselin cases are heralded as triumphs not because of their substantive results, but because both affirmed that claims to economic rights can be heard in Canadian courts without denying that claims to positive rights may later succeed. Porter also points to societal and governmental attitudes and policies which view economic rights as undeserving of adjudicative attention, and the need for anti-poverty litigants to focus on the Charter since the repeal of the Canada Assistance Plan. [NOTE: does not specifically address disability]
Legislation:

Cases:

Jurisdiction: Ontario, Canada


According to Pothier, despite the Supreme Court of Canada’s express recognition of the need to understand the claimants’ perspective in determining whether section 15 equality rights have been violated, in matters of poverty and disability, the Court has denied the legitimacy of these perspectives by applying “paternalistic assumptions” and “community prejudices.” Pothier discusses two cases, *Eaton* and *Gosselin*, to demonstrate that the Court’s acceptance of these discriminatory premises, itself, is harmful to human dignity, and perpetuates inequality.

Legislation:

Cases:

Jurisdiction: Canada


Shaw argues that one of the primary reasons courts do not protect welfare rights is because of the prevailing neo-liberal political climate that has defined poverty as a failing of the individual, rather than as a failing of society. This ideology, and its democratic support, is the underpinning of the court’s refusal to recognise positive rights to welfare. Shaw theorizes that without democratic support, any judicial affirmation of positive rights would go largely unimplemented. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada, United States of America


This article contextualizes the Supreme Court of Canada’s decision making within constitutional culture—norms and values that reflect foundational organizing principles of law and society. After explaining how media provide an outlet for these views, the author assesses the correlation between judicial reasoning in Gosselin and the views expressed in the media reports on the case. Based on the Court’s frequent recourse to “common sense,” and the correlation between the majority ruling and the views in the media, the author argues that the Court opted not to take a leadership role, but rather to express the existing social consensus on the issues. He concludes, therefore, that the Court is unlikely to promote an interpretation of the Constitution favourable to social rights without clear direction from political leadership. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


Wiseman argues that Canadian judges are neglecting to probe into the breadth of the institutional competency, and in response are miscalculating their competence and over-estimating their perceived incompetency. He surveys the leading competency concerns in Charter adjudication (evaluating social science research, and weighing competing interests) and the courts response to them through injusticiability, deference, or remedial restraint. Wiseman frames Charter jurisprudence by forming a series of questions, and uses them to assess
competency with reference to academic and judicial analysis of these concerns.
[NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


Young examines the juncture between legal activism and Charter scepticism. She notes the shift in focus from substantive to formal equality, the change in political climate (with increased emphasis on individual resources, and lack of concern for the just distribution of resources) and resistance to social justice interests. Citing *Gosselin*, Young voices concerns about the Law analysis including: judicial unease with benefit provisions, the focus on individual dignity without the broader group context, and the failure to adopt an intersectional analysis. While Young does not come to a definite conclusion about the usefulness of rights litigation for social change, she reiterates the importance of critiquing the process. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


The author notes that although legal principles and norms are instructive for determining the justification, coherence, and legitimacy of government policy, legal considerations are rarely considered in the early stages of policy development. She maintains that legal principles and norms should be continually analyzed and “front-loaded” into government policy-making; they are valuable resources that can inform the direction, legitimacy, and viability of policy choices. In particular, she considers the significant value of integrating legal considerations—particularly considerations of the *Charter*, human rights
norms, and international law—into the early stages of policy development with respect to issues of poverty. [NOTE: does not specifically address disability]

**Legislation:**
[International human rights law, generally]

**Cases:**
*Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 49 O.R. (3d) 564 (C.A).
*Polewsky v. Home Hardware Stores Ltd.* (2003), 60 O.R. (3d) 600 (Div. Ct.).

**Jurisdiction:** Canada

---


Jackman responds to the argument, often heard from *Charter* critics, that *Charter* challenges of government laws and policies undermine democracy. She contends that *Charter* challenges in poverty litigation are responses to governments’ failure to respect the rights of low-income Canadians who are largely excluded from the political arena; thus, *Charter* challenges are a legitimate and necessary mechanism of government accountability. Jackman argues that the current use of the *Charter* must be expanded; the Charter should be used, not only as a judicial remedy, but also as a mechanism to directly resolve the failures of Canada’s political system. [NOTE: does not specifically address disability]

**Legislation:**

**Jurisdiction:** Canada

---


This article surveys the composition of the *Charter* equality guarantee, the lobbying of various groups to change the wording, and their expectations that the *Charter* would positively ensure equality and protect social and economic rights. Canada’s concept of equality is unique in that it incorporates both social rights and international human rights elements. Porter examines the high points
of s. 15 litigation, and interprets this success as a result of the positive approach to social rights. He sees the Auton case as a signal that the court is restricting the positive approach to s. 15, and creating a wider gulf between the Canadian vision of equality and the Court's interpretation of the guarantee. [NOTE: this article is an edited version of Porter’s “Twenty Years of Equality Rights: Reclaiming Expectations”]

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


Wiseman observes that Canadian courts have been reluctant to interpret and apply the Charter so as to impose anti-poverty obligations upon governments. He considers one argument, offered by judges and academics, to justify this reluctance: courts lack the competence to adjudicate anti-poverty claims. Wiseman critiques the “anti-poverty incompetence argument,” finding it to be out of step with the overall jurisprudential developments on competence concerns in Charter adjudication. The jurisprudence, he argues, does not justify greater limitations on the scope of Charter protection for poverty claims than for other types of claims; rather, it supports the judiciary in finding ways to manage the challenges or build competence. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

Bryden critiques the Supreme Court of Canada’s jurisprudence with respect to the application of section 7 of the Charter outside the criminal law context. The Court has set boundaries of judicial review by severely restricting the meaning of “liberty” and “security of the person.” The Court’s failure to offer compelling reasons why these terms are limited in particular ways encourages ambitious claims that exceed the proper scope of section 7. Bryden argues that a better approach to limiting judicial review with respect to section 7 was suggested by Professor Eric Colvin, who contended that the types of interests protected by section 7 are those interfered with through the interaction of individuals with the legal system, and that “the principles of fundamental justice” require governments to comply with accepted legal norms. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada

Porter examines the need to read the Charter correctly to encompass social and economic rights, versus needing to rewrite the Charter to include these rights. The discussion is contextualised by commenting on the increased poverty and homelessness since the Charter’s conception, and international obligations and adjudication surrounding social and economic rights. Reading the Charter in the international context, combined with Constitutional obligations to provide reasonable public services, is indicative that social and economic rights are intertwined with the Charter’s individual rights guarantees. Porter remained hopeful the Supreme Court would affirm the claim in Gosselin. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


Porter reviews the status of social and economic rights under the Charter. Noting that these rights are not explicitly included in the Charter, Porter examines two broadly framed sections that have significance for social and economic rights: sections 7 and 15. He discusses positive jurisprudential developments for protection of these rights, highlighting the Supreme Court’s rejection of the following arguments often used to defeat them: social and economic rights are not judiciable, the courts should not interfere with resource allocation, and the Charter does not impose positive obligations on government. Despite these positive developments, Porter notes that expectations that the Charter would guarantee substantive equality and require governments to meet their obligations under international human rights law have not been realized. Porter, nevertheless, concludes that poverty should continue to be challenged using a human rights framework. [NOTE: does not specifically address disability]

Legislation:
[International human rights legislation, generally]

Jurisdiction: Canada


The authors note that whereas front-line decision makers in social welfare often treat guidelines, directives, and other forms of “soft law” no differently than statutes or regulations, courts tend to perceive a sharp division between policy and law, the later regarded as a matter for the judiciary and the former considered to be the business of government bureaucracy. The authors discuss the various myths and false dichotomies which characterize the judicial conception of discretionary decision-making and judicial supervision of administrative decision-making in the social welfare context. They recommend ways of moving beyond these untenable dichotomies in order to make public law more relevant and responsive to the realities of administrative discretion in social welfare. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


Porter reviews the expectations of the s. 15 Charter guarantee by various equality seeking groups (such as Women, Gays and Lesbians, Aboriginals, and Persons with disabilities), from the wording of the section, to the consultation on its implementation by the Boyer Committee. Their equality perspective uniquely encompassed the expectation social rights would be protected, that positive rights would be enforced, and that the government would aid groups in their equality challenges. While there have been some victories, Porter points to governmental opposition and inaction towards equality claims, and the Court’s decision in Auton, as troubling developments. Porter also suggests administrative tribunals as a new venue for Charter jurisprudence.

Legislation:

Cases:

Jurisdiction: Canada


The author considers the potential usefulness of section 7 of the Charter for advancing social and economic rights in Canada. First she addresses the jurisprudence on section 7 to demonstrate that doctrinal considerations do not preclude interpreting section 7 to encompass protection for these rights. She then responds to oft cited concerns about the justiciability of social and economic rights, noting that these concerns apply no less to civil and political rights. Finally, she considers the larger political climate in which the debate over social and economic rights is situated. She concludes that it is the prevailing neo-liberal ideology, hostile to the foundations of social and economic rights, that makes section 7 an unlikely instrument of redistributive justice in the near future. [NOTE: does not specifically address disability]

Legislation:

Cases:
Grootboom v. Oostenberg Municipality (17 December, 1999) 6826/99 (High Court of South Africa, Cape of Good Hope Provincial Division).

Jurisdiction: Canada


Jackman responds to the criticisms of opponents of the “Court Party”, who claim litigation is being used undemocratically to promote the values of the few against the opinions of the majority. She argues that Charter litigation by low income individuals is not a means to by-pass Parliamentary democracy, but to enforce rights underlying democratic values in a political system that largely discounts their interests. [NOTE: does not specifically address disability]

Legislation:

Cases:
Various cases that show the limited success in anti-poverty litigation.

Jurisdiction: Canada


Cowper criticises/assesses the Courts’ decisions in Auton regarding whether the government of British Columbia’s failure to provide Lovaas treatment to children with autism was discriminatory. Cowper critiques the Court’s retreat to formal equality, choice of comparator group, and focus on fiscal concerns. The author surveys numerous equality decisions to determine how s. 15 social program cases are treated. While the character of the social program itself is not determinative of the outcome of the decision, the underlying social policy behind a program is conceptually relevant. The Court appears to view blanket exclusions in universal programs unfavourably even where they are logically based, and is generally responsive to rational governmental balancing of interests.

Legislation:
Cases:

Jurisdiction: Canada


This article considers the status of positive social and economic rights under section 15 of the Charter, and the application of these rights in promoting substantive equality for people with disabilities. The authors argue that in order for section 15 to have relevance for persons with disabilities, the right to equality must encompass the “disability-related values” of inclusion, independence, and inherent dignity. Writing in 2004, the authors emphasize the significance of the Supreme Court’s pending Auton decision.

Legislation:
Canada Health Act, R.S. 1985, c. C-6.


Cases:


Jurisdiction: Canada


The author surveys the decisions of the Supreme Court in Gosselin. She examines the Court’s analysis of section 45 of the Québec Charter and sections 7 and 15 of the Canadian Charter, contending that the Court’s treatment of section 7 of the Canadian Charter allows for “cautious optimism” about future enforcement of economic and social rights. She supports her position by noting
general agreement among the Justices that section 7 might protect economic rights, apply outside an adjudicative context, impose positive state action, and be justiciable. The author concludes by considering how courts in South Africa and the United Kingdom have responded to situations that are similar to *Gosselin*. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**
*Grootboom v. Oostenberg Municipality* (17 December, 1999) 6826/99 (High Court of South Africa, Cape of Good Hope Provincial Division).  

**Jurisdiction:** Canada, South Africa, United Kingdom

**Porter, Bruce. “Poverty and the Courts” (Keynote Address by invitation of the National Judicial Institute to Judges of the Ontario Superior Court: Niagara Falls, May 7, 2004)**

Porter argues that the judiciary’s treatment of poverty, as being a matter outside its jurisdiction, is incompatible with fairness and impartiality. He highlights that poverty-related matters are outcomes, not just of social and economic forces, but also of how the judiciary balances and interprets rights. Porter contends that the Supreme Court has laid the foundations for re-valuing the rights of the poor; the lower courts, which interact with people living in poverty on a day-to-day basis, have a duty to apply these principles in ways that fulfil their responsibility to all Canadians. [NOTE: does not specifically address disability]

**Legislation:**
[International human rights legislation, generally]

**Cases:**
*Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481.
Finlay v. Canada (Minister of Finance), [1993] 1 S.C.R. 1080.

**Jurisdiction:** Canada


In Gosselin, the majority of the Supreme Court of Canada held that the applicant failed to present sufficient evidence showing that the impugned social assistance legislation had a discriminatory purpose or harmful effects. Thus, they held that the legislation did not violate the Charter. In this case comment, Brodsky questions the majority’s evidentiary ruling. She argues that it rests upon negative stereotypes of poor young adults who receive social assistance. She also explains how the majority’s approach to poverty and Charter rights was flawed. In response to the Court’s mention of its concern with promoting the autonomy of young social assistance recipients, Brodsky argues that to deny adequate social assistance, when there is an absence of decent available employment, is neither autonomy promoting nor humane. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


The author contends that institutional boundaries that limit courts’ powers have the effect of protecting the legitimacy of judicial review. Accordingly, he expresses concern about the Supreme Court’s tendency in “positive rights” Charter cases to subordinate considerations of institutional boundaries to those of the substantive merits of claims. The author reviews the status of institutional boundaries in the pre-Gosselin jurisprudence and then highlights the Court’s
failure in Gosselin to consider institutional issues. He concludes by explaining why institutional considerations should always inform the judiciary’s analysis of positive rights and obligations under the Charter. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


The author considers three plausible “nonsubstantive” objections to conferring constitutional status upon social and economic rights. He notes the most frequently raised objection—that the judiciary lacks competence to address these matters—is overstated. Thus, he focuses on the remaining two objections: the democratic objection (it unduly impairs democracy) and the contractarian objection (it hinders a constitution’s ability to legitimize coercive political and legal orders.) According to the author, the weight of these objections varies depending on the extent to which rights are constitutionalized. Furthermore, he maintains that the contractarian objection is manageable regardless of the extent to which these rights are guaranteed. He also contends that the extent to democracy is impaired ultimately depends on how democracy is defined. [NOTE: does not specifically address disability]

Cases:
Bates v. Dir. of Campaign & Political Fin., 763 N.E.2d 6 (Mass. 2002).
Government of Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC)

Legislation:
Constitution of the Commonwealth of Massachusetts, amend art. XLVIII.

Jurisdiction: N/A (But uses South Africa and Massachusetts cases as examples)


The author outlines two visions of democracy: liberal democracy, which emphasizes individual freedom and the free market economy, and social democracy, which aims to balance freedom with equality and subjugates capitalism to democratic principles. Although liberal democracy enjoys preeminence in the western world, social democratic values are enjoying a revival at a grass-roots level. Because of government resistance to the latter vision, proponents of social democracy are pursuing constitutional rights as a way to democratize the economic realm. The author critically analyses this strategy and concludes that normative constitutional argument holds little promise for advancing social equality; coalition building and political mobilization are more viable strategies for achieving social justice. [NOTE: does not specifically address disability]

Cases:
Lüth (1958) 7 BVerfGE 198.

Jurisdiction: North America, Europe


Parkes discusses the emerging Charter jurisprudence and theory on social and economic rights. After providing an overview of 3 recent social and economic rights cases, Parkes examines the obstacles facing social and economic rights claimants, and discusses how recent developments have, in part, addressed them. These obstacles include concerns with respect to the justiciability of social and economic rights claims, the judiciary’s capacity to adjudicate these claims, and the desirability of judicial deference to governments in matters of social and

The author reviews the Supreme Court of Canada’s decision in Gosselin and considers the effect of this judgment for the future of social and economic rights in Canada. He contextualizes the Gosselin decision within a series of cases, grounded in section 7 of the Charter, which show the courts’ resistance to recognizing that governments have an obligation to protect their most disadvantaged citizens. The author concludes that the dissenting judgments of Justices Arbour and L’Heureux-Dubé offer hope for future poverty-law adjudication because they acknowledge that section 7 imposes a positive duty on governments to guarantee a basic means of subsistence for their citizens. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


The authors argue that poverty is an issue of gender inequality and that systemic discrimination is responsible for women’s disproportionate experience of poverty. They consider two arguments that are often used to defeat poverty-related Charter challenges, namely that the Charter is a bill of negative rights and that social and economic rights are not justiciable. The authors contend that these arguments are based on an out-dated constitutional paradigm and are
inconsistent with the Supreme Court’s jurisprudence on substantive equality. They also maintain that substantive equality requires governments to take positive remedial steps to address women’s poverty. [NOTE: does not specifically address disability; however, the authors’ arguments may be used to demand economic equality for people with disabilities.]

**Legislation:**


**Cases:**


**Jurisdiction:** Canada

---


The author traces the evolution of child welfare law in Canada so as to explain the implications of the Supreme Court of Canada’s decision in *G.(J.)* for women in the Canadian political order. She acknowledges that, in one sense, the decision is a victory for disadvantaged women facing the apprehension of their children: the Court held that section 7 of the Charter protects parental rights and may sometimes require the provision of publicly funded legal aid in these situations. However, the author cautions against being overly optimistic. In keeping with the current neo-liberal climate, the Court framed these entitlements in classical liberal terms; its concern was with individual sovereignty and self-reliance, not with entitlement to state support. Thus, while recognizing *G.(J.)*’s commendable achievement, the author warns that this decision reinforces jurisprudential barriers to welfare rights under section 7. [NOTE: does not specifically address disability]
Legislation:

Cases:

Jurisdiction: Canada


Martin provides a thorough overview of the Supreme Court of Canada’s approach to equality rights under s. 15. The evolution of the s. 15 equality test and its various elements are explained and assessed in detail, as is the s. 1 Oakes test which permits reasonable limitations on rights and freedoms. Features that affect the balancing of breaches of equality (such as human dignity, the rejection of irrelevant personal characteristics, and the importance of a contextual approach) are also critiqued. Martin concludes with observations on a principled approach to balancing equality rights and social goals. Two Appendices contain tables which categorise forty-four s. 15 cases decided by the Supreme Court at the date of the article’s composition (although cases in which equality rights were pleaded and not relied upon in the Court’s decision were excluded). [NOTE: does not specifically address disability]

Legislation:

Cases:
Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358.
Various other s. 15 and s.1 decisions.

Jurisdiction: Canada


Wiseman reviews and critiques Lorne Sossin’s analysis of the law of justiciability in Canada, and the principle that courts should not adjudicate cases beyond their capacity. He identifies areas justiciability jurisprudence is in need of restructuring—primarily Lower Court decisions in socio-economic and poverty related claims which neglect to take into account international trends in social and economic rights litigation, Sossin’s analysis, and Supreme Court jurisprudence. Wiseman credits Sossin’s contribution, but rejects the distinction between injusticiability and deference (at the s. 1 and remedial stages of Charter analysis), stating that injusticiability should only be considered if the degree of judicial incapacity is too great to be managed by deference. [NOTE: does not specifically address disability]

Legislation:

Cases:
The “Labour Trilogy” (Reference Re Public Service Employee Relations Act (Alta.), Public Service Alliance of Canada v. Canada, and Saskatchewan v. Retain, Wholesale & Department Store Union et al.) Various cases on s. 1 deference.

Jurisdiction: Canada

Farrell maintains that the state of social and economic injustice in Canada is worsening. He argues that governments encourage poverty by failing to enact remedial legislation and also by enacting legislation that reduces the ability of Canadians to realize their social and economic rights. Farrell identifies class bias as a significant barrier to combating poverty: most middle/upper income Canadians do not recognize social and economic rights as human rights that are essential for a healthy democracy. Farrell asserts that governments have an obligation to enact legislation to promote respect for social and economic rights, and he argues that governments should involve lower-income Canadians in the legislative process. [NOTE: does not specifically address disability]

**Legislation:**

**Jurisdiction:** Canada

---


Jackman responds to criticisms that are raised against judicial recognition/enforcement of social and economic rights. She argues that these criticisms are based on a false distinction between social/economic rights and “classical” rights; that they falsely dichotomize social/economic rights and democracy, and that social and economic rights claims do not challenge judicial competence more than other areas of legal decision-making. Jackman concludes that judicial recognition of social and economic rights can serve to effect social change; moreover, it can ensure that the Constitution embodies the values and aspirations, not just of the advantaged, but of all Canadians. [NOTE: does not specifically address disability]

**Legislation:**

**Jurisdiction:** Canada

---


Writing in the late 1990s, Keene observes that people who are affected by severe cutbacks to social programs are turning to the courts as their last resort. Persons who are most affected by government slashes to social services are becoming increasingly desperate, yet they have no recourse to the democratic process. While Charter claims in response to these cutbacks are a logical development of the guarantees therein, they have met with little success. Keene argues that this lack of success does not speak to the legal validity of the claims;
rather, it results from government misrepresentations and the factual misunderstandings that this engenders. She explains how lower court decisions, with respect to constitutional challenges to cutbacks, have been largely inconsistent with the Charter jurisprudence of the Supreme Court of Canada. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


Writing in 1998, Young discusses the two most recent equality decisions released by the Supreme Court of Canada: *Eldridge* and *Vriend*. She explains how the Court, to some extent, advanced a more expansive approach to the Charter’s equality provisions. First, the Court was willing to find government action (to ground the Charter’s application) in instances where the action was more subtle than in previous cases. Second, the Court accepted that discrimination can exist where harm results from government failure to respond to, or accommodate, a pre-existing condition. Nevertheless, Young cautions against being overly optimistic that these decisions signal the Court’s departure from a restrictive and conventional approach to equality.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


Bakan discusses the nature of the Charter equality right, and explains why, because of the “ideological form of rights”, equality litigation is largely ineffective against the causes of social inequality. The ideological form of rights views
social conflict as a battle between “duty-holders” and “rights-bearers”, divorced from structures that construct inequality (greatly reflected in the capitalist system). Given this framework, whether the Courts view the Charter as imposing traditional negative or expanded positive rights, the underlying causes of inequality will go unaddressed. While acknowledging progress under Charter litigation, Bakan adds caveats to its overall efficacy. He also critiques the “ideological form of rights”, but suggests a reinterpretation of liberal rights discourse alone is insufficient given the external socio-political context. [NOTE: does not specifically address disability]

**Legislation/International Instruments:**


**Cases:**


Various other cases dealing with constitutional issues are mentioned, but not discussed in detail.

**Jurisdiction:** Canada

---


In *Oakes*, former Chief Justice Dickson prefaced his discussion of the elements of a section 1 Charter analysis with a reminder of the dual purposes for which the Charter was created: to protect individual rights and to promote democracy. Since Oakes, courts have largely failed to appreciate that judicial rights review is a mechanism that can be used to enhance democracy; thus, their concerns with upholding democracy have resulted in excessive judicial deference, particularly in matters of social policy. In this article, Jackman argues that the courts should stop ignoring the democracy-related objectives of the Charter. Courts should carefully weigh the democratic potential of human rights guarantees against the democratic quality of government decisions that undermine these rights before determining whether the government action can be justified in a free and democratic society. [NOTE: does not specifically address disability]

**Legislation:**

*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ss. 15 & 32(1).*

**Cases:**


**Jurisdiction:** Canada

Pothier explores the Charter’s application in the context of legislative silence: can the Charter be used to challenge what the legislature has not said? Writing in 1996, Pothier critically considers how two Courts of Appeal dealt with this issue in the context of section 15 equality challenges: the Alberta Court of Appeal in Vriend, and the British Columbia Court of Appeal in Eldridge. She explains how in both of these cases, legislative silence “spoke loudly and clearly;” they illustrate that there is no sharp distinction between what a legislature says and what it declines to say. Thus, when a legislature has occupied a field, but declines to address a particular area, the impact of this silence should be subject to Charter scrutiny. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


The authors survey many aspects of poverty law in Ontario from 1993-1994, including: current issues in social assistance and legislative changes, worker’s compensation, legislative and litigation issues in unemployment insurance, restructuring and litigation developments involving the CPP, legislative developments related to housing, social welfare regimes and the Charter, and Human Rights Law developments. The focus of the article is on the developments that will affect the beneficiaries of these programs. The review has a special emphasis on reforming social policy, as most of the legislation and programs discussed were undergoing a period of review. Notably, an Ontarians with Disabilities Act was tabled in May, 1994.

Legislation:
Canada Assistance Plan, RSC 1985, c. C-I.
Canada Pension Plan, R.S.C. 1985, c. C-8, as amended.
Employment Equity Act, S.O. 1993, ch. 35.
Landlord and Tenant Act, R.S.O. 1990, c. L-7 as amended.
Occupiers Liability Act, R.S.O. 1990, c. 0-2.
Ontario Human Rights Code, R.S.O. 1990, c. H.19
Resident’s Rights Act, S.O. 1994, c. 2.

Cases:
Furac v. Ontario (Workers’ Compensation Board) (16 November 1993), Court File # 344/93 Ontario Court (General Division) Divisional Court [unreported].
Storto v. The Minister of National Health and Welfare (30 December 1993), Appeal: CP 2690 (Pension Appeals Board) [unreported].
Various Housing Cases.
Various Workers’ Compensation Board Decisions.

Jurisdiction: Ontario, Canada


The authors survey many aspects of poverty law in Ontario from 1992-1993, including: poverty related statistics; social assistance; worker’s compensation; Unemployment Insurance; Canada Pension Plan; housing law; constitutional, human rights, and poverty law. The article mentions changes to social assistance in Ontario, allowing for the establishment of modest trusts for persons with disabilities that will not affect benefits, and policies that pressure individuals to apply for the CPP disability benefit rather than provincial initiatives which are more conducive to re-entry into the workforce. The implications of changes to the CPP disability benefit are also discussed.

Legislation:
Canada Pension Plan, R.S.C. 1985, c. C-8, as amended.
Landlord and Tenant Act, R.S.O. 1990, c. L-7 as amended.
Rent Control Act, S.O. 1992, c. 11.

Cases:
Director of Income Maintenance v. Roper (1993), 62 O.A.C. 76 (Div.Ct.).
Elliot v. Epp Centres Ltd. (June 27, 1993), Ont. Rd. of Inquiry [unreported].
R. v. Diggs, (May 19, 1993), Dartmouth #299880 -299909 (N.S. Prov. Ct.) [unreported].
Various Housing Cases.
Various Workers’ Compensation Board Decisions.

Jurisdiction: Ontario, Canada


Jackman considers the reluctance of lower courts in Canada to accept Charter claims in areas of social welfare. She begins by reviewing the cases where claimants have challenged programs and legislation in relation to health, housing, social assistance, and employment. Noting that few of these claims have met with success in the lower courts, Jackman outlines factors that can account for this trend. She contends that lower court judges have misconstrued the legislative history of section 7 and the interests asserted by claimants, and have failed to apply the substantive vision of equality endorsed by the Supreme Court of Canada. Their analyses were ultimately coloured by negative attitudes toward the poor and discomfort with Charter review in social welfare matters. [NOTE: does not specifically address disability]

Legislation:

Cases:

Certosimo suggests that the protection of social and economic rights is not inconsistent with the Charter’s philosophical basis. While the emphasis in Charter interpretation has been on negative rights, several sections of the Charter require positive state action, and there is a marked difference between unprotected commercial and (potentially) protected subsistence level rights under s. 7. A test is proposed and applied to determine whether the retraction of state benefits triggers s. 7. Possible amendments and alternatives to the current Constitution (including a social covenant, a Justiciable Social Charter, or an interpretive clause) are also mentioned. [NOTE: this is a truncated version of “Does Canada Need a Social Charter?”, and it does not specifically address disability]
Cases:
Dartmouth/Halifax County Regional Housing Authority v. Irma Sparks, County Court of Halifax, Nova Scotia, C.H. No. 75171 (April 13, 1992).

Jurisdiction: Canada


Certosimo discusses the philosophical and social context of the Canadian Charter, and questions whether the Charter’s wording (of which the interpretational emphasis has been on negative rights) can encompass positive social and economic rights, or if a new/amended Charter is needed. The role of the judiciary, comparisons to other jurisdictions, international obligations, and the extension of s. 7 and s. 15 to positive obligations are also surveyed. Certosimo critiques the traditional interpretations of s. 7 and s. 15 in the trial decision in Sparks, and relates proposals for amendments or alternatives to the Charter, as well as suggesting his own. [NOTE: does not specifically address disability]

Legislation:

Cases:
Dartmouth/Halifax County Regional Housing Authority v. Irma Sparks, County Court of Halifax, Nova Scotia, C.H. No. 75171 (April 13, 1992).

Jurisdiction: Nova Scotia, Canada


The authors survey many aspects of poverty law in Ontario from 1991-1992, including: poverty related statistics, access to justice, legal aid and court challenges funding, social assistance, workers compensation/reinstatement, unemployment insurance, Canada Pension Plan, Charter jurisprudence, the Charlottetown Accord, and other human rights developments. While a very good source for Ontario, the article also describes and discusses recent anti-poverty Charter litigation from throughout Canada. Notable to the disability context changes to the CPP disability benefit are discussed, as well as a proposed Ontarians with Disabilities Act.

Legislation:
Canada Pension Plan, R.S.C. 1985, c. C-8, as amended.

**Cases:**  
Fernandes v. Director of Social Services (Winnipeg Central) (10 June 1992), Suit No. AI 91-30-00477 (Man. C.A.) [unreported].  
Gosselin v. Proceur General du Québec (27 May 1992), No. 500-06-000012-860 (Que. S.C.) [unreported].  
Mireau v. Saskatchewan (13 December 1991), No. Q.B. 3758/91 (Sask. Q.B.) [unreported].  
Schacter v. Canada, (9 July 1992), File No. 21889 (S.C.C.) [not yet reported].  
Sparks v. Dartmouth Housing Authority, (13 April 1992), Halifax No. 75171 (N.S.Co.Ct.) [unreported].  

**Jurisdiction:** Ontario, Canada  


This article surveys cases and judicial trends from 1989-1990 in Charter and poverty litigation, particularly in the context of social welfare programs. Morrison reviews cases dealing with social assistance, workers compensation claims, the *Canada Pension Plan*, Unemployment Insurance, health care, and the *Charter* and the jurisdiction of administrative tribunals. The article also contains sections dealing with trends in the analysis and interpretation of s. 7 and s. 15 in relation to the reluctance of courts to view interests in social benefit schemes as “rights”. [NOTE: does not specifically address disability]  

**Legislation:**  

**Cases:**  


**Jurisdiction**: Canada

---


Bakan argues that many lawyers focus on what the courts should do (given the interpretive possibilities of the *Charter*) and not on what the courts are likely to do (given their historical and political context). Judicial review has to be viewed within the constraints and pressures faced by the Courts. Bakan identifies formal equality, unequal access to justice, and judicial conservatism as three key pressures. He critiques the “Anti-scepticism” and false optimism of many lawyers, not because their theories of *Charter* interpretation are unsound, but because their assertions of new *Charter* interpretations will not necessarily effect changes divorced from the social, political, and economic environment the Courts act within.

**Legislation/International Instruments:**


**Cases:**


**Jurisdiction**: Canada

---


McBean discusses the history of s. 7 of the *Charter* and the debate over including property rights in the *Charter*; then reviews possible outcomes of the entrenchment of property rights under s. 7, and the manner in which this may be accomplished. The author considers two types of property rights—traditional property rights (including economic and contractual rights), or “new property” rights (such as social assistance, pensions, etc). McBean reviews early Supreme Court jurisprudence and the interpretation of s. 7, and makes comparisons to the American constitutional experience. Worst and best case scenarios speculate on the deficiencies of incorporating traditional property rights (including legislation that would be affected), and the benefit of entrenching “new property” rights in the *Charter*. [NOTE: does not specifically address disability]
Legislation/International Instruments:
Canadian Bill of Rights, 1960, c. 44.
Constitution Act, 1867, 30 & 31 Victoria, c. 3. (U.K.).
U.S. Const. (September 17, 1787) art. I-VII.
U.S. Const. (December 15, 1791) amend. 1-10.

Cases:

Jurisdiction: Canada


Charter adjudication and jurisprudence is grounded upon the liberal ideological assumptions of its framers and interpreters. The authors provide a scathing critique of this liberal paradigm; they argue that it is neither an accurate description of existing social and political conditions nor a desirable framework for developing future social and political conditions. The authors highlight the illusory nature of the public/private distinction at the heart of liberalism, and they describe the liberal mandate to police this boundary as “a formal fraud that perpetuates a substantial injustice.” The authors conclude that the present challenge is to replace this liberal paradigm with a substantive vision of social justice. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada
Writing in 1988, Jackman argues that section 7 of the Charter guarantees protection of welfare rights, that is, social security rights arising from positive state action. She begins by explaining how the context in which the Charter was adopted supports an interpretation of section 7 which includes welfare-related rights. In doing so, she considers Canada's social and political traditions, Canada's international human rights obligations, the American experience of welfare rights, and the underlying purposes of the 1982 Canadian constitutional reforms. Next, Jackman considers the nature and scope of welfare entitlements that are protected by section 7. Lastly, she discusses the implications of her interpretation of section 7 for the role of the judiciary. [NOTE: does not specifically address disability]

Legislation:
Canada Assistance Plan, R.S.C., 1985, c. C-1.
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, s. 36.
U.S. Const. am. 5.

Cases:
Re Rafuse and Hambling (1979), 107 D.L.R. 349.

Jurisdiction: Canada


The advent of the Charter prompted considerable debate with respect to the possibilities and limitations of using liberal democratic legal rights to transform social relations of inequality. For the purpose of moving this discussion beyond
the realm of theory, Fudge considers the degree of success that both the labour
and women’s movements have had through invoking the Charter to advance
their social, political, and economic goals. Fudge considers these examples in
order to highlight the limitations of using “bourgeois” legal rights to further the
cause of social transformation. [NOTE: does not specifically address disability]

Legislation:
*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*,
being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7.

Cases:

Jurisdiction: Canada

of Social Regulation in Canada”, in Maxwell, Judith, Grady, Patrick &
Robert Howse, *Redefining Social Security* (Kingston: School of Policy
Studies, Queen’s University, 1995) 99-161.

Howse considers the impact of the *Charter* on social policy in Canada. He
considers the basis for *Charter* claims to social entitlements under s. 7 (life,
liberty and security of the person) and s. 15 (equality), and extensively details
the lower court jurisprudence on: social assistance, health care, and tax
benefits/burdens. Howse separately considers Supreme Court jurisprudence on
the *Charter* and social entitlements, and then contemplates the implications
lower and higher court decisions may have on future governmental directions in
relation to social programming. Howse specifically examines how cutbacks,
targeted/universal assistance, conditional assistance, and privatization may be
affected by the *Charter*.

Legislation:
*Canadian Charter of Rights and Freedoms*, *The Constitution Act, 1982*, being
Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Cases:
Canada Employment and Immigration Commission et al. v. Tetrault-Gadoury,
C.(J.) v. British Columbia (Forensic Psychiatric Services) (1992) 64 B.C.L.R. (2d)
386 (S.C.).
Fernandes v. Director of Social Services (Winnipeg Central) (1992) Man R. (2d)
172 (C.A.).
Man. R. (2d) 92.
Mckinney v. Board of Governors of the University of Guelph et al., [1990] 2
S.C.R. 229.

Jurisdiction: Canada


Canadians living in poverty were essentially absent from the debates that informed the framing of the Charter and were voiceless during the first decade of Charter jurisprudence. The Charter Committee on Poverty Issues (CCPI), a national coalition of low income activists and advocates, was formed in 1989 to correct this situation. Writing in 1994, Porter reviews the early efforts of CCPI to advance Charter litigation on poverty issues. He explains the evolution of its litigation strategy from “case development” to creating a more favorable equality paradigm—one that recognizes the rights of the Canada’s poor. While poverty rights claims challenge the limits of a formalistic equality framework and demand reflection on the values that underlie the Charter itself, the ultimate effects of these challenges remains to be seen. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


According to Pocklington, the Meech Lake processes revealed that the politics of constitutional rights have significant drawbacks—drawbacks which can no longer be disregarded. In this brief commentary, Pocklington identifies and describes three of these drawbacks. He concludes that the central downside of the politics of constitutional rights is that, although Canada is held to be a liberal democracy, these politics place disproportionate emphasis on the liberalism relative to the democracy. [NOTE: does not specifically address disability]

Legislation:

Jurisdiction: Canada


Writing in 1986, the author argues that the Charter’s impact upon disadvantaged Canadians is more likely to be detrimental than beneficial. He argues that, contrary to popular belief, the conferral of rights and entitlements under the Charter is a zero-sum game; the Charter only gives to its citizens what it takes from government; and the Charter’s ultimate impact depends upon the political nature of the judicial system responsible for its interpretation. The author describes the existing barriers to accessing the justice system and how they limit the Charter’s utility for disadvantaged Canadians. Furthermore, he examines how the social context and political nature of judicial decision-making ensures that Charter rights are being shaped predominantly by the interests of Canada’s economically privileged. [NOTE: does not specifically address disability]

Legislation:

Cases:

In this chapter, Hutchinson explores the social impact of constitutional litigation. Whereas the prevailing view in the legal community is that litigation and adjudication are important instruments of social policy, Hutchinson argues that these mechanisms have only marginal significance for changing society. He explains that insofar as constitutional litigation and adjudication shape existing governmental institutions and civil rights, they ultimately contribute to the retention of existing social arrangements; no matter how radical the constitutional claim, participation in the litigation process effectively sanctions and reinforces existing social relations. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada (with lessons from the United States)


The author argues that legislative characterizations of poverty as an economic condition merely describes the symptoms of poverty while disguising its structural causes. This has led to superficial remedial responses to poverty that emphasize transferring funds rather than eliminating root causes. The author goes on to argue that by adopting this formulation of poverty, poverty lawyers have targeted their efforts towards the symptoms, rather than causes, of poverty. Although it is unrealistic to suppose that poverty lawyers can end poverty, they should use their skills towards enhancing awareness of the structural inequalities at the heart of our socio-economic system. Looking at the
American experience with constitutionally entrenched equality rights, the author considers whether the Charter will be an effective means of combating the systemic sources of poverty in Canada. [NOTE: does not specifically address disability]

**Legislation:**


*U.S. Constitution*, amend. XIV, s.1 (1868).

**Cases:**


**Jurisdiction:** Canada (with lessons from the United States)

**Whyte, John D. "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983), 13 Man. L.J. 455-476.**

The author, writing in 1983, considers two questions with respect to the scope and application of section 7 of the Charter. First, what standards are suggested by the phrase “except in accordance with the principles of fundamental justice” for reviewing deprivations of life, liberty, or security of the person? Second, what is the range of interests that are protected by the right to “security of the person?” As regards the latter question, the author argues that section 7 includes protection of “vital economic interests,” that is, conditions necessary for life such as food, shelter, or the economic means of attaining these necessities. [NOTE: does not specifically address disability]

**Legislation:**


**Cases:**


**Jurisdiction:** Canada

Writing in 1982, just months into the life of the Charter, the author notes that Canadian judges are being required to enforce the rights guaranteed by the Charter without any clear statutory or constitutional theory of rights. He argues that Canada needs to develop a rights jurisprudence that is appropriate to the Canadian constitutional context—one that is uniquely Canadian. The author discusses the nature of this context and suggests how this rights jurisprudence might be developed. [NOTE: does not specifically address disability]

Legislation:
Bill of Rights of 1689
U.S. Bill of Rights

Cases:

Jurisdiction: Canada (But, considers American and British constitutional models, political philosophies, and theories of rights)
Federal/Provincial/Territorial Legislation


Lamarche provides a critical appraisal of Québec’s Act to Combat Poverty and Social Exclusion. She contends that this act was not developed within a human rights framework: it reflects a neo-liberal approach to poverty that limits the content of social and economic rights and the state’s role in protecting these rights. By limiting the state’s obligation to that of managing extreme poverty, the act fails to promote the progressive and continuous implementation of all human rights—an obligation to which Québec is committed under the ICESCR and the Québec Charter. Thus, despite the good intentions of the large coalition that advocated for this legislation, it presents a threat to social and economic rights in Québec. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Québec


L’Heureux-Dubé considers the contributions of the Supreme Court of Canada to the social and economic rights debate, and the ambit of the social and economic guarantees in the Québec Charter of Human Rights and Freedoms. L’Heureux Dubé frames her discussion around the Charter claims in Gosselin, which had yet to be heard by the Supreme Court at the time this article was written. The author analyses several Supreme Court decisions (G (J), Eldridge, and Baker), the framework they provide for future social and economic rights claims, and the material protections for social and economic rights stemming from these decisions. Social and economic rights in the Québec Charter and their application to the Court of Appeal’s decision in Gosselin are also discussed. [NOTE: does not specifically address disability]
Legislation:

Cases:

Jurisdiction: Canada


Jackman and Porter argue that social and economic rights should be expressly included in the CHRA, and they consider how the Act can be amended to protect these rights. After considering Canada’s non-compliance with its international human rights obligations and why domestic laws have not been effective in redressing women’s social and economic inequality, Jackman and Porter propose specific amendments to the CHRA. In particular, they suggest that the CHRA should be amended to: expressly recognize social and economic rights, guarantee the enjoyment of these rights free of discrimination (including discrimination based on social condition), include a statement of the obligations of Parliament and the Government of Canada toward the realization of social and economic rights, establish a specialized social rights tribunal, and expand the mandate of the Canadian Human Rights Commission. [NOTE: does not specifically address disability]

Legislation:

Cases:
Jurisdiction: Canada


Falardeau-Ramsay looks back on the 50 years since the Universal Declaration of Human Rights (UDHR), and 20 years since the Canadian Human Rights Act (CHRA), and predicts future directions. Falardeau-Ramsay discusses continuing periodic requests for expanded jurisdiction to help disadvantaged groups that were falling through the gaps in human rights legislation. The author notes that human rights legislation is relegated to playing “catch-up” to other innovative court and legislative decisions. To become the leader in the future, especially with regards to poverty-based discrimination, Falardeau-Ramsay indicates a full scale review of the CHRA is required, and that Human Rights Commissions must do mandatory pre-enactment scrutiny of legislation and educate the public, rather than merely adjudicating claims. [NOTE: does not specifically address disability]

Legislation/International Instruments:
Employment Equity Act, S.C. 1995, c. 44

Jurisdiction: Canada
Grounds of Discrimination


Iding explores Canada’s options for implementing social condition human rights protection, and considers two competing perspectives on the scope of protection that should be recognized: protection only from discrimination based on stereotypes of poverty vs. protection from the disadvantageous conditions of poverty itself. She notes that the former perspective is inconsistent with the existing discrimination analytical framework, and she argues that conditions of poverty—as opposed to stereotypes—are the more significant barriers to equality facing the poor. She concludes that substantive equality may be advanced most effectively by achieving judicial recognition of positive economic rights under the Charter. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


This is an edited version of Sheppard’s article of the same name [below]. Notably, Sheppard expands her analysis of intersectionality and grounds of discrimination.

Legislation:

Cases:


Three employment discrimination cases based on “perceived handicap”.


**Jurisdiction:** Québec, Canada


The authors provide the first comprehensive review of the Canadian Human Rights Act, including: processes and claims models under the act; roles and independence of the Commission; and the scope of the Act. Notably, the Panel recommended the addition of social condition as a ground (based largely on the Québec definition but limiting its application to disadvantaged individuals), while exempting certain complex governmental programs, and studying the interaction of social condition with other grounds. While social and economic rights were a concern, it was recommended the Commission only monitor compliance with international treaties, as there was apprehension this addition may over-extend the Commission’s jurisdiction. The Panel also recommended adding “predisposition to being disabled” to the definition of disability.

**Legislation:**


**Jurisdiction:** Canada


Sheppard addresses legal categories and grounds of discrimination in human rights legislation and the Charter. While liberal interpretations of certain grounds of discrimination (particularly sex and disability) have expanded their scope of protection, restrictive interpretations of legislative intent frequently limits the scope of enumerated grounds. Sheppard discusses the symmetrical application of grounds (such as race and sex), versus the historical realities of groups within these grounds, while other grounds (such as disability) are interpreted more asymmetrically and contextually. She also comments on the Intersectionality critique which recognises discrimination may implicate more than one ground of discrimination, and that the nature of this discrimination is qualitatively different.
Legislation:

Cases:
Three employment discrimination cases based on "perceived handicap".

Jurisdiction: Québec, Canada


Day and Brodsky consider the proposal to add “social condition” as a prohibited ground of discrimination in the CHRA. They explain how this amendment, by itself, would be of little benefit in challenging laws and practices that maintain and perpetuate women’s economic inequality. Day and Brodsky propose that the CHRA needs to be reframed to keep pace with the evolving equality jurisprudence and respond effectively to women’s inequality. They provide recommendations for reframing the CHRA, highlighting the need for it to expressly do the following: recognize group disadvantage (including the disadvantage experienced by women), respond to overlapping grounds of discrimination, guarantee protection from adverse effect discrimination, encourage positive action to redress inequality, and recognize that the right to substantive equality includes social and economic equality. [NOTE: does not specifically address disability]

Legislation:
Bill S-11, An Act to amend the Canadian Human Rights Act in order to add social condition as a prohibited ground of discrimination, 1st Sess., 36th Parl., 1997-98 (defeated).

Cases:
Québec (Comm. des droits de la personne) v. Briand (May 6, 1997), Québec 200-53-000003-967, (Que. Trib.).
Québec (Comm. des droits de la personne) v. Gauthier (1993), 19 C.H.R.R. D/312 (Que. Trib.).

Jurisdiction: Canada


This article addresses whether the CHRA could be used more effectively to promote women’s equality if its closed list of prohibited grounds of discrimination was replaced with an open-ended list. The authors describe and evaluate 3 variants of open-ended clauses that could be incorporated into the CHRA; they give particular consideration to the analogous grounds approach of the Charter and consider whether incorporating an analogous ground provision in the CHRA would help poor women to challenge conditions of economic inequality. The authors conclude that an open-ended clause would not advance equality for poor women; moreover, the risks of incorporating this clause would outweigh its benefits. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


This report considers adding social condition as a prohibited ground of discrimination under the Canadian Human Rights Act. The authors discuss how a definition of social condition may be drafted; jurisdictional and statutory interpretation of human rights legislation; arguments for including social condition (including international obligations under the ICESCR and domestically under the Charter); administrative problems that may occur because of the inclusion of social condition, and arguments against its inclusion; and available alternatives.

Legislation:

Jurisdiction: Canada

Keene, Judith. “Discrimination in the provision of government services and s. 15 of the Charter: making the best of the judgements in Egan, Thibaudeau, and Miron” (Fall 1995) 11 J.L. & Social Pol’y 107-164.

Keene isolates and synthesizes the common approaches taken by various Justices and courts in a series of decisions under the former s. 15 Andrews test. The article also canvasses the definition of discrimination, including discrimination based on differentiation and adverse effects/”constructive discrimination”, and the typical attitudes or arguments countering claims of discrimination. Approaches to both enumerated and analogous grounds, as well as critiques and methods to rebut the typical counter arguments, are analysed in the context of specific Justices and cases. Keene also discusses the analysis and development of the s. 1 Oakes test, particularly in the government services/benefits context. [NOTE: does not specifically address disability]

Legislation:
**Cases:**

**Jurisdiction:** British Columbia, Manitoba, Canada

**Jurisdiction:**


Jackman discusses the incidence of poverty in Canada, and recommends the recognition of poverty as a ground of discrimination under s. 15 of the Charter. People who are poor often find the political process inaccessible because of their lack of resources, and barriers to voting. Governments are then unreceptive to the poor because they are constituency they do not represent. This political vulnerability conforms to the “insular minority” approach, and supports equal protection of the poor. Jackman notes the intersectional nature of equality complaints, and reviews human rights legislation which includes social condition/source of income as prohibited grounds but fail to include poverty. [NOTE: does not specifically address disability]

**Legislation:**
Various Human Rights Codes.

**Cases:**
*Elizabeth Wiebe v. The Queen in Right of Ontario et al.*, Ontario Human Rights Commission Complaint No. 20-106S.
Jurisdiction: Ontario, Manitoba, Québec, Canada


Turkington discusses the historical causes of “povertyism” (including its origins in British Poor Laws and Canadian legislation), and suggests ways in which the Ontario Human Rights Code may effectively respond to this discrimination. The article attempts to maintain a bottom-up/outsider perspective. Turkington discusses the debate about rights discourse, and affirms its usefulness in challenging norms. She promotes including poverty in the Ontario Human Rights Code, but explains that the legislation should reflect the outsider perspective of individuals experiencing poverty, and the definition of “poverty” should be interactive (allowing complainants to explain discrimination based on poverty combined with other grounds of discrimination) rather than categorical or additive. [NOTE: does not specifically address disability]

Legislation:

Jurisdiction: Ontario, Canada, United Kingdom


This report discusses including “social condition” as a prohibited ground of discrimination under the Canadian Human Rights Act, and cites the Québec Charter of Human Rights and Freedoms as a successful example. “Social condition” is a flexible ground depending on external social and economic circumstances, and Lamarche insists it is needed to protect increasing discrimination against individuals who are not protected under existing grounds. Québec views the right to equality as guaranteeing social and economic rights without discrimination based on social condition, and Lamarche argues this civilizes social policy by bringing it under judicial scrutiny, rather than removing it from the political realm. Lamarche also suggests that Human Rights Tribunals should have express jurisdiction to interpret “social condition”. [NOTE: does not specifically address disability]

Legislation/International Instruments:

Jurisdiction: Québec, Canada.

The authors discuss including “social condition” as a prohibited ground of discrimination under the Canadian Human Rights Act (CHRA). Domestically and internationally “social condition” has not been widely used as a ground of discrimination. Québec’s case law and human rights guidelines are reviewed as the sole Canadian interpretive authority. Most Canadian human rights statutes include a ground of discrimination providing some protection for social and economic rights, and internationally they are protected under the ICESCR; however, the bulk of Canadian jurisprudence views ICESCR obligations as negative rights. Discrimination based on “social condition” is more likely to fall under provincial jurisdiction, and human rights legislation may be inappropriate for claims to economic security.

Legislation/International Instruments:

Cases:
La Commission des droits de la personne c. Centre Hospitalier St-Vincent-de-Paul de Sherbrooke C.S. St-François jugement inédit dossier no 450-05-000856-78, 7 Sept. 1979.

Jurisdiction: Québec, Canada


Wesson discusses whether adding “social condition” as a ground of discrimination is the “next best” option to having justiciable social rights legislation. Wesson relies on South African and Canadian jurisprudence to prove that the philosophical underpinning of discrimination law can encompass social condition. He asserts that social condition can apply both to individuals denied a benefit, as well as to those who are already reliant on the benefit. In addition, issues of judicial incompetency can be avoided by taking the American intermediate standard of review to administrative decisions. Social condition is needed as a ground of discrimination because, while equality law requires only incidental positive action from the government, social rights and social condition directly engage positive measures. [NOTE: does not specifically address disability]
Legislation/International Instruments:

Cases:
Khosa v. Minister of Social Development, 2004 (6) BCLR 569 (Const. Ct.).
Minister of Finance and Another v. Van Heerden 2004 (6) SA 121, 11 B. Const. L.R. 1125 (Const. Ct.).

Jurisdiction: Canada, South Africa, United States of America


Pothier advocates for a more comprehensive treatment of grounds of discrimination in equality analyses. She argues that grounds are more than a “distraction”, because they illuminate the social and historical context and root cause of discrimination. To illustrate this point, Pothier provides a review of human rights and constitutional case law (in relation to gender and disability analysis, analogous grounds, human dignity, and “skipping the grounds”). She explains the tension between the intersectionality of grounds and the legal mindset which attempts to compartmentalize experiences. Pothier also discusses the difficulty proving discrimination that is not based on formal policies, the complexity of claims that challenge the victim/dominant group dichotomy, and the need to challenge, rather than conform, to dominant “norms” in equality litigation.

Legislation/International Instruments:

Cases:
Corbière v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203.


Pitawanakwat v. Canada (Department of Secretary of State) (1992), 19 C.H.R.R. D/110.

Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2001] 1 S.C.R. 665.


**Jurisdiction:** Canada
Implementation/Interpretation of International Law


Cohen examines the detrimental impact of international legal institutions, associated with economic globalization, on the ability of states to provide public services that promote the realization of collective economic rights—rights that have proven effective in combating poverty. He discusses the ways that international trade agreements—in particular, the WTO’s General Agreement on Trade in Services—undermine public services, and considers how social activists should respond. Cohen argues that while social activists need to monitor, explain, and oppose these agreements, they should not use these agreements as a forum to institute social or economic rights. Instead, a concerted effort is required to promote a fundamental rewriting of the nature of trade agreements and to persuade nation states to create new international institutions control international capital. [NOTE: does not specifically address disability]

International Trade Agreements:

Jurisdiction: International


Day discusses the 2003 review of Canada by the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW)—and Canada’s lack of response to its findings—to highlight the discrepancy between Canada’s international commitments and its actual practices. She reviews the efforts of Canadian women’s organizations to encourage governments to follow up on CEDAW’s recommendations, as well as governments’ failures or refusals to take action. Day expresses concern that Canadian governments have no established procedures or venues in place for responding to the treaty body’s recommendations. She concludes that Canada’s international commitments will remain empty promises until mechanisms are established that enable Canadians to engage with their governments to give effect to these human rights. [NOTE: does not specifically address disability]
Legislation:

Jurisdiction: Canada


The authors suggest that the traditional model for the enforcement of civil and political rights may not be appropriate to the social and economic sphere, and propose a “programmatic model” developed in Northern Ireland (in which the government integrates socio-economic rights in policy and practice), although of potential application in other jurisdictions, combined with judicial enforcement as a means to ensure the realisation of socio-economic rights. The Northern Irish context and legislation which found the programmatic approach are also explained. [NOTE: does not specifically address disability]

Jurisdiction: Northern Ireland


The authors discuss the Charter in the context of International law. They identify the Charter as a domestic response to international developments after WWII, and view the Charter as an effective tool for social change which enhances democratic dialogue through judicial review. Despite judicial resistance, the authors argue that Canada has much to gain through clear rules applying international human rights law in the domestic context, and note that although Canada has signed many of the major human rights conventions, without meaningful domestic implementation Canada’s position as an advocate for human rights abroad is diminished. They recommend Canada fully integrate into the American human rights system by ratifying the American Convention on Human Rights. The authors also discuss two pressing rights issues in Canada: the recognition of economic, cultural and social rights; and access to justice. [NOTE: does not specifically address disability]

Legislation:
OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).
Cases:

Jurisdiction: Canada, International.


The authors address the three primary arguments against the justiciability of social and economic rights: social and economic rights are unjusticiable, unlike civil and political rights; it is undemocratic and a violation of the separation of powers for courts to adjudicate social and economic rights; and courts are incompetent to decide claims for competing resources. The authors feel justiciability has been confirmed, and focus should shift to the protection and enforcement of rights. [NOTE: this is a general discussion, not jurisdictionally specific, and does not specifically address disability]

Jurisdiction: International


Porter discusses a constitutional challenge raised against NAFTA Chapter 11 investor-state dispute procedures based upon s. 96 of Canada’s Constitution Act, 1867, and s. 7 and s. 15 of the Charter. The claim alleges that NAFTA has created an unconstitutional regime in which matters that are constitutionally required to be heard by Canadian Superior Courts have been relegated to tribunals which are not required to interpret the law with respect to the supremacy of Charter principles and rights, or in accordance with values under international human rights law. While the claim was dismissed at trial, it was on appeal at the time of publication. [NOTE: does not specifically address disability]

Legislation:
The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.

Jurisdiction: Canada

According to Porter, the debate about developing an Optional Protocol for the ICESCR revolves around the issue of whether it is necessary to hear and adjudicate the socio-economic claims of rights-holders. He argues that it is imperative that a mechanism be created to ensure that rights claimants receive a hearing and an effective remedy for all types of ICESCR violations. Furthermore, Porter contends that the international community’s approach will have serious implications for the protection of human rights at the domestic level. He recommends ways to implement an international adjudication process in a manner that respects the principles of the ICESCR. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**
*Grootboom v. Oostenberg Municipality* (17 December, 1999) 6826/99 (High Court of South Africa, Cape of Good Hope Provincial Division).

**Jurisdiction:** International


Porter’s article discusses the “crisis” between existing methods of rights litigation and the emerging economic, social and cultural (ESC) rights practice. Porter points to the detachment between human rights litigation (which stresses historical context and the perspective of the claimant) and ESC rights litigation (which searches for a ‘minimum core’ right the claimant is entitled to). The current ESC rights framework also favours established state obligations over rights claiming. Porter also suggests there is danger in using a formal equality legal analysis without the ESC rights context as the core of substantive equality. To respond to this deficit, Porter recommends adopting the framework from the CESCRR’s General Comment No. 9. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**
Jurisdiction: Canada, International


Dhir discusses the United Nation’s General Assembly’s decision to pursue a Disability Rights Convention, and whether it will effectively ensure the rights of individuals with mental disabilities. While certain international instruments have a bearing on the rights of individuals with mental disabilities, they are generally more reflective of a paternalistic medical model, rather than a rights-based approach, and have failed to respond to the abuses of persons with mental disabilities. In response, Dhir argues that a rights-based approach based on the social construct model of disability is essential to enhance disability advocacy under the proposed convention. Although the author acknowledges arguments against a disability specific convention, he views the development positively. Dhir also makes recommendations on key issues—such as non-discrimination, forced treatment, and progressive realisation—by providing select examples of the current international approach.

Legislation:

Cases:

Jurisdiction: Canada, United States of America, International.


Weiser overviews the integration of international human rights treaties into Canada’s domestic legal framework. She describes international law as part of a global dialogue and comments on international law’s increasing influence in Canadian courtrooms. Weiser explains how Canada’s constitutional structure
affects its ability to sign and implement treaties, and discusses the way implemented treaties, binding unimplemented treaties, and non-binding sources of international law have been interpreted by the Courts. After reviewing case law, Weiser concludes that international law has been treated inconsistently by the Supreme Court, and proposes a consistent analytical framework dealing with the interaction between international and domestic human rights law. [NOTE: does not specifically address disability]

**Legislation/International Instruments:**


Various other international instruments.

**Cases:**


Various Charter challenges dealing with international law.

**Jurisdiction:** Canada, International


Brodsky provides a brief overview of the Montreal Principles—non-binding normative guidelines (adopted by legal experts) for interpreting Articles 2(2) and 3 of the ICESCR (the provisions of the Covenant guaranteeing non-discrimination in the exercise of the Covenant’s rights and the equal enjoyment of these rights by men and women). She describes how the Montreal Principles can facilitate understanding of what is required to give effect to women’s equal enjoyment of economic, social, and cultural rights. [NOTE: does not specifically address disability]

**Legislation:**


Jurisdiction: Canada, International


Porter considers the domestic implementation and application of the ICESCR, as informed by article 2(1) and General Comment No. 3 and No. 9 of the CESCR. He discusses how human rights advocates, lawyers, and courts can integrate international law into domestic law, and he encourages advocates to get involved in the CESCR’s periodic review process. Porter notes that rights-holders have been absent from the analysis and debate surrounding economic, social, and cultural rights. He argues that the voices of people, whose rights are at stake, must be heard, and the focus must shift from abstract discussion to developing effective remedies. [NOTE: does not specifically address disability]

Legislation:
General Comment No. 3 Need Citation
General Comment No. 9 Need Citation

Cases:
Grootboom v. Oostenberg Municipality (17 December, 1999) 6826/99 (High Court of South Africa, Cape of Good Hope Provincial Division).

Jurisdiction: Canada, International


The author examines the Canadian judiciary’s use of international human rights law (particularly the inter-American human rights system), in order to determine its efficacy in promoting social and economic rights. She details 5 rationales that are used by judges to support their reliance on international norms, which
reveals tension in international law between defending the status quo and striving for a more utopian ideal. The author notes that international law is not a panacea for human rights advocates, as it is used both to advance and defeat human rights claims. She concludes that effective advocacy depends upon understanding the multi-faceted ways that judges invoke international law; this understanding is necessary to shape the application of international law in ways that promote its utopian vision. [NOTE: does not specifically address disability]

**Legislation:**
American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the ninth International Conference of American States (1948).

**Cases:**

**Jurisdiction:** Canada, International


This publication discusses the background to the disability rights movement and how international conventions can be used to enhance human rights for individuals with disabilities. The evolution from a medical model to a human rights framework in disability rights theory, and the manner in which international "soft law" can aid its realization, and result in "hard law" domestically, is overviewed in Part I. In Part II, six international conventions (the ICCPR, ICESCR, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of all Forms of Discrimination Against Women, Convention on the Rights of the Child, and the International Convention on the Elimination of All Forms of Racial Discrimination) and provisions applicable to disability rights are outlined. Case studies and reports by member states are reviewed to determine how and whether the
states acknowledge the conventions’ applicability to the circumstances of people with disabilities. Part III relates the results of a questionnaire asked to various disability rights non-governmental organizations, and makes recommendations about how the United Nations convention framework could be improved for person with disabilities, including a disability-specific convention.

Legislation/International Instruments:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85.


Cases:


Jurisdiction: International


This article considers whether Canada’s commitments under the ICESCR could be invoked to challenge conditions of poverty. Based on a survey of non-criminal Charter cases—which was conducted to determine the role that the ICESCR (and ICCPR) have played in court decisions—the author draws the following conclusions: reference to these covenants is rare; the covenants are being given little weight; treatment of the covenants is inconsistent and superficial; and the ICESCR is invoked far less than the ICCPR. The author considers reasons that the ICESCR has played such a small role in Canadian jurisprudence, and offers suggestions for how to counter arguments that deny the applicability/usefulness of the ICESCR in poverty-related challenges. The author concludes that in theory, the ICESCR could be used successfully in poverty litigation. [NOTE: does not specifically address disability]

Legislation:

In her commentary on the article “Freedom from Want,” Arneil discusses how the author’s analysis of social and economic rights lacks awareness of the political forces impeding their full implementation in Canada. She discusses how Canada’s system of federalism, its history of classical liberalism, and its current climate of fiscal restraint, all contribute to the second-rate status of social and economic rights. Arneil argues that solutions are only viable if they take these political realities into account. She concludes that coordinated, pro-active initiatives adopted by Canada’s federal and provincial governments are required, over-and-above judicial enforcement of social and economic rights. [NOTE: does not specifically address disability]

Legislation:

Jurisdiction: Canada, International

This article addresses Canada’s failure to incorporate poverty into its domestic human rights framework. The author discusses developments in international human rights monitoring. He considers the consensus among various UN human rights treaty monitoring bodies that poverty in Canada is a serious human rights violation and that Canada’s domestic approach to protecting human rights is inadequate. The author emphasizes that the task of bringing the domestic legal-order in line with Canada’s international human rights obligations does not require a rejection of Supreme Court Charter jurisprudence; instead, Canadian courts need to apply it more consistently in poverty-related matters. The author contends that Canada’s challenge is not to find ways of reading social and economic rights into the Charter but rather to stop reading out of the Charter the rights of poor people to dignity and security. [NOTE: does not specifically address disability]

Legislation:

Cases:
Grootboom v. Oostenberg Municipality (17 December, 1999) 6826/99 (High Court of South Africa, Cape of Good Hope Provincial Division).

Jurisdiction: Canada

This article describes the historical development of economic, social, and cultural rights. The author highlights Canada’s longstanding pattern of indifference and opposition to their full realization—from objecting to the inclusion of these rights in the Declaration to opposing an optional protocol to the ICESCR. The author argues that the division of human rights into two categories—civil and political vs. economic, social, and cultural—and the assignment of lesser status to the latter is an error that resulted from Cold War politics. He suggests ways to elevate the profile of social, economic, and cultural rights. [NOTE: does not specifically address disability]

Legislation:

Cases:
Singh v. Canada (Minister of Employment & Immigration), [1985] 1 S.C.R. 177.

Jurisdiction: Canada, International


Writing in the late 1990s, the author evaluates the Charter’s potential to uphold Canada’s commitments to protecting social and economic rights in accordance with the ICESCR. She argues that changes to social welfare policy and legislation in Canada during the mid-90s have created an urgent need for judicial enforcement of social and economic rights through Charter review. After considering the Charter jurisprudence on social and economic rights, the author
concludes that the Charter is a viable mechanism for protecting these rights. [NOTE: does not specifically address disability]

**Legislation:**


**Cases:**


**Jurisdiction:** Canada


This paper was written for the May 1999 Roundtable on economic, social and cultural rights; its purpose was to stimulate informed discussion about the role of these rights in Canadian foreign policy. The author provides an introduction to international human rights instruments/ monitoring and describes the changing international climate for economic, social, and cultural rights. He then poses a number of questions to generate Roundtable discussion. [NOTE: does not specifically address disability]

**Legislation:**


Jurisdiction: Canada, International


Scott discusses Canada's international treaty obligations under the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. He suggests that the Baker decision aids in understanding the Covenant’s interpretive force in our legal system, as treaties containing values and principles underlying free and democratic societies. Scott summarizes the findings of Canadian non-compliance with the Covenants by the Human Rights Committee, and hypocritical government policies that argue conformity with the Covenants in the international arena and against them domestically. Improved methods to domestically implement international law are also discussed. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada, International

Foster discusses the international and national erosion of mechanisms promoting social and economic rights, and urges action. He points to the increasing prevalence of international economic organisations (such as the World Trade Organization) interfering in spheres traditionally exclusive to the United Nations, and the need for increased funding/reform of both international bodies to work in conjunction and maintain a rights focus. On the domestic front, the repeal of the Canada Assistance Plan, and retreat from using the Federal Spending Power, has weakened instruments used to enforce and implement international commitments to socio-economic rights. [NOTE: does not specifically address disability]

**Jurisdiction**: Canada, International


This presentation examines Canada’s obligations under articles of the International Covenant on Economic, Social and Cultural Rights, and the impact governmental policy (particularly governmental spending, and the Canada Health and Social Transfer) has had on enforcing the social, economic and cultural rights of women. The presentation is highly critical, and points to statistics and policies that indicate social and economic disparities between women and men, and between certain groups of women (including women with disabilities). This is indicative of the fact that Canada is not fulfilling its obligations under the Covenant. The International Committee’s observations are also included.

**Legislation**:

**Jurisdiction**: Canada, International


Scott argues that human rights and human dignity should be pursued through the broad principles and values in international instruments, rather than by limiting human rights through “false dichotomies” between social and economic rights, and civil and political rights. He defines a concept of interdependence between rights (which is more robust than legalistic technicality), and discusses five normative relations (interdependence of rights, interrelationships of persons,
concretization of general rights, forms of universal rights, and intersectionality) that both transcend and affirm categories as a working template in human rights analysis. Scott provides a concrete example of the relations using migrant worker's housing rights under the *European Social Charter*. [NOTE: does not specifically address disability]

**Legislation/International Instruments:**
Various other covenants which can be read in conjunction with the *ICESCR* and *ICCPR*.

**Cases:**

**Jurisdiction:** International

---


In this article, the author outlines the critical features of human rights law which need to be taken into consideration in developing interpretive standards and preventative/remedial measures with respect to violations of economic, social, and cultural rights. He identifies and analyses the key features of violations of economic, social, and cultural rights, the various classes of potential rights’ violators, and the measures which states should implement so as to fashion effective domestic remedies for the violation of these rights. [NOTE: does not specifically address disability]

**Legislation:**

**Jurisdiction:** International

After tracing the evolution of rights, from the civil libertarian theories of 17th century England to “human rights” following the Second World War, Justice Abella considers the recent backlash against human rights in North America. She notes that many are frightened by the transformative powers of human rights and have become nostalgic for the old civil liberties rights framework. She expresses concern that society has been lulled in a false sense of complacency by the significant human rights victories that ensued in the wake of the Second World War. Justice Abella concludes by cautioning against forgetting the lessons of this war, namely, the atrocities that shocked us into accepting a new appreciation of diversity and understanding of rights. [NOTE: does not specifically address disability]

Jurisdiction: North America


Odio argues that the current socio-economic structure focuses more on economic prosperity than on the welfare of a nation’s people. Individuals are viewed as worthy only in relation to their ability to contribute to the economic system, and are marginalised (often to the criminal underworld) if they cannot. Governments’ focus on economic gain comes at the expense of social programs and impoverishes their people. Odio calls for a new justice that conforms to human rights (equitable distribution of resources), thus eliminating the need for charity (welfare), and sees the Convention on the Rights of the Child as a promise to create a just society in the future. [NOTE: does not specifically address disability]

Legislation/International Instruments:

Jurisdiction: International, South America


Robertson discusses the ICESCR obligation that State’s devote the “maximum available resources” to economic, social and cultural rights; and asks how
resources must be defined and devoted to be in compliance with this obligation? Although not an exhaustive list, Robertson isolates five resource areas: financial, human resources, information, natural resources, and technology. All available domestic (including private) and international resources should be factored into considering a State’s compliance with their ICESCR obligations. One possible gauge of State compliance is to use formal indicators measuring the resources (in each of the five resource areas) needed to realise specific ICESCR rights. Robertson elaborates on this methodology with examples and commentary. [NOTE: does not specifically address disability]

Legislation/International Instruments:

Jurisdiction: International


Robertson examines the right to food at international law, and Canada’s failure to provide for this right. He argues that as a signatory to the *International Covenant on Social and Economic Rights* Canada is obliged to respect, protect, and fulfil the human right to food. Robertson suggests interpretive devices by which s. 36(1) of the *Constitution* and sections 7 and 15 of the *Charter* may guarantee the right to food, and cites the *Finlay* case to argue that customary and conventional international law may be used to attack the adequacy of social assistance rates. The Aboriginal right to food is also discussed.

Legislation:

Cases:
Various s. 7 and s. 15 cases.

Jurisdiction: Canada, International


Scott discusses human rights contained in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR), arguing that through the doctrine of interdependence of human rights, social and economic rights should be able to permeate civil and political rights, allowing them to be subject to procedures
under the *ICCPR*’s optional protocol. Scott discusses the history, context, and barriers to permeability, and also examines decisions under four provisions of the *ICCPR* where permeability has been at issue. [NOTE: does not specifically address disability]

**Legislation:**
*International Covenant on Civil and Political Rights*

**Jurisdiction:** Canada, International
Socio-Economic Rights Abroad: Lessons for Canada


Pillay surveys the South African Constitutional framework (including the specific references to socio-economic rights contained in the Constitution), the outcome of leading socio-economic rights cases heard before the South African Constitutional Court, and analyses the development of socio-economic rights jurisprudence. She notes the generous standing provisions which allow disadvantaged members of society greater access to courts, the movement from rationality to reasonableness tests, which have assessed the nature, cost, and impact of a service and the vulnerability of the group claiming the service. Pillay also mentions the interpretive usefulness of South African Constitutional jurisprudence in the Canadian context. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: South Africa


This discussion paper questions whether a Canadian with Disabilities Act should be endorsed by reviewing existing federal legislation, comparable legislation in other jurisdictions, and other pertinent issues. The authors review the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act, Canada Transportation Act, Employment Equity Act, Broadcasting Act and Telecommunications Act. The functioning of these acts, how disability rights issues have been interpreted under the acts, current advancements under the act, guidelines, measures of success, and recommendations are outlined. The American legislative framework under the Americans with Disabilities Act, and the Australian framework under the Disability Discrimination Act are compared to determine lessons Canada may learn from these jurisdictions. Points in favour and against a “Canadians with Disabilities Act” are discussed, and the
factors necessary for legislation that successfully removes barriers are determined through legislative analysis.

**Legislation:**
*Canada Transportation Act*, S.C. 1996, c. 10
*Employment Equity Act*, S.C. 1995, c. 44.

**Jurisdiction:** Canada, Australia, United States of America

---

**Arbour, Louise.** "'Freedom from Want’—From Charity to Entitlement", *LaFontaine-Baldwin Lecture, Quebec City* (March 3, 2005)

Arbour considers the evolution of economic, social, and cultural rights in Canada’s political and legal culture. She explores the international origins of these rights, including the role played by Canada in their development, while highlighting Canada’s reluctance towards their recognition and enforcement. Arbour contrasts the Canadian experience with the experiences of countries whose courts play a vital role in enforcing economic, social, and cultural rights. In her view, these nations provide important lessons to Canada, as they bring life-threatening matters “from the realms of charity to the reach of justice.”

[NOTE: does not specifically address disability]

---

**Legislation:**

**Jurisdiction:** Canada, International
Gender:


According to Day and Brodsky, the Budget Implementation Act (which repealed the Canada Assistance Plan and introduced the Canada Health and Social Transfer) reflects significant changes to social and economic policy occurring both within Canada and internationally—changes that are deepening women’s inequality. This book explores the discrepancy between Canada’s express commitments to women’s equality (in human rights instruments) and its social/economic policy decisions. The authors conclude that the Budget Implementation Act contravenes Canada’s international treaty obligations and women’s Charter rights. They consider what women must do to ensure that social programs and equality guarantees respond effectively to their needs and aspirations. Moreover, they suggest future directions for women’s activism, institutional reform, and government policy. [NOTE: does not specifically address disability]

Legislation:
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, s. 36.
[Provincial human rights statutes, generally]

Cases:

The author notes that women’s economic inequality is a universal phenomenon resulting from discrimination against women across the world. She argues that women cannot achieve equality until addressing women’s poverty and economic inequality is made an indivisible, inseparable, and central part of the human rights agenda. The author then explains how current macro-economic government policies are detrimental to women; she argues that when governments pursue these policies, they violate the human rights commitments that they have made to women. The author concludes by highlighting the importance of effective human rights accountability mechanisms, and she recommends ways to ensure that women play an active participatory role.

[NOTE: does not specifically address disability]

Legislation:
[International human rights treaties, generally.]

Jurisdiction: International


In 2000, the National Association of Women and the Law (NAWL) obtained status to intervene before the Supreme Court of Canada in Gosselin—a case challenging the constitutionality of welfare regulations in Quebec during the 1980s. NAWL’s position was that the impugned regulations worsened women’s existing inequality, poverty, vulnerability to sexual and racial violence, and discrimination. Prior to intervening, NAWL held consultations with women in four provinces across Canada who have lived in poverty or work closely with impoverished women in order to explore the legal/political implications of the case and obtain feedback on NAWL’s proposed arguments. This final report on
the consultation process presents a number of themes that emerged in the consultations. [NOTE: does not specifically address disability]

**Cases:**
*Gosselin v. Quebec (Attorney General)*: pending appeal to the Supreme Court of Canada

**Jurisdiction:** Canada


Writing in 1987, Fudge explores how the public/private distinction has colored constitutional adjudication of sex equality cases and how this distinction both reinforces and ameliorates women’s subordination. Specifically, she examines cases where state action affects the status of women through protective or remedial labor legislation, the legal recognition and regulation of a specific type of family, and legislation designed to protect women from sexual violence/victimization. Her examination reveals that the public/private distinction acts primarily to impede the feminist struggle for substantive equality. Fudge also considers the debate with respect to whether the attainment of formal legal equality is a necessary condition for women’s substantive equality by considering the legal regulation of reproduction. In the final analysis, she concludes that the Charter has potential to further and undermine feminist struggles; thus, for these objectives, if it is used, it should be used with caution. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

Jurisdiction: Canada
National Standards/Accountability in Social Welfare


The author considers the Canada Assistance Plan (repealed) and the Social Union as regimes of accountability for expenditure of money and for social rights. She examines how these regimes have reconciled principles of responsible government and federalism with the principle of social citizenship. The author argues that the Canada Assistance Plan fostered principles of responsible government and social citizenship by requiring democratic accountability for social rights and monetary spending, although it posed problems for federalism; the Social Union, in contrast, does not provide democratic accountability for social rights or money. The author concludes by considering how Canada’s experiences with these regimes can inform the design of a new regime that ensures accountability for money and social rights, but does so in accordance with principles of federalism. [NOTE: does not specifically address disability]

Legislation:
Canada Assistance Plan, R.S.C., 1985, c. C-1 (repealed).

Agreements:
Communique on Early Childhood Development (11 September 2000).
Multilateral Framework on Early Learning and Child Care (November 2003).
NCB Governance and Accountability Framework (12 March 1998).

Jurisdiction: Canada


The paper discusses the need for national standards for social programs to s. 36 of the Constitution, and fulfil Canada’s human rights obligations to women. The authors survey the history of fiscal federalism from minimum standards and cost sharing under the Canada Assistance Plan, to the erosion of social programs through block funding and provincial flexibility under the Canada Social Transfer (CST) despite the promises of the Social Union Framework Agreement. Focusing on British Columbia, the authors note the cut backs to social programs, such as
social assistance and legal aid, and their negative impact on women. The authors also compare the usefulness of Charter litigation and human rights complaints to fill the void left by the repeal of the CAP. Different manners in which the federal government has jurisdiction to create and maintain social programs (including jurisdiction over social programs, federal spending power, s. 36 of the Constitution Act, dual provincial-federal aspects, POGG powers, and accommodating modern realities/Québec) are detailed. The authors also propose a Canada Social Programs Act that would define standards and create accountability for the CST. [NOTE: does not specifically address disability]

Legislation:

Cases:
Various Human Rights cases considering housing, education, duty to accommodate, and social assistance.

Jurisdiction: British Columbia, Canada


Prince discusses collaborative/executive federalism, and interprovincial/territorial collaboration, and its implications for the political, social, and economic citizenship rights of persons with disabilities. He surveys the development and mechanisms of certain pieces of legislation, including the Canada Assistance Plan, the Vocational Rehabilitation of Disabled Persons Act (VRPD), the Canada Pension Plan and its various reforms, and the replacement of the VRPD with the Employability Assistance for People with Disabilities program. While there has been a move towards interprovincialism, it co-exists with collaborative federalism, which remains a relatively democracy friendly and participatory mechanism for disability policy-making.

Legislation:
Canada Pension Plan Act, R.S.C, 1985, c. C-8
The Canada Assistance Plan, R.S.C. 1985 Vol. 1, C-1.

Jurisdiction: Canada

By replacing the Canada Assistance Plan (CAP) with the Canada Health and Social Transfer (CHST), the federal government removed national standards for the quality of social welfare programs. This article considers whether judicial review of the CHST holds promise for restoring national standards to social welfare. After providing an overview of the CHST—the context in which it emerged, how it works, how it differs from the CAP, as well as the views of its critics and supporters—the author considers how the federal government’s use of its spending power under the CHST could be challenged based upon grounds in administrative, constitutional, and international law so as to restore national standards to social welfare. Despite concluding that a successful challenge is unlikely, the author contends that judicial review may redirect attention from deference, decentralization, and devolution to issues of need, poverty, and the purposes underlying Canada’s welfare state. [NOTE: does not specifically address disability]

Legislation:
Canada Assistance Plan, R.S.C., 1985, c. C-1.
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, s. 36.

Cases:
Finlay v. Canada (Minister of Finance), [1993] 1 S.C.R. 1080.

Jurisdiction: Canada

Jackman reviews the Canada Health and Social Transfer (CHST), its differences with the Canada Assistance Plan (including scaled-back conditions attached to the transfer of funds), and its effect on socio-economically disadvantaged women. Jackman proposes that the CHST is constitutionally deficient because it does not require welfare funds to be spent consistently with s. 15 equality rights; s. 7 should guarantee a minimum level of welfare, in addition to appeal procedures; the CHST is inconsistent with s. 36 of the Constitution, and is likewise non-compliant with International obligations. Recommendations to bring the CHST in line with Constitutional and International Covenants are also suggested. [NOTE: does not specifically address disability]

Legislation:

Jurisdiction: Canada


Scott discusses the reaction of the U.N. Committee to draft legislation replacing the Canada Assistance Plan with the Canada Health and Social Transfer. He argues that by maintaining national standards for health care, while removing most standards for social assistance, the poor are being discriminated against. Under the International Covenant on Economic, Social and Cultural Rights member states have a duty not to take retrogressive measures and Scott theorises how Canada’s actions may be interpreted as such. Although Canada may justify breaching the Covenant by delegating responsibility to the provinces, Scott insists this legislation is legally unjustifiable under international law. [NOTE: does not specifically address disability]

Legislation:
Canada Assistance Plan Act, R.S., c. C-1.

Jurisdiction: Canada, International

Focusing on the period up to 1988, Beatty writes about the nature of federal provincial fiscal arrangements, their content, and how they may be changed. He overviews the Canada Assistance Plan, Established Programs Financing Act (EPF), Canada Health Act, and Vocational Rehabilitation of Disabled Persons Act (VRDP). Government assessment of the effects of the VRDP and CAP on persons with disabilities has been uneven, and Beatty proposes methods of reform through administrative remedies (as suggested by Finlay) and Charter litigation (by bringing applications under s. 24, and using s. 15 to argue that the provinces’ CAP spending cannot discriminate based upon place of residence). Beatty also discusses the federal spending power, and constitutional reforms that would give the federal government more control over social policy spending.

Legislation/International Instruments:
Canada Health Act, S.C. 1984, c. 6.

Cases:
Finlay v. Minister of Finance of Canada, Minister of National Health and Welfare and Attorney General of Canada, 48 N.R. 126 (Fed. C. A.); 71 N.R. 338 (S.C.C.)

Jurisdiction: Canada


This article details the history of the constitutional negotiations that ultimately resulted in the entrenchment of section 36 in the Constitution Act, 1982. The author explains how this section resulted from the federal government’s struggle to obtain “explicit recognition” of the federal spending power in the Constitution. He notes, however, that the federal government acquired something much more: a share of responsibility for promoting equality of opportunity, furthering economic development, and providing essential public services of reasonable quality to all Canadians. In considering the legal status of section 36, the author concludes that this section is justiciable; the courts have, at minimum, the power to issue declaratory relief in the event of a breach; the commitment embodied in the section is of a significant nature and must at least bear the strength of a “constitutional obligation;” and finally, it is not good enough for governments to “work towards” providing essential public services—they must actually provide them. [NOTE: does not specifically address disability]

Legislation:
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 36.

Cases:

Jurisdiction: Canada
Income and Social Assistance


The National Council of Welfare describes the changes in welfare policy in Canada during the 1990s up until the fall of 1997. After briefly describing the decline in federal financial support for provincial/territorial welfare programs, the report details the numerous changes in welfare policy—by province and territory—that occurred during the 1990s. Ultimately, it contends that reforms have been misguided; they have brought misery to millions of poor Canadians without providing them any more hope of escaping poverty. The report concludes by considering the broad trends in welfare reform across the provinces/territories, and it provides recommendations for improving welfare in Canada. [NOTE: does not specifically address disability]

Legislation:
Various provincial/territorial welfare statutes.

Jurisdiction: Canada


This article, written just months after the Conservative majority was elected in the 1995 Ontario election, considers the changes that this government has proposed for Ontario’s social assistance system and the implications that these changes will have for recipients. The authors begin by noting that the federal government bears some responsibility for these detrimental reforms owing to its repeal of the *Canada Assistance Plan*. Next, they describe the specific reforms announced by the newly-elected provincial government, as well as recent jurisprudential developments with respect to social assistance. The authors conclude that the future is one of “despair and grinding hardship” for Ontario’s most disadvantaged citizens. [NOTE: does not specifically address disability]

Legislation:

Cases:
*Director, Income Maintenance Branch, Ministry of Community and Social Services v. Nicolltsis*; *Director, Income Maintenance Branch, Ministry of Community and Social Services v. Arbour* (July 24, 1995), Ottawa #945/95, #946/95; Toronto #777/92, #674/93 (Div. Ct.) [unreported].
Re Jeevaratnam and The Attorney General of Ontario (File No. RE 4874/95).

**Jurisdiction:** Ontario


Greschner critiques the decision of the Board of Inquiry in *Chambers and Sask. Human Rights Commission v. Gov’t of Sask.* In this decision the Board held that it was not discriminatory to provide different amounts of social assistance to married and unmarried individuals because they interpreted “offered to the public” under the *Human Rights Code* as restricted to programs without eligibility requirements. Greschner explains the startling consequences of this decision, and offers the proper principled approach to interpreting human rights codes and conclusion the Board should have reached. Greschner also suggests the Board’s interpretation of “offered to the public” is reviewable as a question of law.

**Legislation/International Instruments:**

**Cases:**
Various cases indicating the appropriate method of interpreting human rights legislation.

**Jurisdiction:** Saskatchewan
Disability Income Supports and Social Assistance:


The author argues that social assistance policies and practices are increasingly based upon and reinforce a division of persons with formal citizenship status into full or model citizens and second-class or inadequate citizens. After describing the rise of neo-liberalism and its influence on conceptions of citizenship, she considers changes to social assistance in Ontario, noting that they are representative of changes taking place across North America. She discusses how the reduction in welfare rates, the introduction of workfare, and the development of comprehensive and punitive fraud control schemes operate to define the welfare recipient as an outsider, who is not deserving of full citizenship. The author concludes by offering strategies for overcoming the present climate of hostility towards social rights of citizenship. [NOTE: does not specifically address disability]

Legislation:
Canada Assistance Plan, R.S.C., 1985, c. C-1.

Jurisdiction: Ontario, North America


The authors present their research on the benefits of extending non-cash benefits to single mothers and women with disabilities during the transition from social assistance to employment. The research project was premised on a realization that although many women who receive social assistance would like to support themselves and their families through paid employment, the costs are often prohibitive due to the resulting loss of all non-cash benefits (e.g. child care, transportation, and housing.) In focus groups, women with disabilities and single mothers were asked about the importance of these benefits, and what would assist them to join the workforce. The authors also calculated the financial costs of returning to work due. They contend that a national strategy to remedy this situation would be most effective yet least likely to occur. Thus, they recommend a number of provincial changes that would make employment a feasible option.

Jurisdiction: British Columbia, Ontario, Saskatchewan, Newfoundland and Labrador, Canada

The author criticizes the Supreme Court’s judgment in Granovsky. In this case, Mr. Granovsky argued that the ‘recency of contributions’ requirement for CPP discriminated against him on the basis of disability, as his sporadic work history was the result of being partially disabled during the years leading up to his application. The author notes that the court’s rejection of his argument will make it harder for people with temporary, episodic or progressive disabilities, or disabilities with an uncertain prognosis, to qualify for CPP benefits. She then discusses disturbing trends in the decision which might make it more difficult for people with disabilities to launch successful Charter equality claims in the future.

Legislation:

Cases:

Jurisdiction: Canada


The authors present the results of their study on CPP disability policy. Their research explored the experiences of women with disabilities in relation to living with and receiving CPP disability benefits. By conducting focus groups of women with disabilities, group interviews with CPP administrators, and drawing upon statistics, literature and their own knowledge as feminist researchers with disabilities, the authors identify common themes with respect to the impact of pension policies on women with disabilities, and provide recommendations for reform so as to distribute resources equitably and respond to changes in health status and ability to work.

Jurisdiction: Canada


Writing in 1999, Beatty considers the impact of the Ontario Disability Support Program (ODSP) on Ontarians with disabilities. According to Beatty, the government’s creation of a separate social assistance program for people with disabilities demonstrates its pursuit of two competing objectives, what Beatty terms the “model program” and “strict enforcement” objectives. Beatty describes the program’s development and then analyzes the its key features by
considering the following for each of these features: the relevant provisions of the ODSP; comparisons with the previous system; comparisons with the programs of Alberta and British Columbia; major policy decisions embodied in the ODSP; implementation of the ODSP thus far; and evaluation/proposals for reform.

**Legislation:**
*Vocational Rehabilitation Services Act*, R.S.O. 1990, c.V.5.

**Jurisdiction:** Ontario, Alberta, British Columbia

---


Pearce examines current developments in *Canada Pension Plan (CPP)* policy and litigation from a poverty law perspective. Pearce notes the trend towards abstract, rather than contextual “real world”, analysis of whether individuals qualify for disability benefits by the Pension Appeals Board, the increased scrutiny of applicants with psychological disabilities, and policy changes allowing disability pensioners to maintain benefits while attending school where they have not experienced any medical improvement. *CPP* retirement criteria, pension credit splitting, survivor’s pensions, as well as residency and spousal requirements under the Old Age Security pension are also discussed.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada

---

Schwartz reviews existing disability related programs, and makes recommendations for an improved federal role in the social security system for persons with disabilities. He discusses federal laws prohibiting discrimination; federal agencies simplifying access to existing disability related programs; shared-cost programs versus direct delivery of benefits; bilateral agreements between the federal and provincial governments; tax deductions and credits; a guaranteed annual income; long term disability insurance; the consolidation of decision-making tribunals; and employment training. Schwartz’s recommendations favour increased use of the federal spending power to provide direct benefits to individuals, rather than concentrating on universal programs or contentious federal-provincial agreements.

**Legislation:**
The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.
The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

**Cases:**
Central Mortgage and Housing Corp. V. Co-Operative College Residences (1975), 57 D.R.C. 1103 (Ex. Ct.).

**Jurisdiction:** Canada


Schulze discusses long-term disability, public income support programs, and their interaction with disability insurance. Schulze provides examples of how the insurance industry distorts information about the true situation of claimants to deny or suspend benefits, blatantly disregarding judicial decisions and legal definitions in the process. Insurance companies word contracts to provide the minimum benefits possible, and reduce their own liability by placing the burden on the public system; while employers act as agents of the insurance company and discourage employees from making claims. Schulze suggests the current methods of regulation are not requiring equitable income replacement by insurance companies, and provides ideas for reform.

**Legislation:**
Insurance Act, R.S.O. 1990, c. I.8

**Cases:**
Various cases about disability insurance.

**Jurisdiction:** Ontario, Canada

Although there are numerous programs in Ontario that purport to provide financial compensation for disability, the system is failing many people with disabilities. Writing in 1991, Beatty notes that despite calls for developing a comprehensive disability scheme, there has been little in the way of progress. Beatty discusses steps, which he maintains are necessary, to realize this goal. The first step, he argues, is to conduct a public review of the existing programs to produce a descriptive framework of how the system actually operates. Next, the objectives of a reformed disability compensation scheme should be defined, which requires consideration of equity issues. Beatty explores six of these issues in detail before considering more “practically-oriented” objectives. Finally, he describes strategies that the Ontario government could use to reform the system.

Legislation:
Insurance Act, R.S.O. 1980, c. 218.
Workers’ Compensation Act, R.S.O. 1980. c. 539.

Jurisdiction: Ontario, Canada


Writing in 1990, Ison considers the trend towards inclusion of a right to continuing employment in provincial workers’ compensation acts. He argues that this development is detrimental to the interests of employees who have a permanent disability, and goes on to consider alternative statutory mechanisms for facilitating their employment, including: occupational health and safety legislation, human rights and employment equity legislation, quota systems, and other facilitative legislation. Ison concludes that the quota system, despite its many drawbacks, is probably the most viable statutory scheme for ensuring the hiring of people with disabilities; ergonomic regulations are also desirable for making work environments more accessible. Nonetheless, he maintains that a comprehensive social insurance system—providing regular income for persons with permanent disabilities—would enable more people with disabilities to find fulfilling work than any legislation purporting to create rights to employment.

Legislation:
Workers’ compensation acts (generally)
Occupational health and safety legislation (generally)
Human rights and employment equity legislation (generally)

Jurisdiction: Canada

This report documents and analyses the publically available sources of income for persons with disabilities, with focus on individuals with intellectual impairments. It discusses the levels of support and services provided by Social Assistance, CPP/QPP, Unemployment Insurance, Old Age Security/Guaranteed Income Supplements, Tax credits, among other programs. There is comparison between the level of support provided in different provinces, as well as analysis of the purpose of the programs, and how they aid or hinder individuals with disabilities to be financially autonomous. The author also suggests ways the programs can be improved, and discusses proposals for incremental and comprehensive reform.

**Jurisdiction:** Canada

---

Ross, David P. “Selected Income Security Programs and Disabled Persons” (Fall 1987) 5 Just Cause 3-7.

Ross notes the three objectives of the public income security programs (Support, supplementation and Stabilization), and reviews demographics and financial circumstances of persons with disabilities living on support from public programs (the CPP/QPP or CAP) who have no alternate sources of income. He proposes an improved “core income” program which would provide basic support at the poverty line.

**Jurisdiction:** Canada

---


Writing in 1985, the authors discuss discriminatory provisions in Ontario’s *Family Benefits Act* and *General Welfare Assistance Act* (now repealed). They criticize the use of gender-specific language, and note the ways in which various provisions have disparate impacts on women—particularly single mothers. The authors consider how these provisions may be violations of sections 7 and 15 of the *Charter*.

**Legislation:**
*Family Benefits Act*- Need 1985 citation
*General Welfare Assistance Act*- Need 1985 citation

**Jurisdiction:** Ontario
Right to Adequate Social Assistance:


Jackman considers an obstacle that confronts litigants who challenge the inadequacies and inequities of social welfare: judges’ presumptions that welfare laws/policies and governments’ dealings with the poor are benign or innocent and that welfare recipients are responsible for their own misfortunes. Jackman argues that outcomes of Charter welfare cases depend upon judges’ willingness to engage in “reality checks”—to test presumptions of innocence and guilt against the realities of the welfare system and the lived experiences of welfare recipients. In particular, she demonstrates how, in Gosselin, the openness of the Supreme Court Justices to considering the actual contexts and real life experiences of those persons affected by the legislation directly impacted their rulings. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


This article discusses the Supreme Court of Canada’s analyses of Charter sections 7 and 15 in Gosselin. According to the author, a major obstacle to successful poverty-related Charter challenges is the courts’ tendency to attribute poverty to individual shortcomings rather than to systemic factors. Because it is difficult to blame children for their own poverty, the author reasons that courts may be more willing to acknowledge systemic conditions where children are directly involved. She concludes that a section 7 or 15 Charter challenge to legislation that fails to ensure adequate social assistance will likely be successful in a case where child poverty is directly at issue. Limitations of Charter litigation for improving the actual living conditions for people who receive social assistance are also considered. [NOTE: does not specifically address disability]

Legislation:
Cases:

Jurisdiction: Canada


This article considers the struggle to achieve constitutional protection for a minimum level of social assistance in Canada. After reviewing various failed attempts to achieve this protection via a legal-rights framework, Reynolds urges advocates to explore alternative methods. He examines how the Hungarian Constitutional Court found legislation (which terminated numerous social welfare benefits) unconstitutional without resorting to a rights-based analysis. Although the principles invoked in Hungary are not likely to achieve similar results in Canada, Reynolds contends that they are significant for revealing that legal rights are not the only available mechanism for achieving a constitutionally protected minimum level of assistance [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada, Hungary


Matas overviews the Gosselin decision from the lower courts to the Supreme Court, and emphasizes the treatment of economic, social and cultural rights versus civil and political rights under international and domestic law. He critiques arguments presented to the courts, including: the inequality of economic, social and cultural rights versus civil and political rights; the distinction between “positive” economic social and cultural rights and “negative” civil and political rights; distinguishing the two sets of rights based on expenditure; the lower Court’s interpretation of the nature of obligations, progressive realisation, and economic development under international law; and
the role of the Court in economic and social rights adjudication. Matas also
assesses the decisions of Justice Arbour and Bastarache in the Supreme Court
decision. [NOTE: does not specifically address disability]

Legislation/International Instruments:
*Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being
Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.*
*International Covenant on Economic, Social and Cultural Rights, 16 December

Cases:

Jurisdiction: Canada, International

Elliot, Amber. “Social Assistance and the Charter: Is There a Right to

Writing in 2001, the author explores whether there is a right to welfare in
Canada. She begins by considering the provincial welfare legislation, noting that
low rates of assistance, strict eligibility requirements, and ministerial discretion
suggest that the legislation does not entitle citizens to a minimum level of social
assistance. She suggests that the idea of a statutory right to welfare is even less
plausible following the repeal of the Canada Assistance Plan. The author then
focuses upon whether section 7 of the *Charter* confers a right to welfare. She
concludes that although a strong case can be made that section 7 protects
welfare rights, a constitutional right to welfare may yield limited practical
significance. [NOTE: does not specifically address disability]

Legislation:
*B.C. Benefits (Income Assistance) Act, R.S.B.C. 1996, c. 27.*
*Canada Assistance Plan, R.S.C., 1985, c. C-1.*
*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982,
being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 7.*

Cases:
*Finlay v. Canada (Minister of Finance), [1993] 1 S.C.R. 1080.*
*Masse v. Ontario (Ministry of Community and Social Services) (1996), 134
D.L.R. (4th) 20.*
*New Brunswick (Minister of Health and Community Services) v. G. (J.) (1999),
177 D.L.R. (4th) 124 (S.C.C.).*
*Wilson v. British Columbia (Medical Services Commission) (1988), 53 D.L.R.
(4th) 171.*

Jurisdiction: Canada

Scassa reviews the Conrad case, which considered whether Mrs. Conrad’s s. 7 Charter rights had been violated when her social assistance was revoked (pending appeal) on suspicion of cohabitation with her husband. The trial judge held that Mrs. Conrad had not been eligible for social assistance, and made obiter statements that as an economic interest social assistance is outside the scope of s. 7. Scassa indicates that more context sensitive adjudication, focussing on individual dignity and societal/international values rather than on the classification of economic/non-economic rights, is required. The trial judge’s discussion of the principles of fundamental justice in social assistance decisions is also critiqued.

Legislation/International Instruments:

Cases:

Jurisdiction: Nova Scotia, Canada


Hasson discusses the use of litigation to rectify social problems in the pre and post-Charter Canadian context, and in the American judicial forum. Hasson reviews the traditional conservatism of the Canadian courts in the 1960s-70s through case law, and notes the lack of interest in income maintenance law by the legal profession. His assessment of Charter income maintenance cases to 1989 indicates worsened outcomes for the financially vulnerable, and gains for the economically advantaged. Hasson does not view the American example positively, because although procedural protections have been granted to individuals challenging income maintenance decisions in certain situations, they are restrictive and require financial resources. [NOTE: does not specifically address disability]

Legislation/International Instruments:
US Const.
Cases:
Re Fawcett (1973), 1 O.R. (2d) 772 (Ont. C.A.).
Symes v. R (31 May 1989), Case T-1989-152 [unreported].
Various Canadian and American cases where courts deal with “social problems”.

Jurisdiction: Canada, United States of America


Writing in 1988, Morrison explores the possibility that section 7 of the Charter provides a form of protection to “welfare rights.” He begins by describing Canada’s international and domestic legislative commitments to assisting those in need, and notes the trend toward the legalization of welfare rights. Morrison responds to objections that are often raised against the inclusion of welfare rights under section 7 and he advances an argument that the jurisprudence on this section allows for protection of “contingent interests”—interests in liberty or security of the person that are dependent upon an entitlement to benefits. [NOTE: does not specifically address disability]

Legislation:
Cases:
Wilson v. Medical Services Commission of B.C. (5 August 1988), (B.C. C.A.) [unreported].

Jurisdiction: Canada


Writing in 1988, Johnstone examines the scope of interests that are protected by section 7 of the Charter under “security of the person”. He argues that security of the person must be interpreted to entail the protection of welfare benefits in order for the Charter to be effective in ensuring that the governments’ activities do not undermine individual dignity and self-respect. Furthermore, he contends that whether or not the Charter requires governments to provide welfare, it at least obliges governments to administer existing welfare programs in accordance with principles of fundamental justice. In developing this argument, Johnstone considers Canadian jurisprudence, lessons from the United States, as well as the values that lie at the heart of the Charter. [NOTE: does not specifically address disability]

Legislation:
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, s. 36.

Cases:
Board of Regents v. Roth (1972), 408 U.S. 564
Re Rafuse and Hambling (1979), 107 D.L.R. 349.

**Jurisdiction:** Canada (with lessons from the United States)
Tax: Equity and Social Policy


Larre critically evaluates policy rationales behind the exemption of personal injury damages from taxation. The author compares American taxation provisions, and the Canadian position, and evaluates whether personal injury damages taxation exemptions are consistent with current disability policy. Larre isolates income support for persons with disabilities, and pity-based humanitarian justifications as potential policy justifications for tax exemption. By reviewing older medical based disability theories, and recent developments which focus on citizenship, and the social construction of disablement, Larre demonstrates the negative impact of the humanitarian justification on persons with disabilities, and encourages the Canadian government to clarify their policy position.

Legislation:
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

Cases:

Jurisdiction: Canada, United States of America.


This article discusses disability tax policy in Canada in light of recent proposed changes to the system. The authors distinguish between two principles that inform tax policy in this area: horizontal equity and social policy. They argue that tax policy should be governed by the horizontal equity objective, while the social policy objective is better served by direct support measures outside of the tax system. With this in mind, the authors explore options for tax reform.

Legislation:
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

Jurisdiction: Canada

Chisholm discusses concerns with the Disability Tax Credit (DTC), and ways to address its deficiencies, particularly for amputees. She reviews the socio-economic situation of persons with disabilities and the income tax system which seeks to achieve fairness between taxpayers. However, the income tax system emphasizes the medical model of disability, and Chisholm identifies this as a barrier to horizontal equity. Chisholm also provides the legislative history of the DTC, and the judicial response to it—which featured a mixture of anger at the restrictiveness of the legislation, and sympathy for claimants. The author provides a case study of how the DTC works for amputees, and makes recommendations to improve the DTC, including: refundability, a disability expense tax credit, and redesigning the eligibility criteria for the DTC.

**Legislation:**
*Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)*

**Cases:**

**Jurisdiction:** Canada


Philipps discusses the income exclusions and deductions in the income tax system, refundable tax credits, and their effect on low income individuals with disabilities. She describes the inequities in the current income exclusion system, where low-income individuals with income from taxable sources cannot benefit from income exclusions, and those with low or non-taxable income cannot benefit through tax deductions, or non-refundable credits (whose transferability is not always personally beneficial). While there are Constitutional hurdles to income support programs for low-income people with disabilities, Philipps evaluates three proposals for reform in light of income support, access to services, and social and economic integration.

**Legislation:**

**Jurisdiction:** Canada

Duff explores current tax income tax provisions designed to promote horizontal equity between persons with and without disabilities, and the individuals/families who support persons with disabilities and those who do not. Duff critiques and makes recommendations for provisions aimed at the cost of disability, tax measures designed to increase participation of persons with disabilities in the labour force, and tax rules surrounding income support for persons with disabilities. While the paper is more concerned with narrowly defined tax policy, it also explores and the issue of social policy as implemented through the Income Tax Act, and distinguishes between policies and measures that best accord with them.

**Legislation:**

**Jurisdiction:** Canada

---


This article discusses the Canadian tax system’s unequal treatment of women by focusing on mothers, lesbians, elderly women, and women as poor. Young points out women are more likely to be economically disadvantaged, and that tax system mechanisms are of greater advantage to higher income earners. These include subsidies in the form of deductions instead of refundable credits, inadequacy of child care expense deductions; opposite sex definitions of spouse, RRSPs, and preferential treatment of capital gains over other forms of investment. The *Symes* and *Thibaudeau* cases are also analysed, and possible arguments for successful s. 15 *Charter* challenges are proposed. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Ontario, Canada

Writing in 1994, the author considers Canadian tax laws’ inconsistent treatment of the varied sources of income for persons with disabilities. Whereas some forms of disability income are taxable, others are tax exempt. The author discusses the ways that this inconsistent treatment creates horizontal inequity among persons with disabilities, fosters vertical inequity between people who have a disability and people who do not, and lacks neutrality and simplicity. After considering two options for reform—taxing all forms of disability income or making all forms tax exempt—the author argues in favour of the latter option. He discusses the benefits of exempting all disability income for taxation while taxing all contributions to income replacement programs to offset lost revenue.

**Legislation:**

**Jurisdiction:** Canada
Disability and Employment:


Malhotra analyzes and applies philosopher Martha Nussbaum’s theory of equality, which is based on identifying a list of core human entitlements that represent a minimum of what respect for human dignity requires, to re-evaluate the Supreme Court of Canada’s decision in Granovsky. Malhotra argues that use of Nussbaum’s framework for equality might stimulate more expansive readings of the notion of dignity, which have become crucial to the Supreme Court’s equality jurisprudence. Malhotra suggests ways in which Nussbaum’s set of entitlements might lead to a richer conception of dignity and consequently encompass a right to a public disability pension for workers whose disabilities preclude them from making consistent contributions.

Legislation:

Cases:

Jurisdiction: Canada


Malhotra examines the implications of the social model of disablement, which focuses on structural and attitudinal barriers, for the legal regulation of modern workplace in Canada and the United States. Malhotra demonstrates how all markets have some measure of regulation and that the notion of a self-regulating market is a myth. Malhotra offers an analysis of how principles of contract law and property law disempower workers in general and workers with disabilities specifically. He then provides a detailed critique of the Supreme Court of Canada’s decision in Meiorin. He concludes that two implications of the social model are to increase the workers’ conceptual and physical control of the day to day production decisions and the provision of disability supports across the lifespan decoupled from labour market status.
Legislation:
*Wartime Labour Relations Regulations*, P.C. 1003, February 17, 1944

Cases:
*Adkins v. Childrens Hospital* 261 U.S. 525 (1923).
*Carter v. Exxon Co. USA*, 177 F3d 197 (3d Cir. 1999).
*Newfoundland (Treasury Board) v. NAPE*, [2004] 3 S.C.R. 381.

Malhotra compares the marginalization of people with disabilities in Canada and the United States. Malhotra specifically contrasts the barriers that people with disabilities face in the two countries in accessing transportation and attendant services. He then explores the state of the law in the two countries, considering leading Supreme Court of Canada decisions and the jurisprudence under Title I of the Americans with Disabilities Act. Malhotra explores the paradox of how Canada has relatively generous policies toward employees with disabilities yet poor environmental and physical accessibility, while the United States has much greater levels of accessibility but relatively harsh policies toward people with disabilities.

Legislation:

Cases:
British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1990] 3 S.C.R. 3

**Jurisdiction:** Canada, the United States


In this article, Malhotra critiques some of the central concepts of the law and economics school from the perspective of the social model of disablement. He illustrates how cost-benefit analysis, statistical discrimination and the traditional perception of law and economics scholars of unions as monopolies may be usefully critiqued. The author then briefly analyzes how cost-benefit concepts were used in the majority and dissenting judgments in Council of Canadians with Disabilities v. Via Rail.

**Legislation:**
- Canadian Transportation Act, S.C. 1996, c. 10, s. 5.

**Cases:**

**Jurisdiction:** Canada, United States


Malhotra evaluates different schools of law and economics to determine which are most consonant with the values of the social model of disablement. The extent to which the schools provide robust explanations for labour market policy is explored. Malhotra concludes that neo-institutionalist Law and Economics, feminist Law and Economics and Critical Race Theory Law and Economics hold
out the most promise in light of the implications of the social model of disablement.

**Legislation:**

**Cases:**
*Cargill Ltd. v. United Food and Commercial Workers International Union, Local 1118* (2004), 76 C.L.A.S. 380 (Arbitrator Power)
*Fernandes v. Manitoba (Director of Social Services Winnipeg Central)* (1992), 93 D.L.R. (4th) 402, leave to appeal to S.C.C. refused, 23169 (15 April 1993),

**Jurisdiction:** Canada, United States

**Employment Equity**

*Roehrer Institute for the Canadian Bankers Association. Factors Affecting the Employment of People with Disabilities: A Review of the Literature (North York, Ont.: L’Institut Roehrer Institute, 2001).*

This document is a survey of factors affecting the employment of people with disabilities commissioned by the Canadian Bankers Association reviewing Canadian and international definitions of disability, employment policy, employment equity, and private sector practices that enable recruitment and retention of workers with disabilities. The definition of disability has generally shifted from a bio-medical to social model, however some countries using quota-based (rather than rights based) approaches to employment equity still rely on the bio-medical model. Internal and external factors that commonly affect employment include: type and severity of disability, multiple grounds of disadvantage, age, living situation, education, access to supports, and government incentives.

**Legislation/International Instruments:**


Disability Discrimination Act (U.K.), 1995, c. 50.

Disabled Persons Employment Act (1986), Austria.

Employment Equity Act, S.C. 1995, c. 44.


Human Rights Act 1993 (N.Z.)

**Jurisdiction:** Canada, Australia, Austria, Finland, Germany, New Zealand, Sweden, United Kingdom, United States of America

“Contract compliance: Toronto takes the lead” (Winter 1986) 4 Just Cause No. 3, 11-12.

While federal labour laws apply only to federally regulated industries, provinces have several options to increase employment opportunities for disadvantaged groups. Ontario has done so by introducing pay equity legislation, while all levels of government, by requiring employment equity of all companies they enter into contracts with, can help achieve equality in the workplace through contract compliance. Toronto is an example of a municipality which has phased in this policy.

**Jurisdiction:** Ontario, Canada

Fudge, Derek. “Solidarity: A strategy to obtain employment equity” (Winter 1986) 4 Just Cause No. 3, 3-5.

Fudge proposes that organised labour and the consumer movement of persons with disabilities have similar goals (adequate income, full employment and advancement of human rights), and would benefit from allying with one another.

**Jurisdiction:** Canada


Holmes argues that unions fight for rights for people with disabilities through collective bargaining, and have moved from demanding secure pensions and benefits to securing jobs for workers with disabilities who have been denied
access to employment in the past. Examples of contract clauses that benefit persons with disabilities are also included.

**Jurisdiction:** Canada


Stein notes the systemic and adverse effects discrimination that persons with disabilities face in the employment market, and how employment equity can combat both types of discrimination. After outlining examples of what an effective employment equity program would include, Stein discusses the features and deficiencies of Bill C-62. Since Bill C-62 is a voluntary, rather than mandatory, program by its very nature it is unlikely to be complied with. Amendments requested by advocacy groups are also highlighted.

**Jurisdiction:** Canada


Weiler suggests that, although flawed, the federal government’s Employment Equity Program has positive features that will promote the interests of persons with disabilities. While Weiler believes that the program’s results will be evidenced through mandatory reporting, some critics believe reporting may undermine privacy, and question the efficacy of the program in the absence of an enforcement agency. Weiler also believes the program provides realistic targets and empowers the disability community by encouraging active participation in its development.

**Jurisdiction:** Canada


This article lists the recommendations concerning employment equity from the 1985 report “Equality for All” and “Toward Equality” of the Parliamentary Committee on Equality Rights along with the response of the Department of Justice. As these recommendations and responses were designed to be the foundation for the new employment equity bill, the article asks whether the actual legislation mirrors its framework. Review mechanisms, participation by groups of individuals underrepresented in the workforce, contract compliance, tax concessions, census information, training, and other legislative recommendations are included.

Chabursky comprehensively deals with employment equity/affirmative action in the historical context of discrimination remedies. The author chronicles the development of the concept of discrimination (citing both American and Canadian examples); systemic discrimination; the Employment Equity Act (including its results and enforcement); and affirmative action programs based on statistical comparisons. Chabursky also suggests that merely meeting statistical rates of disadvantaged groups in employment may not be enough; for the elimination of discrimination in the workplace discriminatory practices and attitudes must also change. The 1992 recommendations of Parliament’s Special Committee on the Review of the Employment Equity Act are also discussed.

Legislation:

Cases:

Jurisdiction: Canada, United States of America

Malhotra reviews the jurisprudential history of duty to accommodate jurisprudence in Canada and the United States to determine why Canadian human rights decisions have been more responsive to disability accommodation than American jurisprudence. Although the Canadian vision of the duty to accommodate is indebted to American doctrines, it has been given a more substantive treatment in religious belief accommodation in Canada than in the United States. Malhotra argues that the Establishment Clause in the American Constitution prohibited the development of a robust concept of accommodation for religious beliefs, and that the de minimis standard for undue hardship created an impoverished notion of equality. In America, religious belief jurisprudence transferred conceptual difficulties to disability accommodation decisions, while in Canada religious belief jurisprudence provided the basis for a more substantive vision of equality in disability accommodation.

Legislation:
U.S. CONST. amend. I.

Cases:
Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977).

Malhotra discusses John Rawls’ concept of justice as fairness, its inadequacy with respect to the structural barriers that face workers with disabilities, and argues that if enriched by critical theory it has the potential to transform practices and secure substantive equality for persons with disabilities. Malhotra outlines the economic status of persons with disabilities, disability discrimination law, and Rawls’ theory of justice as fairness. Malhorta makes four suggestions that, while committed to Rawls’ redistributive equality, reconfigure his principles of justice to make them more responsive to persons with disabilities. While there are positive aspects of Canadian disability accommodation jurisprudence, more is required to attain the standards of the Rawls’ Difference Principle.

Legislation/International Instruments:

Cases:
British Columbia (Public service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3.

Jurisdiction: Canada


The author examines the legislative and judicial history of anti-discrimination and employment equity law, relating to persons with disabilities, in Canada and the United States. She notes that although American legislation has been successful in creating a universally accessible physical environment, American courts have been reluctant to enforce accommodation in the workplace; the opposite is true in Canada. Even so, people with disabilities in both countries remain at a significant disadvantage with respect to employment. The author contends that the successes and failures of both countries reveal that when disability is understood as a social issue and universal remedies are sought, access and anti-discrimination efforts have greater success. She concludes that
Canada’s Parliament should enact legislation requiring universally accessible environments.

**Legislation:**
*Accessibility for Ontarians with Disabilities Act, S.O. 2005, c. 11.*
*Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).*

**Cases:**
*Board of Trustees of Univ. of Alabama v. Garrett, (99-1240) 531 U.S. 356 (2001).*
*Calgary (City) Electric System v. Weitman, [2001]: Get reference*
*Deas v. River West, LP, 152. F. 3d 471, 478 (5th Circ. 1998), 527 U.S. 1044 (1999).*
*Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), 2000 SCC 27, [2001] 1 S.C.R. 665.*

**Jurisdiction:** Canada, United States of America


This report provides a practical and approachable guide to disability, human rights and employment. Bowland surveys reasonable accommodation and the workplace; the definition of disability; the duty of the employee, employer and union; medical issues; alternative employment; absence from work; reasonable accommodation and substance abuse; and discharge from employment. Principles are amply cited by case law; and the appendices contain lists of human rights statues, publications, and abridged policy statements.

**Legislation:**
Various human rights statues.

**Cases:**
Various disability and employment related cases.
Jurisdiction: Canada


Malhotra enunciates his counter-hegemonic approach to explain disability discrimination in the workplace, and to assess policy decisions. Malhotra evaluates redistributive theories of equality, and finds them lacking because they rely on the medical model of disability. Writings of disability scholars on the social-political model of disability, and the flexible relational approaches to equality of some feminist scholars combined with redistributive equality inform Malhotra’s counter-hegemonic approach. Likewise the counter-hegemonic approach must be open to a wide variety of strategies to promote social change. Malhotra evaluates and compares American and Canadian jurisprudence on disability discrimination (especially with respect to seniority rights and duty to accommodate conflicts) in the workplace, and assesses them in relation to the counter-hegemonic approach.

Legislation:  

Cases:  
*Canadian Union of Postal Workers v. Canada Post* (November 9, 1995) (Ponak). This case is unreported.  
*Eckles v. Consolidated Rail Corp.* 94 F.3d 1041 (7th Cir. 1996).  
*Re Queen’s Regional Authority and International Union of Operating Engineers, Local 942*, (1999), 78 L.A.C. (4th) 269 (Christie) [Queen’s Regional Authority].  
Jurisdiction: Canada, United States of America.


The authors discuss Supreme Court jurisprudence under s. 15 and human rights legislation and the effect it may have by studying the accommodation of performance standards (the level of production an employee must meet to perform a job successfully) under the Ontario Human Rights Code. The authors overview the Law test, and disability specific Supreme Court jurisprudence, with particular emphasis on the dignity component. Principles from human rights decisions provide content to the idea of dignity, and the authors detail principles from accommodation decisions under human rights legislation. The proper approach to direct and indirect discrimination under the Ontario Code is discussed, and the authors apply tests and principles from human rights jurisprudence to the duty to accommodate in relation to performance standards. The role of the union in performance standards accommodations is also discussed.

Legislation:

Cases:
Granovsky v. Canada (Minister of Employment and Immigration), 1 S.C.R. 703.
Re Mount Sinai Hospital and Ontario Nurses' Association (1996), 54 L.A.C. (4th) 261 (Brown).
Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City) (Re Mercier), [2000] 1 S.C.R. 665.

Keene examines the right of employees with disabilities in Ontario to accommodation in the workplace—a right that is enshrined in the Ontario Human Rights Code and recognized by Canadian courts. She outlines the Code provisions that mandate accommodation; the extent of the duty to accommodate, as embodied in the Code and interpreted by Canadian courts; and the steps that need to be taken by employers and employees when accommodation is needed. She concludes by summarizing employers’ legal responsibilities for accommodating employees with disabilities.

Legislation:

Cases:


Johnson discusses the Meiorin test to establish a standard or rule as a bona fide occupational requirement, and the need to treat the duty to accommodate as an ongoing process. He describes the role of health professionals in accommodation claims, and medico-legal terminology utilised. Johnson argues that accommodation must be seen as an ongoing process that is subject to revision, signalling the need for communication between different actors managing the employee’s files.

Cases:

Jurisdiction: Canada

Lynk discusses employment equality advancements made by people with disabilities in the arbitration via the duty to accommodate. Lynk provides a comprehensive explanation of the applicable principles and definitions involved in labour arbitration and the duty to accommodate, including the extent of the employer’s duty, specific contractual/employment issues, discriminatory provisions in collective agreements, and the duty of the employee. Current interpretational trends taken by arbitrators are also examined through case-law. [NOTE: this is an updated version of Lynk’s “Accommodating Disabilities in the Canadian Workplace”]

Cases:
Various employment and disability related arbitration cases.

Jurisdiction: Canada


Peters discusses the duty to accommodate from the perspective of management in light of the decisions of the Supreme Court in Grismer and Meiorin. In these cases the Court made comments that accommodation should not be viewed as an exception, but rather that workplace policies need to incorporate measures to avoid discrimination. Likewise accommodation must be tailored to individual situations, rather than presumed group characteristics. Peters also notes the evolving concept of undue hardship, and how cost, procedures, and safety factor in its determination.

Cases:
Various accommodation related decisions.

Jurisdiction: Canada


This report mentions three cases which called the Supreme Court to determine the notional boundaries of “handicap” under the Charter of Human Rights and Freedoms—specifically whether it is discriminatory to refuse to hire an individual because of perceived handicaps due to non-functionally limiting medical conditions. The authors outline the guidelines set forth by the Supreme Court
(which go beyond purely bio-medical conditions to social constructs and perceptions). They comment on the lack of Court guidance on bona fide occupational requirements, and speculate the decision will have Canada-wide application.

**Legislation:**

**Cases:**

**Jurisdiction:** Québec


The Ontario Human Rights Commission guidelines provide direction on disability, the duty to accommodate, undue hardship, and practical advice on conformance with the Ontario *Human Rights Code*. The guidelines include information on the social perspective of disability, non-evident and mental disabilities, and *prima facie* discrimination based upon disability. General and legal principles of accommodation are surveyed, as well as duties during the accommodation process, and the most appropriate forms of accommodation. Elements of undue hardships, and factors excluded from this assessment, including objective evidence, and means of minimizing undue hardship, are also discussed. The guidelines also suggest policy and accessibility reviews to ensure compliance with the *Code*.

**Legislation:**


**Cases:**

**Jurisdiction:** Ontario

Lynk examines the importance of the duty to accommodate in the workplace for people with disabilities, and its role in arbitration. He examines case law and trends in several areas, including the employer’s duty to accommodate; specific circumstances, such as seniority, automatic termination provisions, and last-chance agreements; appropriate comparator groups to determine service accrual and benefits for employees on leave due to disability; the union’s role; and the responsibilities of employees with disabilities.

Cases:
Various employment and disability related arbitration cases.

Jurisdiction: Canada


Eber surveys the concept of the duty to accommodate, when the duty arises, who has the duty, and provides examples of how the duty to accommodate has been applied in specific situations. Arbitration cases indicate that accommodation includes modifying an existing position, but does not extend to creating a new position. Training, working part time hours, and modifying physical spaces are clearly encompassed by accommodation; while arbitrators disagree whether accommodation can supersede seniority rights in job postings, includes transferring employees outside of their bargaining unit, or encompasses compensation. Co-worker’s responsibilities to accommodate vary widely on the facts.

Legislation:

Cases:
Numerous disability and accommodation arbitration cases.

Jurisdiction: Ontario, Canada


Writing in 1998, Eisenbraun provides a general overview of the duty to accommodate in the workplace, as well as the standard of undue hardship. After describing the different forms of discrimination that occur in the workplace—direct and adverse effect discrimination—he describes the obligations of employers, unions, as well as employees in the accommodation process. He then considers the application of the duty to accommodate where an employee has a drug or alcohol addiction, and where an employee experiences a work-related
With respect to the latter, Eisenbraun outlines four approaches taken by the courts to answering how far employers must go to accommodate employees who are injured in the course of their work.

**Jurisdiction:** Canada


Hopkinson suggests that the duty to accommodate may extend to creating new positions for employees with disabilities, and cites decisions approving both sides of the debate. To overcome discrimination in the workplace the paramountcy of human rights, and a broad interpretation of essential duties of employment, should be respected over narrow and restrictive approaches to job classifications. The question is whether accommodation can be achieved by the reorganization of a discrete, or productively coherent, set of job duties required by the employer, or whether this process would constitute an undue hardship (because of productivity, cost, health and safety, etc)?

**Legislation:**

**Cases:**
Various arbitration decisions involving the duty to accommodate and disability.

**Jurisdiction:** Ontario, Canada

**Joachim, M. Kaye. “Seniority Rights and the Duty to Accommodate” (Fall 1998) 24 Queen’s L.J. 131-187.**

Joachim details the tension between seniority rights of collective agreements and the duty to accommodate employees with disabilities. She explains the framework and background to the duty to accommodate and seniority schemes, and the similarities and contrasts between the two. Both systems are designed to expand opportunities for employees, but seniority schemes protect against discrimination on mutually contracted factors, while the duty to accommodate protects against non-agreed factors. Joachim discusses types of seniority schemes, and provides examples and analysis of instances where conflict arises with the duty to accommodate. While seniority provisions are not a bar to accommodation, substantial interference with the rights of other workers can be.

**Jurisdiction:** Canada

This article, written in 1998, considers Canada’s adoption of the duty to accommodate: its impact on Canadian labour law and the ways in which it is transforming the rights of employees with disabilities. The author details developments in the jurisprudence during the 1990s with respect to the duty of employers and unions to accommodate, the extent of their respective obligations, as well as the responsibilities of employees who require accommodation.

Cases:
Re Ministry of Health and OPSEU (Pazuk), (1994) (Need Citation)

Jurisdiction: Canada

Marvy discusses innocent absenteeism and the duty to accommodate from the management perspective. To dismiss an employee for innocent absenteeism the employer must show that the employee has been excessively absent, and that there is little chance the employee will regularly attend in the future. The burden shifts to the employee to show there are prospects of future regular attendance. With this backdrop Marvy surveys leading issues such as: the obligation to create a new position, accommodation alternatives, undue hardship, and other practical considerations.

**Legislation:**

**Cases:**
Various duty to accommodate and disability arbitration decisions.

**Jurisdiction:** Ontario, Canada


Murdock contemplates disability, the duty to accommodate, and innocent absenteeism from a Union perspective. Citing case law, Murdock sets out a framework to determine whether accommodation or dismissal are appropriate by determining whether an absence is due to disability; whether regular attendance is essential/absenteeism is excessive; whether attendance policies, deemed termination clauses, or last chance agreements are discriminatory; the scope of accommodation and limits on undue hardship; as well as practical considerations for clients. Murdock supports adding a third prong to the two part Innocent Absenteeism test that responds to disability and the duty to accommodate.

**Legislation:**

**Cases:**
Various cases dealing with the duty to accommodate and innocent absenteeism.

**Jurisdiction:** Ontario, Canada


Swinton discusses the duty to accommodate as one of the most significant contemporary workplace issues. She notes the difference in the federal and
provincial jurisdictions, as direct discrimination will not be accommodated to the point of hardship absence express language absent from the federal human rights act, but contained in the Ontario Human Rights Code. Swinton contrasts the Ontario and Supreme Court approach in contentious areas, including knowledge of the employer, the right to another position, cost and undue hardship, and seniority rights.

Legislation:

Cases:
Various accommodation related decisions.

Jurisdiction: Ontario, Canada


Canadian grievance arbitrators now have a responsibility to interpret and apply human rights legislation in resolving collective agreement disputes between unions and employers. Carter explores whether grievance arbitration is a suitable forum for resolving human rights issues in the workplace. Specifically, he considers whether there are institutional limitations that make grievance arbitration a less than ideal forum for this task. Carter reviews recent changes to the grievance arbitration paradigm and the emerging arbitral case law on the duty to accommodate. These cases reveal that arbitrators, influenced by the classic paradigm of grievance arbitration, are reluctant to apply the duty to accommodate in ways that interfere with collective agreements. Furthermore, because individuals have no independent access to grievance arbitration, they are prevented from asserting rights on their own behalf. Thus, Carter concludes that grievance arbitration is not necessarily the most ideal forum for enforcing Canadian human rights law.

Legislation:
[Human rights legislation, generally]

Cases:

**Jurisdiction:** Canada


Griffin discusses the use of human rights principles when arbitrating the employer’s duty to accommodate. He surveys three trends in case law: (1) the modification of automatic attendance programs and “deemed termination” clauses to accommodate employees with handicaps (as defined by the Ontario Human Rights Code), (2) employers must analyse the workplace to ascertain whether an employee can perform any available job, and (3) the employee’s efficiency must be considered when determining undue hardship. When an employee could perform the tasks of a non-existent position, but not the essential tasks of any available position, the employer is generally absolved of their duty to accommodate.

**Legislation:**

**Cases:**
Various arbitration decisions involving the duty to accommodate.

**Jurisdiction:** Ontario, Canada


Writing from a management perspective, Kort suggests that the duty to accommodate is not an onerous obligation on employers. Kort surveys case law from the Supreme Court, Human Rights Tribunals, and Arbitration noting the employer and union’s respective duties to accommodate. The article includes a practical guide to considerations and requirements for employers, such as the jurisdiction of arbitrators, when the duty to accommodate arises, the burden of proof, the appropriate time for medical assessments, whether new or existing positions are appropriate, training, job competition, bargaining unit transfers, health and safety, cost, and the obligations of employees.

**Legislation:**

**Cases:**
Various Supreme Court, Human Rights Tribunal and arbitration decisions.

**Jurisdiction**: Ontario, Canada


McIntyre discusses Union’s obligations in the duty to accommodate employees with disabilities. The employer must ultimately achieve accommodation, however, the Union has a duty when they contributed to discriminatory policies, and cannot frustrate accommodating measures because of inconveniences less than undue hardship. The standard of accommodation forUnions requires a balance between collective and individual interests in departures from the collective agreement, interference with rights, and prejudice to other employees. The statutory duty to accommodate lies with the employer, and should not be transferred to employees. McIntyre mentions alternative methods (such as negotiation and mediation) more conducive to determining standards of accommodation.

**Cases:**

**Jurisdiction**: Canada


Picher surveys the duty to accommodate and its origins by exploring legislation and decisions from the United States, and Canadian counterpoints. One of the primary distinctions between American and Canadian jurisprudence is that while American courts and arbitrators have upheld terms of collective agreements over civil rights statutes, Canadian courts show deference to boards of arbitration, and apply legislated human rights standards to the interpretation of collective agreements. Picher argues that for greater credibility and conformity of collective bargaining with societal values, arbitrators must enforce the duty of accommodation as a matter of human dignity.

**Legislation:**
*Ontario Labour Relations Act, R.S.O. 1990, c. L. 2.*
**Cases:**
*Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991).

**Jurisdiction:** Canada, United States of America


The authors discuss leading jurisprudence on the duty to accommodate, and provide a critique of its doctrinal deficiencies. While a duty to accommodate to the point of undue hardship exists in adverse effects discrimination, and the "no reasonable alternative" rule in direct discrimination, this may be a distinction without a difference. Likewise, the line between adverse effect and direct discrimination is difficult to construe, and results in radically different outcomes. The current accommodation jurisprudence enforces formal equality (accommodating “difference” to the mainstream “sameness”), instead of dismantling structural discrimination; while its focus on religious accommodation may be an inappropriate model for other grounds of discrimination (such as disability).

**Cases:**
Various BFOQ/R and duty to accommodate cases.

**Jurisdiction:** Canada


Jordan comments on *Corner Brook (City)*. In this decision union’s role in the duty to accommodate came to the forefront, as Mr. Paul grieved because he was denied his seniority rights to “bump” Mr. Lawrence from a position (which was the only one accommodating to Lawrence’s physical disability). While an arbitrator agreed with Paul, on judicial review the Court held that although the bumping was neutral on its face, when applied to Lawrence it caused adverse effects discrimination. Jordan notes that from the union’s perspective, competing meritorious claims pose difficulties for their duty to accommodate.
Legislation:

Cases:

Jurisdiction: Newfoundland


LeFrançois considers the scope of duty to accommodate by surveying decisions of the Supreme Court, lower courts, arbitration boards, and human rights tribunals. Supreme Court jurisprudence holds that in direct discrimination a rule can only be saved if it is a BFOR (*bona fide* occupational requirement), while for adverse effects discrimination, the rule must be accommodated to the point of undue hardship. Tribunal decisions indicate that accommodation extends beyond the position an employee holds (although not to the creation of a new position), and depends greatly on the individual and size of workplace involved. LeFrançois warns that the goal of human rights legislation will come into disrepute if accommodation is paramount to practical economic concerns.

Cases:
Various lower courts, tribunal and arbitration board decisions.

Jurisdiction: Canada


The authors discuss reasonable accommodation of workers with disabilities in Ontario by examining their treatment under the *Human Rights Code* and *Workers’ Compensation Act*. Reasonable accommodation principles from Canadian human rights legislation in all jurisdictions are detailed, as are the basic principles of *bona fide* occupational requirements and accommodation interpretation in tribunals and at the Supreme Court of Canada. The authors outline the features and process of the Workers’ compensation system regarding accommodation. Instances where an accommodation may constitute an undue
hardship, accommodation and the collective agreement/seniority system, and reemployment and accommodation, are also discussed. While the need for accommodation will grow in the future, the authors are unsure whether the Ontario reforms will provide a useful model if they are overly costly or burdensome.

Legislation:

Jurisdiction: Ontario


Swinton discusses the relationship between collective bargaining and human rights law, and the tension between these areas respecting seniority rights. She questions the fairness of Ontario’s Employment Equity Act which excuses seniority rights from scrutiny in certain situations. Swinton reviews the meaning of equality, duty to accommodate jurisprudence from the Supreme Court, the Union’s duty, how collective bargaining affects equality, and the seniority system. She provides examples of how seniority and accommodation can conflict, and how seniority systems can result in constructive discrimination. Possible methods to accommodate within seniority systems without undue hardship are considered, and Swinton indicates that seniority rights should not be beyond review.

Legislation/International Instruments:

Cases:

Jurisdiction: Ontario, Canada

Gadacz writes about participation in the disabled consumer movement, and governmental initiatives that can be used to ensure an empowered vision of equality. Policy initiatives in the areas of Participation (including Employment Equity legislation); Access (including the Court Challenges Program and electoral reform); and Awareness (including education strategies) are discussed. Gadacz relates the struggle to include disability as a prohibited ground of discrimination in the Charter, and the negative ramifications the Meech Lake and Charlottetown accord could have had. Models of equality are detailed, and Gadacz explains the value of the substantive model of equality for persons with disabilities. Gadacz also provides an overview of discrimination and reasonable accommodation, including: various types of barriers to participation; direct and indirect discrimination, and their treatments in the courts; bona fide occupational requirements and defences to allegations of discrimination; and legal issues involving reasonable accommodation (implementation, political response, and community obligations).

Legislation/International Instruments:
Employment Equity Act, S.C. 1986, c. 31

Cases:

Jurisdiction: Canada


Blythe contrasts bona fide occupational requirements, assumption of risk, and accommodation, with the occupational requirements of the Canadian Forces. He summarises environmental and general specifications (including “universality of service”, meaning an employee must be a “soldier first – tradesman second”) required for employment and maintenance of employment in the Canadian Forces. The article contains several recommendations, including reviewing guidelines and language of occupational specifications; and using a more flexible approach to “universality of service”, by focusing on exceptional circumstances and likelihood an individual will be called on to perform duties. Blythe also
provides examples which demonstrate reform is needed to ensure consistent employment/retention practices.

**Legislation:**

**Cases:**

Various BFOR, assumption of risk, and accommodation related decisions.
Various “universality of service” cases.

**Jurisdiction:** Canada


Taylor discusses human rights legislation (particularly the *Individual Rights Protection Act*) in relation to persons with disabilities. She explains the nature of the *IRPA*, as a remedial tool used in circumstances of private sector discrimination, and the Alberta Human Rights Commission as a neutral body that mediates, investigates, and makes recommendations to Boards of Inquiry.

Taylor discusses grounds of discrimination under the *IRPA* relating to disability; how a *prima facie* case is made; human rights cases involving disability discrimination in employment; direct and adverse impact discrimination (citing case law and the *IRPA*); and highlights accommodation as an important concept.

**Legislation/International Instruments:**

**Cases:**
Jurisdiction: Alberta, Canada


While the National Association of Women and the Law (NAWL) supports the principle of employment equity, their submission critiques provisions of Ontario’s Bill 79 as undermining legal principles developed under Charter jurisprudence (particularly the duty to accommodate). NAWL recommends the preamble be used to clearly state the objective of the legislation; improved wording of definitions and designated groups; an explicit statement of the duty to accommodate to undue hardship; legislated standards for barrier removal, accommodation, and supportive measures; guidelines for employment equity plans; the incorporation of Human Rights terminology; a duty to inform, and to report to the Human Rights Commissions; and identical standards for all sizes of employers.

Legislation/International Instruments:

Jurisdiction: Ontario


This article, written in 1993, considers the impact of Ontario’s Human Rights Code—particularly the provisions requiring employers to accommodate workers with a disability—on employers’ right to discharge workers for innocent absenteeism. The author notes that the Code does not merely limit employers’ entitlement to discharge workers for innocent absenteeism; employers may also be required to accommodate the needs of workers whose absences are due to disability. The author outlines the Code provisions that affect the law on innocent absenteeism, and critically reviews the emerging jurisprudence.

Legislation:

Cases:
Ouimette v. Lily Cups Ltd. et al. (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.).
Barber Ellis of Canada Ltd. (1968), 19 L.A.C. 163.
Queensway-Carleton Hospital (1990), 17 L.A.C. (4th) 23.

**Jurisdiction:** Ontario


Writing in 1992, the author addresses the law’s state of confusion with regard to adverse/direct discrimination, bona fide occupational requirements/qualifications, and reasonable accommodation. He describes the evolution of these concepts in Canadian human rights law and argues that legislative intervention is necessary to provide much needed clarity and guidance to the law. The author proposes that human rights legislation be amended to require reasonable accommodation regardless of whether direct or adverse effect discrimination is at issue. The legislation should also be amended so as to acknowledge the collective nature of discrimination, the need for proactive remedies, and more specific obligations on employers and employees or their unions to design programs to prevent or remedy adverse effect discrimination. [NOTE: does not specifically address disability]

**Legislation:**
[Human rights legislation, generally]

**Cases:**
Adler and Colfer (12 January 1979) [Unreported] (Ontario Board of Inquiry).

**Jurisdiction:** Canada

Writing in 1992, the authors discuss the duty to accommodate in the employment context. They begin by surveying the federal/provincial legislation with express accommodation obligations, and then review the legislative frameworks of jurisdictions where there is no express duty to accommodate and where this duty only exists in Commission Guidelines. The authors also survey the Supreme Court of Canada, human rights tribunal, and arbitral jurisprudence on this duty. They also consider the impact of the duty to accommodate on unions, co-workers, and the employee seeking accommodation, and highlight recent amendments to the Ontario Workers’ Compensation Act that impose obligations on employers to offer re-employment following injury. The authors conclude by advising employers to implement proactive measures that will put them in a better position to address accommodation issues if they arise.

Legislation:
Human Rights Act, S.B.C. 1984, c. 22.

Cases:
Ball Packaging Products Canada Inc. (1990), 12 L.A.C. (4th) 145 (Davis).
Writing in 1992, the authors address two emerging issues with respect to the duty of employers to accommodate workers with a disability as required by Ontario’s Human Rights Code. First, they consider the extent to which employers are required to accommodate frequent and lengthy absences. Second, they consider whether employers must provide alternate jobs to employees when disability prevents them from fulfilling the essential duties of their own jobs. The authors acknowledge that these questions remain unanswered; they discuss the treatment of these issues at common law, under workers’ compensation schemes, in labour arbitration, and by human rights boards of inquiry. Notably, the authors discuss how these issues could be resolved using human rights principles.

Legislation:
Workers’ Compensation Act, R.S.O. 1990, c. W.11, s. 54

Cases:
North Bay Hospital Commn. (unreported, 1990).

**Jurisdiction:** Ontario


This article considers the practical implications of the duty to accommodate employees with a disability. Writing in 1992, the author briefly introduces the law on accommodation, provides an overview of existing programs that promote integration of employees with a disability, and considers the relationship between the duty to accommodate and employment equity. He then examines the actual and potential implications of the duty to accommodate for workers with a disability, other workers, employers, and the collective bargaining process. The author concludes by speculating on the future role of the duty to accommodate in the workplace.

**Legislation:**
[Human Rights legislation, generally]

**Jurisdiction:** Canada


Kaye reports on Douglas Bonner and the meaning of the duty to accommodate. Mr. Bonner suffered from depression, and requested this be considered after receiving a negative evaluation. The board of inquiry held the Commission failed to prove Bonner’s performance was caused by his depression, but commented on the duty to accommodate in *obiter*. Inability to accommodate without undue hardship can be proven on a balance of probabilities rather than by unsuccessful actions. Even when an employer can absorb the cost, accommodation does not require lowering the requirements of a position or hiring someone who cannot perform the job for considerable periods of time.

**Legislation:**

**Cases:**

**Jurisdiction:** Ontario

Lepofsky provides an overview of the duty to accommodate in anti-discrimination law. He contends that the duty to accommodate should be approached in a purposive way; that is, it should be construed in a manner that serves its ultimate aims. Lepofsky gives examples of accommodative measures in the workplace, and expounds upon the purposes of the duty to accommodate. He identifies principles that should be respected when considering the “undue hardship” defences raised by those who don’t comply with this duty. Lastly, he considers six misconceptions about the duty to accommodate.

Legislation:
[Human Rights statutes, generally]

Cases:

Jurisdiction: Canada


Writing in 1992, the author examines the nature and extent of the duty to accommodate persons with a disability within the frameworks of human rights statutes and the Charter. Without the duty to accommodate, she explains, guarantees of equality are meaningless for people with a disability. The author considers the existence and scope of the duty in three kinds of legislative schemes: statutes that prohibit discrimination without any elaboration; statutes that prohibit discrimination, but include *bona fide* occupational qualification exemptions; and statutes that specify a duty to accommodate. She maintains that each of these schemes includes a duty to accommodate, short of undue hardship; however, variation in the legislation, along with the corresponding jurisprudence, has obstructed national uniformity and created uncertainty. The author concludes that legislative clarification is required to achieve universal recognition and application of the duty to accommodate.

Legislation:
*Human Rights Act*, R.S.Y. 1986, Supp., c. 11, ss. 6(h), 7(1),(2), 8(b).
Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 31(9), (9.1) (re-en. 1989-90, c.23, s.19(2)).

Cases:

Jurisdiction: Canada


The author outlines the common law on wrongful dismissal from employment due to illness or disability. She explains that at common law, although illness or disability are not, in and of themselves, causes for summary dismissal, an employer may be entitled to terminate a contract based on the doctrine of frustration when absences are extensive or where the employee can no longer perform the essential terms of their contract. The author also discusses the onus of proof in wrongful dismissal cases and the proper assessment of damages. [See Parts 2 and 3 for how the common law is modified by the duty to accommodate]

Cases:
Carr v. Fama Holdings Ltd. (1989), 40 B.C.L.R. (2d) 125.
MacLellan v. HB Contracting Ltd. et al. (1990), 32 C.C.E.L. 103.
The Dartmouth Ferry Commission v. Jane Marks et al. (1904), 34 S.C.R. 366.

Jurisdiction: Canada

The author discusses the protections provided by human rights legislation to workers with a disability in British Columbia, highlighting the ways that this legislation redefines the scope of employers’ common law obligations. Writing in 1992, the author reviews both the jurisprudence on direct discrimination and the defence of “bona fide occupational requirement” available to employers, as well as adverse effect discrimination and “the duty to accommodate short of undue hardship.” Finally, the author discusses the onus of proof in cases of alleged discrimination and the proper assessment of damages.

**Legislation:**

**Cases:**

**Jurisdiction:** British Columbia


In this article, which addresses the rights of employees in British Columbia with respect to illness and disability, the author (writing in 1992) discusses areas of overlap and distinction between the operation of common law principles of contract law and BC’s human rights legislation. She explains how employers may be liable under human rights legislation despite fulfilling their obligations under contract law. She highlights that human rights legislation may require accommodation as opposed to mere compensation or reasonable notice. The author also discusses the different remedies available for employees under human rights legislation and common law.

**Legislation:**
Human Rights Act, S.B.C. 1984, c. 22.

Cases:
Atlantic Provinces Special Education Authority v. Parks (unreported, No. 02489,

Jurisdiction: British Columbia

Adell, Bernard. “The Rights of Disabled Workers at Arbitration and

The article reviews the relationship between the arbitration of collective
agreements and human rights legislation/proceedings affecting disabled workers.
Adell notes the changing perception of disabled workers, and the balance sought
between accommodation and undue hardship. Arbitrators enforce human rights
legislation over non-compliant collective agreements, but are less prone to
affirm statutory benefits beyond those in the agreement, meaning separate
human rights complaints are often necessary. Adell mentions the uncertainty
regarding res judicata and the level of deference human rights commissions
should show to arbitration proceedings, and vice versa. Seniority provisions
which adversely affect disabled workers with sporadic work histories, and the
limited statutory recourse as compared to direct discrimination, are also
discussed.

Legislation:
Labour Relations Act, R.S.O. 1980. C. 228, as amended 1986, c. 64.

Cases:

Jurisdiction: Ontario, Canada


Adell revisits subjects from his first article (above), and reviews recent cases.
Precedent has upheld the view that arbitrators can enforce statutory rights not
contained in agreements (although confined to issues the agreement
encompasses). Arbitrators remain unwilling to defer to concurrent human rights
proceedings, while human rights commissions seem unlikely to defer to
arbitration proceedings even if an arbitrator has dealt with human rights. He
reaffirms the hesitation of arbitrators to override seniority provisions, and notes
authority stating that both unions and employers may be liable if collective
agreements have provisions that discriminate on prohibited grounds.
Legislation:

Cases:

Jurisdiction: Ontario, Canada

Baker, David & Sones, Gregory. “Employer obligations to reinstate injured workers” (Fall 1990) 6 J.L. & Social Pol’y 30-56.

Baker and Sones outline a model for interpreting the duty to accommodate and undue hardship under the Workers Compensation Act, and the Ontario Human Rights Code, while discussing the current shortcomings in enforcement, and alternate methods to tackle systemic barriers to persons with disabilities in the employment field. The article stresses the duty to accommodate as the underpinning of equal opportunity, and the wording of the Ontario Human Rights Code which mandates accommodation to the point of undue hardship. Although the Workers Compensation Act incorporates human rights concepts, its application is still dependant on companies and employment equity legislation is needed.

Legislation:
Workers’ Compensation Act, R.S.O. 1980, 539, as amended by S.O. 1989, c.47

Cases:

Jurisdiction: Ontario


This article, written in 1989, considers the situation where an employer denies employment to a person with a disability, or terminates his or her existing employment, on the basis that their disability creates a safety risk. The author provides a detailed overview of the case law on safety-related “bona fide” occupational requirements or qualifications.” In particular, she considers the jurisprudence on the extent of employers’ duty to accommodate when safety...
risks are present. The author concludes that there is need for a consistent and principled approach for determining when *bona fide* occupational requirements or qualifications, grounded in safety risk, justify refusals of employment to persons with a disability. She provides a proposal for such a test.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada, United States of America


Pentney discusses the *O’Malley* decision which recognised adverse effects discrimination, and the *Bhinder* decision which concluded that when there was a bona fide occupational requirement, this defence counters the discrimination. Both legislative responses and potential arguments to overcome the decision are mentioned. Pentney also mentions s. 15 issues which should be litigated to resolve their implications for persons with disabilities.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada

Loney reviews CLAIR’s recommendations for revision of the interim guidelines on B.F.O.R. It is unacceptable that medical testing is allowed before an offer of employment, and psychological testing should be restrained. Dignity of risk is integral, but it should not relieve the employer’s onus to provide a safe workplace. Employees should be presumed competent, and “reliable performance” as a B.F.O.R. only stereotypes employees with disabilities. Blanket bans on groups should be prohibited, and individuals should only have to demonstrate the ability to fill the position they applied for. There should be a strong presumption of credibility needs are identified, and defences to accommodation should be narrowly construed.

**Jurisdiction:** Canada

---


This article (written in 1984) celebrates the Ontario Treasurer’s appeal for a commitment to reasonable accommodation in the workplace. It reproduces statements from the Honourable Larry Grossman’s address to the Sudbury Ability Coalition, where he encourages government and the private sector to take positive steps to ensure reasonable accommodation for employees with disabilities. The author notes that ARCH will be giving the Treasurer suggestions for how the provincial government could make this a reality.

**Legislation:**

**Jurisdiction:** Ontario

---


Csurgo argues that the norm in tribunal decisions involving safety and risk in employment is to mandate safety over the right of persons with disabilities to choose “risky” employment. She then summarises leading cases in this area, including *Mark Forseille v. United Grain Growers Ltd, Mahon v. Canadian Pacific Ltd, Manitoba Human Rights Commission and A. Rey Loveday v. Baker Manufacturing Ltd.*, *David C. Rodger v. Canadian National Railway, Lela Swanson v. Steveshirl Restaurant Ltd.*, and *Bhinder*. Csurgo views *Mahon* as the most progressive of the decisions, as it was held an employee with a disability could not be denied a position because of the mere presence of risk.

**Cases:**


**Jurisdiction:** Canada
The Canadian Charter of Rights and Freedoms


This article relates the decision in Ontario Nurses’ Association, which challenged a provision of the Employment Standards Act that denied severance payments to individuals whose employment contract had been frustrated by disability. While an arbitration board upheld the provision as non-discriminatory, both Ontario’s Divisional Court and Court of appeal disagreed. The Court of Appeal held that the legislation violated s. 15 by treating individuals whose contracts were frustrated by disability differently, and perpetuating the view the people with disabilities are unlikely remain members of the workforce. The infringement was not saved under s. 1 of the Charter.

Legislation:
Employment Standards Act, 2000, S.O. 2000, c. 41

Cases:
Ontario Nurses’ Association v. Mount Sinai Hospital, [2005] O.J. No. 1739.

Jurisdiction: Ontario


The author outlines four types of employment barriers affecting people with disabilities, namely hiring practices or systemic barriers, architectural barriers, attitudinal barriers, and ancillary barriers, and he discusses the significant role played by that the Charter’s equality rights provisions in making the elimination of these barriers a priority. The author also identifies three objectives that must be met in order to facilitate the inclusion of people with disabilities in the labour force: improve employment services for people with disabilities, combat perception that employment of people with disabilities is a social service or medical issue, and achieve recognition that people with disabilities are one of many sectors of the labour market requiring particular services and policies.

Legislation:

Jurisdiction: Canada

The author, writing in the early 1980s, considers how the Charter might challenge sheltered workshops. She discusses the American jurisprudence on institutional workshops, noting its instructive value for upcoming Canadian Charter challenges. The author explores the potential of section 15 for challenging unfair employment laws and practices, and argues that the process of Charter litigation, itself, may have value in challenging the present approach to vocational rehabilitation, training, and placement.

Legislation:
Employment Standards Act, S.O.1968, c. 35.
U.S. Const. am. 13.

Cases:

Jurisdiction: Canada, United States of America
**Education:**

Fries, E. Murphy. “B.C. Human Rights Tribunal finds underfunding plus program cutbacks equals discrimination against students with severe learning disabilities. (Case comm.)” (July 2007) 17 Educ. & L.J. 147-159.

Fries comments on the British Columbia Human Rights Tribunal’s finding that block funding resulting in cut backs and underfunding of educational resources for children with severe learning disabilities discriminated against Jeffery Moore. The tribunal categorised the benefit sought broadly (in line with *Eldridge*), as “educational programs offered by the district”. Although it was not mandatory, the Tribunal applied the *Law* test, and a comparator group analysis (while not requiring the complainant provide one). Upon finding an unjustifiable case of systemic and individual discrimination, the tribunal awarded damages and systemic remedies.

**Legislation:**

**Cases:**

**Jurisdiction:** British Columbia


Smith discusses the *Charter* guarantee of equality in the educational context with reference to prevailing approaches to new public management (which focuses on cost and efficiency), and data-based evidence (statistics as a measure of needs or results). He notes that equality rights should guarantee equal educational opportunity, limited only by preferential programs or *bona fide* requirements, although the least restrictive alternative is not mandated. With this backdrop, Smith provides a First Nations educational case study which provides a useful framework for advocates engaged in data-based evidentiary inquiries, as if needed for successful court challenges.

**Legislation:**

**Jurisdiction:** Canada

This article provides a brief summary of the duty to accommodate students with disabilities in Alberta schools. She notes that the Alberta Human Rights, Citizenship and Multiculturalism Act is one place where students with disabilities can find their right to accommodation, and then outlines the Canadian jurisprudence on the nature and scope of this right. She also considers the ways that the duty to accommodate has been integrated into government policy in Alberta.

**Legislation:**

**Cases:**

**Jurisdiction:** Alberta


This paper provides background information on issues affecting disability and accommodation in Ontario’s school system as part of a consultation process by the Ontario Human Rights Commission. Relevant international conventions, provisions of the Ontario Human Rights Code, and policy guidelines respecting the duty to accommodate and disability are outlined. The Eaton, Adler, Eldridge and Howard decisions are reviewed with emphasis on their impact on disability rights in the educational context. Background information on the demographic make-up of students with disabilities, funding, and legislative structures are also provided. The paper discusses various human rights issues (such as access to education, stereotypes, and accommodation) involving students with disabilities, and invites comments.

**Legislation/International Instruments:**
Cases:

Jurisdiction: Ontario


Pothier’s decision from the Women’s Court of Canada overturns the Supreme Court’s decision in Eaton. By holding there was no constitutional presumption of integration, the Supreme Court’s analysis confirmed educational segregation of persons with disabilities as “separate but equal”. This ignores the historical marginalisation/inferior status of segregated groups. A presumption of integration is necessary to ensure the equality of students with disabilities because it will (1) counter segregation as a mark of inferior status; (2) place the burden on the state to be inclusive/accommodating, and to demonstrate that an integrated classroom cannot adequately meet a student’s best interests. There is no s. 1 analysis as the issue was moot.

Legislation:

Cases:
Plessy V. Ferguson, 163 U.S. 537 (1896).
Reference re: School Education Bill of 1995 (Gauteng), 1996 (3) S.A. 165 (CC)

Jurisdiction: Ontario, Canada, South Africa, United States of America


This article discusses accommodation policy in post secondary education (specifically at the University of Victoria, in British Columbia), and the process students with disabilities must go through when seeking accommodations. Issues of power, the biomedical perspective, jurisprudence involving the
accommodation process, and recommendations for improvement are also included.

**Legislation/International Instruments:**

**Cases:**

**Jurisdiction:** British Columbia


This article is the second in a two-part series examining litigation related to special education in Canada. The authors consider the impact of the Supreme Court’s ruling in *Eaton* for children with disabilities, and discuss subsequent litigation over the next couple of years. The authors outline jurisprudential trends, as well as the emerging legal issues that require consideration.

**Cases:**
*Grimm v. Wetaskiwin Regional Division No. 11 (1998), 1998 CarswellAlta 644 (Alta. Q.B.).*
*The Halifax Regional School Board v. The Attorney General of Nova Scotia and Fernand*

**Legislation:**

**Jurisdiction:** Canada

The authors discuss developments in judicial recognition/enforcement of educational rights of children with disabilities, from “platform rights” (i.e. rights of non-discrimination and access) to the “new frontier” of “secondary rights” (i.e. specific educational rights once within the publicly funded school system.) In particular, they consider the issues of judicial deference to educational administrators as well as the present debate over the desirability of integrated versus segregated educational placements. The authors argue that instead of working toward public funding of private school education, efforts must go towards developing one inclusive public education system that meets the needs of all students. This will require more than just accommodating individuals within the existing system: the underlying structures and attitudes acting as barriers to inclusion must be targeted.

Cases:

Cudmore (look-up)

Jurisdiction: Canada


The authors consider disciplinary issues that arise when a “special-needs” student poses a safety risk to others at school—a situation that creates a conflict between the student’s rights of non-discrimination and accommodation and the need to maintain a safe school environment. After outlining the pertinent provisions of Ontario’s Human Rights Code, Ontario’s Education Act and its regulations, and the Ontario Court of Appeal’s ruling in Bonnah, the authors consider whether students with behavioral exceptionalities are afforded adequate legal protections. They maintain that Ontario’s safe schools legislation should be amended to include more explicit protections for these students, and they offer practical suggestions for both increasing protections and reducing safety concerns.

Legislation:

Individuals with Disabilities Education Act 20 USC 1400 et seq. (U.S.).

Cases:

Jurisdiction: Ontario


This case comment critiques the Ontario Superior Court of Justice’s ruling in Bonnah—a judicial review of a school board’s decision to transfer a student from his “regular” school to a school for children with developmental disabilities. The Court held that a school board has the authority to make an “administrative transfer” of a student from one school to another using the principal’s powers to restrict access to school property for safety reasons. Wright argues that the Court erroneously expands the school board’s powers and does not respect the principle of statutory interpretation that provisions must be interpreted harmoniously with the scheme of the statute and the intention of the legislature. Moreover, the Court did not follow the requirements of the statute or of procedural fairness.

Cases:

Legislation:

Jurisdiction: Ontario


Stack explores the legal rights of children with learning disabilities and special needs in the education system of British Columbia. He begins by providing an overview of four controversial areas in the recent history of educational policy and human rights: the status of children in law and the role of the state/judiciary in their protection; children’s rights and educational rights recognized in international law; the proper roles of the legislature and judiciary; and evolving views of disability, equality and special education. Stack then outlines the relevant statutory provisions on special needs education in British Columbia, and reviews the jurisprudence on special needs education as a human rights issue. He expresses concern over the absence of a constitutional or quasi-constitutional right to appropriate education in Canada, and notes the limitations inherent in equality-based legal claims for improving education for children with disabilities.

Cases:
This article is the first in a two-part series examining litigation relating to special education in Canada. The authors summarize selected special education cases which were decided between 1978 and 1995 and considered the implications of these decisions for the education system. The discussion of the cases is divided into two sections: the first section considers litigation where parents advocated for the inclusion of their child in the regular classroom and the second section considers litigation where parents supported segregated placements.

**Cases:**
- **Carriere v. County of Lamont No. 30**, August 15, 1978, Unreported Decision of Supreme Court of Alberta, Trial Division [15 August, 1984].
- **Razaqpur v. Carleton Roman Catholic Separate School Board** (need citation)

**Jurisdiction:** Canada

By surveying trends in case law, internal appeal mechanisms, and human rights complaints, the authors analyse the Court’s common approach of disengaging from pedagogical debates and deferring to educational experts, and contrast it with the discrimination and equality based approach taken in Eaton by the Ontario Court of Appeal. Since many legislative regimes and educational practices do not guarantee the right to integrated education, the affirmation of a presumption of integration in Eaton would provide greater access to equal educational opportunities. The authors compare Eaton with Chauveau, and maintain that the Eaton approach is preferable because it gives supremacy to Charter principles over the views of educational experts.

Legislation:

Cases:
Various cases involving integrated education and s. 15 arguments that resulted in settlements.

Jurisdiction: Ontario, Québec, Canada


Peacock discusses the interpretation of laws affecting public education rights for linguistic minorities and persons with disabilities. He thoroughly reviews the Constitutional framework, legislation and regulations surrounding English language education rights, and difficult aspects of its interpretation in case law. Jurisprudence under the Charter of Human Rights and Freedoms that legitimises “separate but equal” education for exceptional students is contrasted with the Ontario Court of Appeal decision in Eaton, which held that segregated education
is discriminatory under s. 15 of the Charter and can only be justified under s. 1.

**Legislation:**

**Cases:**

**Jurisdiction:** Québec, Canada


This case note considers the court of appeal decision in *Eaton v. Brant (County) Board of Education*, which concerned a school board decision to move a 10 year old girl with cerebral palsy to a special class against the family’s preference for regular classes. A tribunal and the Divisional Court upheld the school board’s decision, while the Court of Appeal held that there was a rebuttable presumption in favour of integration, and parent’s refusal of a placement must be respected unless there are no adequate alternatives. The court held that the *Education Act* allowed discriminatory placements violating s. 15, was not justified under s.1, and read in a remedy.

**Legislation:**

**Cases:**

**Jurisdiction:** Ontario


This case comment on *Chauveau* contrasts the approaches of the Human Rights Tribunal and the Court of Appeal towards the equality rights of students with disabilities. The author details the Tribunal’s purposive approach to the *Québec Charter*, and how this approach manifested a ruling that student segregation generates a rebuttable presumption of discrimination. The Tribunal also
acknowledged that affirmative action is required to remedy systemic discrimination in the education system. The author contrasts the Tribunal’s purposive approach with the restrictive approach taken by the Court of Appeal, which reversed the Tribunal’s decision. He notes that the Court of Appeal did not recognize the existence of systemic discrimination, nor appreciate the importance of inclusion for equality.

**Legislation:**

**Cases:**

**Jurisdiction:** Québec


Dickinson comments on the Berg case, in which a student with a mental disability was denied a key for after-hours access to the school and not provided the rating sheet required for her practicum. The Supreme Court held that discretionary academic decisions, such as the ones made in Berg’s circumstances, are not immune from review under provincial human rights legislation. While student assessments are subject to human rights legislation and may not be discriminatory, more jurisprudence is required to know the nature reasonable accommodation or bona fide justifications will take in the academic context.

**Legislation:**
Human Rights Act, S.B.C. 1984, c. 22.

**Cases:**

**Jurisdiction:** British Columbia, Canada

In their Case Comment on Berg, the authors consider the Supreme Court’s response to the restrictive approach of previous courts towards human rights legislation. They outline the relational test, established by the Court, for determining if discrimination is prohibited with respect to the provision of accommodation, services, and facilities. The authors also discuss the Court’s position that an element of discretion in decision-making does not negate prohibitions against discrimination. The authors conclude with a critical review of Justice Major’s dissenting judgment.

Legislation:
Human Rights Act, S.B.C. 1984, c. 22, s. 3.

Cases:
Rosin v. Canada (Canadian Forces), [1991] 1 F.C. 391 (C.A.)

Jurisdiction: Canada


In her Case Comment on the Supreme Court’s decision in Berg, Crane considers the Court’s adoption of a new “relational” approach for determining if accommodation, services, or facilities are “customarily available to the public” and hence fall within the scope of anti-discrimination legislation in B.C. (and other jurisdictions with similar legislation). Crane applauds the Court’s rejection of the reasoning applied in previous cases (and by the B.C. Court of Appeal), which produced illogical distinctions between a person’s rights while being considered for admission to accommodation, a service, or a facility, and their rights following admission; she also commends the Court for clarifying that a discretionary component in decision-making does not negate the application of anti-discrimination legislation. Although by no means perfect, Crane concludes that the new interpretive framework is a positive development that will ensure greater protection against discrimination.

Legislation:
Human Rights Act, S.B.C. 1984, c. 22, s. 3.

Cases:

The authors examine whether a failure to provide an “appropriate” education to a child with a learning disability constitutes discrimination under provincial human rights statutes in Canada. They outline the issues that need to be considered in the course of pursuing a complaint of discrimination under a provincial human rights code. The authors caution that, although tribunals and courts are open to considering this type of complaint, the absence of specific statutory provisions guaranteeing the right of all students the opportunity to achieve their full potential renders the success of a claim unlikely. The authors conclude, nevertheless, that human rights statutes may have some utility in promoting “appropriate” education for children with learning disabilities.

Legislation:
Various provincial human rights statutes

Cases:
Re Schmidt & Calgary Board of Education (1976), 57 D.L.R. (3d) 746 (Alta. S.C., Trial Div.).

The author explores private law remedies—apart from public law education statutes and human rights legislation—that a parent may pursue in the event that her/his child with a learning disability is not receiving an “appropriate” education. The author considers the tort of negligence and breach of fiduciary duty as viable grounds for action. He also offers insights and strategies for launching a successful suit.

Cases:

Jurisdiction: Canada


The authors consider how the Charter may be used to promote the right to an “appropriate” education. They suggest that a right to education is implicit in section 7; however, they contend that a claim based upon section 15 equality rights may have greater success. Whereas courts have shown reluctance to interpret section 7 as guaranteeing substantive rights, section 15 has been used successfully in a number of cases to remedy disadvantage. The authors also briefly discuss Charter remedies, arguments for countering defences that might be advanced by School Boards and Departments of Education, and strategies for launching a group Charter challenge.

Legislation:

Cases:

**Jurisdiction:** Canada


Smith discusses the ruling of the Quebec Human Rights Tribunal in Saint-Jean, a case that addressed the exclusion of a child with disabilities from the mainstream of regular education. Smith notes that this case established an important principle: children with a disability cannot be placed in a segregated educational setting simply because of their disability. Instead, placement must be determined on the basis of an understanding of the needs of the whole child, while providing for the most “normal” setting possible. Smith also discusses the case’s significance with respect to the role of the integration aide and the responsibility for covering their costs.

**Cases:**

**Legislation:**
Education Act, R.S.Q. c. I-13.3.

**Jurisdiction:** Canada


This article briefly reviews the Supreme Court of Canada’s decision in Eaton, particularly the standard it set for determining the appropriateness of exceptional educational placement. It notes that the Eaton standard was subsequently used by an Ontario court in Pokonzie to uphold a decision to deny to a student full integration. The article also notes that the recent jurisprudence on special education raises interesting questions about the application of the Eaton decision—both as a standard of review and as a basis for a cause of action.

**Cases:**

**Legislation:**

**Jurisdiction:** Canada


The authors provide a comparative analysis of the legislative framework, and equal educational opportunity services for people with disabilities, in each Canadian Province and Territory. By creating a normative framework of the values and goals of equal opportunity education, the authors summarise the provincial and territorial legislation and jurisprudence in relation to these standards. The authors specifically use non-discrimination, access to schooling, assessment and placement, service delivery and (self) advocacy as categories of evaluation.

**Legislation:**
Various provincial and territorial Education Acts.

**Cases:**
Various disability/minority language decisions.

**Jurisdiction:** Canada (Provincial and Territorial)


The author provides a detailed review of the landmark Canadian case Eaton v. Brant (County) Board of Education in order to demonstrate how, in Canada, equality considerations played a central role in a constitutional challenge to a child’s segregated educational placement. The author provides some tentative conclusions as to the legacy of this decision, and he explains why Eaton is problematic as the main Canadian precedent regarding the equality rights of students with special needs.

**Legislation:**

**Cases:**
Jurisdiction: Canada


This document compiles findings on the educational rights of students with disabilities in the Canadian provinces and territories. It is in an accessible format to benefit parents, advocates, and professionals. The study interpreted legislation using five themes: Non-Discrimination; Access to Schooling; Assessment & Placement; (Self) Advocacy and Service Delivery. Using a hierarchy of possible answers to questions, the authors ranked jurisdictions, and the relative rights available in each. The authors found that the national average for educational rights was 40%, with Ontario and the Yukon ranking first, and Nova Scotia last. Students had more rights with respect to barrier free access, duty to attend school, and non-discrimination, and fewer respecting assessment and appeals.

Legislation/International Instruments:
Education Act, R.S.Q., c. I-13.3.
Education Act, R.S.S. 1978, c. E-0.1.
Human Rights Act, R.S.Y. 1986 (Supp.), c. 11.
Human Rights Act, S.B.C. 1984, c. 22.
Handicapped Persons’ Education Act, R.S.N.S. 1989, c. 194.
Public Schools act, R.S.M. 1987, c. P-250.
Schools Act, R.S.N. 1990, c. S-12.
School Act, S.B.C. 1989, c. 61.
**Cases:**


**Jurisdiction:** Canada (Provincial and Territorial)

---


This article examines problems of exclusion in education. The author begins by considering the evolution of the jurisprudence regarding discrimination in education on the basis of mental disability, highlighting the promise that the Ontario Court of Appeal’s decision in Eaton holds for promoting inclusive education in Canada. The author goes on to consider problems of racial discrimination in education, identifying the key developments, challenges, and signs of hope in the United States and Canadian contexts. He then reviews the Malcolm Ross case, describing the Supreme Court of Canada’s decision as an important step towards making schools free from all forms of discrimination. The author concludes by identifying administrative initiatives in Nova Scotia which are designed to promote more inclusive schools.

**Legislation:**


[Various provincial human rights/education statutes]

**Cases:**


**Jurisdiction:** Canada; U.S.A.

---


In this monograph, Smith presents the results of his comparative analysis of provincial/territorial legislative action (in force on December 31, 1992) with respect to provision of equal educational opportunity to students who have a disability. Smith investigated how legislative action in each jurisdiction provided for non-discrimination, access to schooling, identification and placement, service delivery, and parental participation. Although he found diversity in the level/type of rights provided for in the jurisdictions, overall, rights were absent from the legislation more often than they were present.
Legislation:
Provincial/ Territorial Human Rights Codes:
Human Rights Act, R.S.Y. 1986, (Supp.), c. 11.
Human Rights Act, S.B.C. 1984, c. 22.

Legislation:
Provincial/Territorial Education Acts:
Education Act, R.S.N.S. 1989, c. 136.
Education Act, R.S.Q. c. I-13.3.
Education Act, R.S.S. 1978, c. E-0.1.
Education Act, S.Y. 1989-90, c. 25.
Public Schools Act, R.S.M. 1987, c. P-250.
Schools Act, R.S.N. 1990, c. S-12.
School Act, S.B.C. 1989, c. 61.
School Act, S.P.E.I. 1993, c. 35.

Jurisdiction: Canada

Smith, W.J. and Lusthaus, C. “Students with disabilities in Canada: What rights do they have?” (1994) 34 Education Canada 5-9, 45-46.

The authors provide the results of a survey of provincial/territorial legislation of the right to school for children with disabilities up to December 31st, 1992. Areas covered include the right and obligation to attend school; the right to placement in special and regular classes, including the right to appeal placement; the right to an appropriate education, and to appeal service delivery; student monitoring; and the participation of parents. The framework developed by the authors provides a method by which to evaluate provincial initiatives. The study demonstrates that students with disabilities have equal rights to enter the school system, although this may not translate to meaningful educational opportunities once inside the school.

Legislation/International Instruments:
Makes references to, but does not specifically discuss provisions of, Human Rights Codes and Education Acts of the provinces and territories.
Jurisdiction: Canada


The authors did a study of provincial and territorial legislation in force on December 31, 1992 to determine the extent to which each jurisdiction provides for equal educational opportunity to students who have disabilities. In particular, they investigated legislative action with respect to "platform rights" (i.e. rights to equal benefit and protection of the law, and access to schooling) and rights to specific educational services and benefits. This article discusses their findings with respect to specific educational services and benefits—rights to identification and placement, service delivery, and parental participation.

Legislation:
Provincial/Territorial Education Acts:
Education Act, R.S.N.S. 1989, c. 136.
Education Act, R.S.Q. c. I-13.3.
Education Act, R.S.S. 1978, c. E-0.1.
Education Act, S.Y. 1989-90, c. 25.
Public Schools Act, R.S.M. 1987, c. P-250.
Schools Act, R.S.N. 1990, c. S-12.
School Act, S.B.C. 1989, c. 61.
School Act, S.P.E.I. 1993, c. 35.

Jurisdiction: Canada


Writing in his capacity as Chair of the Learning Disabilities Association of Canada’s Legislative Task Force, Henteleff contends that the right to education means the fundamental right of every person to an individualized education program—"to have their uniqueness responded to on an individual basis." After detailing 10 specific rights that comprise the right to an "appropriate" education, Henteleff gives a comparative analysis of provincial/territorial educational statutes, considering the extent to which the legislation guarantees these rights. (The analysis is based on legislation in force on December 31, 1991)
**Legislation:**
Various provincial/territorial educational statutes

**Jurisdiction:** Canada

---


The authors did a study of provincial and territorial legislation in force on December 31, 1992 to determine the extent to which each jurisdiction provides for equal educational opportunity to students with a disability. In particular, they investigated legislative action with respect to “platform rights” (i.e. rights to equal benefit and protection of the law, and access to schooling) and rights to specific educational services and benefits. This article presents the conceptual/analytical frameworks of the study and discusses the results of their analysis of platform rights included in the legislation.

**Legislation:**
Provincial/Territorial Human Rights Codes:
Human Rights Act, R.S.Y. 1986, (Supp.), c. 11.
Human Rights Act, S.B.C. 1984, c. 22.

Provincial/Territorial Education Acts:
Education Act, R.S.N.S. 1989, c. 136.
Education Act, R.S.Q. c. I-13.3.
Education Act, R.S.S. 1978, c. E-0.1.
Education Act, S.Y. 1989-90, c. 25.
Public Schools Act, R.S.M. 1987, c. P-250.
Schools Act, R.S.N. 1990, c. S-12.
School Act, S.B.C. 1989, c. 61.

**Jurisdiction:** Canada

In her Case Comment on the British Columbia Court of Appeal’s decision in Berg, Crane considers the Court’s interpretation of section 3 of B.C.’s Human Rights Act, which prohibits discrimination in the provision of any “accommodation, service or facility customarily available to the public.” She explains that the Court’s narrow interpretation of the phrase “customarily available to the public” limits the legislation’s protections against discrimination in the provision of education and other services. Crane outlines an alternative framework for interpreting this phrase, which focuses on the nature and scope of the overall service delivery arrangement.

**Legislation:**
*Human Rights Act*, S.B.C. 1984, c. 22, s. 3.

**Cases:**

**Jurisdiction:** British Columbia, Canada


MacKay details the case of Luke Elwood who argued for mainstream integration regardless of mental disability. The Elwoods and counsel argued there was a constitutional right to education; that due process and fundamental justice had been denied; and that integration and equality should be the norm, while special placement must be justified as a limit on rights. MacKay also suggests the usefulness of the Elwood agreement as a structure for future claims.

**Legislation:**

**Jurisdiction:** Nova Scotia, Canada

The authors discuss the Canadian Charter and decisions of the United States Supreme Court regarding special education and equal benefit under the law and theorise about two implications of equal benefit (equal as same, and equal as fitting the needs of the individual student). [NOTE: this is an excerpt from a longer article of the same name in the Canadian Journal of Law and Society Vol. 2 1987]

Legislation:

Cases:

Jurisdiction: Canada, United States of America


In response to the article, “Special Education and the Charter: The Right to Equal Benefit of the Law,” the authors note the dangers of assuming that a right to education derives solely from statutes. In their view, it is preferable to regard education as a basic human right that is, in turn, manifested in legislation. The authors explore various ways of justifying a right to education. They consider the potential of construing section 7 of the Charter to include the right to an appropriate education, concluding that inclusion is supported by human rights theory and the jurisprudence. The authors also attempt to define the content of a right to education, focusing on its significance for students with disabilities. They conclude with a discussion of Elwood, citing it as the Charter’s first victory in securing a student’s right to an appropriate education.

Legislation:

Cases:

Jurisdiction: Canada

Writing in the late 1980s, the authors examine legislative and judicial trends with respect to the educational rights of children with disabilities. They examine the responses of public interest organizations to these developments, noting a general consensus that current educational policies and anti-discrimination statutes fail to address the educational needs of children with disabilities. Recent developments in the United States are considered, insofar as these developments might be instructive for pursuing reform in Canada. The authors consider the Charter’s “equal benefit” provision; they conclude that, notwithstanding unresolved issues and potential obstacles, this Charter guarantee might provide a mechanism for affirming the right to appropriate education for children with disabilities.

Legislation:
Various provincial human rights/ educational statutes

Cases:

Jurisdiction: Canada, United States of America


Writing in 1986, the authors suggest that while the framers of the Charter did not intend nor anticipate the expansion of judicial power over other branches of government, the early years of Charter jurisprudence reveals a trend towards greater judicial “activism” and thus an expanded role of the judiciary in the
political process. The authors go on to explore how judicial activism could affect education in Canada. Drawing upon the early Charter jurisprudence and the experiences of the United States with judicial intervention in educational policy, the authors maintain that the courts undertaking a “supervisory function” over the education system could fundamentally alter the structure and organization of education across the country. The authors conclude that although judicial activism could produce needed educational reform, it could also lead to bureaucracy that paralyzes the system. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada (with lessons from the U.S.)


MacKay provides a brief commentary on *Bales*—a case involving parental challenge to their son’s assignment to a special school in place of accommodation in the regular school. After outlining the facts and legislative context of the case, MacKay considers the arguments advanced by the parents, and notes the judge’s dismissal of these arguments. MacKay maintains that parents and students should be given rights to proper involvement in the placement decision process, and he considers whether section 7 of the Charter will strengthen their procedural rights.

Cases:

Legislation:

Jurisdiction: Canada

McKay discusses the probable impact the Charter will have on the rights of children in the educational context, especially given that the interests of parents (and individuals standing in loco parentis) and their children do not always coincide. The piece is highly theoretical (given its early date in the history of the Charter) and considers whether the Charter would apply to actions in school, which reasonable limits may be placed on school actions, and how “welfare” and “option” rights are treated under the Charter. Numerous American examples that may aid in Charter interpretation are cited. [NOTE: does not specifically address disability]

Legislation/International Instruments:
US Const. Amend. XVI.

Cases:
Numerous American and Canadian cases dealing with students constitutional rights in the classroom.

Jurisdiction: Canada, United States of America


Written in 1984, in this article MacKay discusses the right to public education in Nova Scotia. MacKay determines that the Education Act of Nova Scotia imposes a duty on the school board to provide education, however, he also warns of situations where the child’s right to education can clash with parental interests. MacKay discusses the content of the right to education, including special education, and surveys to whom the right to special education applies, the procedures by which students are assessed, and whether this right is enforceable. Parent’s rights, such as the right to information and religious rights, are also discussed. MacKay contrasts the right to education with penalties (such as suspension) for truancy or delinquency, and the due process and fair procedures required.

Legislation:
Education Act, R.S.N.S. 1967, c. 81, as amended.
Human Rights Act, S.N.S. 1969, c. 11.
Various other education or truancy related statutes.

**Cases:**

- Carrière v. County of Lamont, unreported.
- Re Clark and Clark an unreported decision, November 25, 1982, per Matheson Co. Ct. J. (Ont. Co. Ct.).
- Re Superintendant of Family and Child Service and Dawson et al., an unreported decision, March 14, 1983 (B.C. Prov. Ct.).

**Jurisdiction:** Nova Scotia


The author outlines the struggle endured by her and her husband to achieve integrated schooling for their son— and the value that integration has had for his quality of life. She highlights the damage of segregation, and the value of making schools accessible to all children. The author calls for concerted action of parents in order to make this a reality.

**Jurisdiction:** Canada


Writing in 1984, Ruff condemns the segregation of children with disabilities in the schools. She notes that although some school boards are pioneering a new integrative approach, many still refuse to allow children with a mental disability into the regular classroom. Ruff describes how parents, along with advocates, professionals, and lawyers, are banding together to fight for the rights of children to integrated schooling. Their determination, she contends, will lead to victory.

Carver argues that the least restrictive educational environment for deaf children is not found in mainstreamed education, but rather in separate schools for the deaf. Generally, hearing schools are not hospitable to the needs of deaf students; their attempts to "normalize" deaf children are impeded by a lack of understanding of deafness and the needs of deaf children and an inability to accept the “differentness” of being deaf. While the deaf do not reject integration per se, they do oppose the vehicle imposed by the hearing (i.e. mainstreaming) without consultation.

Jurisdiction: Canada


Writing in 1984, the author outlines sections of the Indian Act that govern the nature of the right to education on reserve for aboriginal children with disabilities. She explains how sections of the Act can be interpreted to mean that where a school has insufficient accommodations, a child with a disability may not be required to attend school on the reserve and no laws require that they be provided with educational services. The author discusses how section 15 of the Charter may be used to challenge instances where education is denied to aboriginal children with disabilities on reserve.

Legislation:
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 15. Indian Act (need citation)

Jurisdiction: Canada


Writing in 1984, O’Reilly considers the situation in Canada with respect to the rights of all children to receive an appropriate education. While describing improvements as “revolutionary,” he also notes that governments have been slow to enact positive legislation guaranteeing this right. He concludes by recommending that rights to an appropriate education for all children, regardless of disability, should be proclaimed in all provincial/territorial human rights acts and education acts across Canada.
**Legislation:**
Provincial human rights legislation and education acts, generally

**Jurisdiction:** Canada
Housing:


This research paper reports on the effectiveness of the *Ontario Disability Support Program* (ODSP) on homeless persons with disabilities in Toronto. Background statistics on homelessness and disability in Ontario, the costs of lack of access to income supports, barriers to accessing the ODSP, gaps in other income support programs (such as the *Canada Pension Plan* disability benefit, employment insurance, and *Ontario Works*), and positive outcomes once participants were enrolled in the ODSP are also discussed. The report contains several recommendations to improve access to income supports for homeless persons with disabilities.

**Legislation/International Instruments:**

**Jurisdiction:** Ontario


Porter discusses the discrepancy between Canada’s international recognition of/commitment to the right to adequate housing and its domestic policy and legislation. After documenting the magnitude of homelessness in this affluent country, Porter asserts that homelessness in Canada is a direct consequence of government policy/legislative choices, which have eroded housing security for its most disadvantaged groups. Noting the absence of an explicit guarantee to adequate housing in Canadian law, Porter examines proposals, which have been made since 1990, for incorporating this right into domestic law, and he discusses the jurisprudence on open-ended provisions of the *Charter* and human rights legislation as they relate to housing. Lastly, Porter discusses Canada's unsatisfactory response to UN criticism; he urges human rights advocates to work toward achieving both international and domestic enforcement mechanisms/ remedies for violations of the right to adequate housing. [NOTE: does not specifically address disability]

**Legislation:**
*Canada Assistance Plan, R.S.C., 1985, c. C-1.*

232


[Provincial human rights statutes, generally]

[Various provincial tenancy statutes]

**Cases:**
Finlay v. Canada (Minister of Finance), [1993] 1 S.C.R. 1080.

**Jurisdiction:** Canada, International

---


This article examines the goals/progress of the deinstitutionalization process broadly, and focuses on aftercare/community-based care in Nova Scotia in detail. Frankel describes the homelessness many individuals with mental disabilities face after deinstitutionalization, and examines whether there is a Charter right to community-based aftercare. The author discusses the possibilities and pitfalls of s.15 challenges based on aftercare provided to individuals with physical disabilities, adverse effects discrimination because aftercare is not provided equally, and community care as an s. 7 issue. Comparisons to the American experience are also noted. Frankel suggests possible civil actions, and legislative reform incorporating the “least restrictive alternative” or a Patient’s Bill of Rights.

**Legislation:**
Various Nova Scotia health related legislation.

**Cases:**

**Jurisdiction:** Nova Scotia, Canada, United States of America

In light of the discrimination and inequality experienced by women in all areas of housing, the author suggests that the significance to women of the ICESCR’s right to housing depends on it being interpreted and applied in ways that address women’s unique experiences. The author argues that women will only derive equal benefit from the right to housing if a substantive approach to equality is applied. She considers how closely the international housing rights jurisprudence (in particular, the CESCR’s General Comments 4 & 7) conforms to principles of substantive equality. After demonstrating that the jurisprudence has ignored the experiences of women, the author concludes by stressing the benefits of adopting a substantive approach to the equal enjoyment of the right to housing. [NOTE: does not specifically address disability]

Legislation:
General Comment No. 4 Need Citation
General Comment No. 7 Need Citation

Jurisdiction: International

Centre for Equality Rights in Accommodation, Women and Housing in Canada: Barriers to Equality (Toronto: CERA, 2002).

Women’s experiences of homelessness in Canada have largely been ignored and are, therefore, not widely understood. This report considers homelessness from the perspectives of women. It exposes the systemic barriers which preclude many women from satisfying their housing needs; the unique challenges faced by Aboriginal women are given special consideration. This report also uncovers the deficiencies of federal policies and programs targeting women’s housing and income security. It makes recommendations to the federal government for how it can respond more effectively to the growing crisis of women’s homelessness in Canada. [NOTE: does not specifically address disability]

Legislation:
Canada Assistance Plan, R.S.C., 1985, c. C-1.
Employment Insurance Act (need citation)
Indian Act, R.S.C. 1985, c. I-5.
National Housing Act R.S., c. N-10

Jurisdiction: Canada

Pierce looks at the potential for class action law suits to enhance the political power of individuals with mental disabilities undergoing deinstitutionalisation. Pierce assesses the advantages and disadvantages of the use of class action lawsuits in Canada by reviewing the American experience. Although there have been significant American victories in class action law suits, they have failed to materially change the lives of persons with disabilities; however, class actions have been the impetus for practice, policy, and legislative changes.

**Legislation:**
Legislation allowing class action lawsuits in several provinces is mentioned.

**Cases:**
Features of American class action cases are mentioned, but not discussed in specific detail.

**Jurisdiction:** Canada, United States of America.


McCreary argues that the government policy of deinstitutionalization, coupled with inadequate community supports, has forced disproportionate numbers of poor people with disabilities into substandard boarding home accommodations. She notes that under the *Ontario Human Rights Code*, substandard conditions may be challenged as discriminatory treatment based on disability and income, and home operators have a duty to accommodate disabled tenants. Furthermore, because boarding homes receive funds and referrals indirectly from government, section 15 of the *Charter* may be used to challenge substandard conditions. McCreary argues that the root of this systemic discrimination—government policy—should also be challenged.

**Legislation:**

**Cases:**
**Jurisdiction:** Ontario

Olds, Kris “Canada: Hallmark Events, Evictions and Housing Rights” in A. Azuela, E. Duhau, and E. Ortiz, eds., *Evictions and the Right to Housing: Experience from Canada, Chile, the Dominican Republic, South Africa, and South Korea* (Ottawa: IDRC, 1998) 1. [Available online: www.idrc.ca/books/focus/861]

This article considers the coincidence of “hallmark events” and large-scale forced evictions. The author examines the forced evictions which took place in Vancouver due to Expo ’86 as well as the forced evictions which occurred in Calgary because of the 1988 Winter Olympics. He also explores how anticipated evictions were dealt with in Toronto during deliberations over its 1996 Summer Olympic bid. The author describes how, in all of these cases, provincial legislation left tenants vulnerable to displacement. Furthermore, he outlines the challenges facing community groups in their struggles to prevent such violations of the right to housing. [NOTE: does not specifically address disability]

**Legislation:**

*Innkeepers Act, R.S.B.C. 1948, c. 160.*
*Landlord and Tenant Act, R.S.A. 1980, c. L-6.*
*Landlord and Tenant Act, R.S.O. 1980, c. 232.*
*Rental Housing Protection Act, R.S.O. 1986, c. 164.*
*Residential Rent Regulation Act, S.O. 1986, c. 63.*
*Residential Tenancy Act, S.B.C. 1984, c. 15.*
*Tenant Protection Act, S.O. 1997, c. 24.*

**Jurisdiction:** Alberta, British Columbia, Ontario


The article considers the legislative difficulty associated with regulating the competing concerns of rights/independence and mandated intervention for persons with mental disabilities. The authors survey the historical and legislative progression from gaols to deinstitutionalization between the Middle Ages and present day Ontario. Notably, the recent *Residents’ Rights Act* (Ontario, 1994), combined with the *Advocacy Act* may provide improved regulation and protection for people with mental disabilities in group and care-home settings (although it is unclear whether the acts will provide tenant’s rights for individuals with mental disabilities living in shelters). The authors also comment on group-home admission and eviction criteria which is potentially discriminatory under the *Ontario Human Rights Code*.

**Legislation:**
Residents’ Rights Act, S.O. 1994, c. 2. (This act was incorporated into the Tenant Protection Act, and now the Residential Tenancies Act, 2006, c. 17, s. 261.)

Cases:
June Kafato (on behalf of Summit Halfway House) v. Halton Condominium Corporation No. 4, 71 (1991), 14 C.H.R.R. D/154 (Board of Inquiry).

Jurisdiction: Ontario


Hulchanski reviews the evolution of the “rule of thumb” that no more than 30% of one’s income should be spent on housing, and the discriminatory use of minimum income criteria by landlords. The rule is an instance of statistical discrimination—individuals are judged based on group characteristics, rather than on individual merits. Individuals who cannot meet minimum income criteria are generally those protected under human rights legislation (such as women, racial minorities, and people receiving public assistance), and minimum income criteria allows landlords to indirectly discriminate against people they cannot directly discriminate against. Statistics and history demonstrate the arbitrariness of the 30% “rule of thumb”, and its reinforcement of statistical discrimination. The Ontario “sellers” market perpetuates income discrimination, and Hulchanski asserts landlords would not experience hardship if minimum income criteria were banned. [NOTE: the appendix features summaries of housing research determining whether housing expenditure to income ratio is a valid measure of need and affordability]

Legislation/International Instruments:

Jurisdiction: Ontario


Spotton discusses the minimum income policy of many Ontario landlords that requires tenants pay no more than 25-30% of their income on rent, and argues that this is discriminatory under the Ontario Human Rights Code. Spotton relates key sections of the Code and how the components of a constructive
discrimination claim (prima facie case, bona fide requirements, and the undue hardship defence) may be advanced or countered. Stances taken by landlord’s advocates are considered. Alternative options to the minimum income requirement are assessed, and segregation, discrimination (contravening the ICESCR), and equal access to housing are discussed. [NOTE: does not specifically address disability]

**Legislation/International Instruments:**


**Jurisdiction:** Ontario

---

**Coughlan, Stephen G. “Public Housing and Equality Rights—Dartmouth/Halifax County Regional Housing Authority v. Irma Sparks” (Fall 1992) 15 Dalhousie L.J. 648-654.**

Coughlan discusses the Sparks decision regarding the provision of security of tenure to private, and not public, housing tenants of at least five years. While Coughlan sees positive features to the county court decision, including its holding of “social assistance recipients” as an analogous ground under the Charter, he criticizes Palmeter J.’s narrow interpretation of “special characteristic” from the O’Malley test for adverse-effects discrimination. Coughlan also suggests that differential treatment of public and private housing tenants violated s. 15 of the Charter because while not every black woman on social assistance lives in public housing, as a group they are disproportionately more likely to. [NOTE: does not specifically address disability]

**Legislation/International Instruments:**


*Residential Tenancies Act, R.S.N.S. 1989, c. 401.*

**Cases:**


*Dartmouth/Halifax County Regional Housing Authority v. Irma Sparks (1992), 112 N.S.R. (2d) 389 (Cty. Ct.).*


**Jurisdiction:** Nova Scotia, Canada

---


This article, written in 1988, examines the nature and scope of homelessness in Toronto, with a particular focus on the Parkdale community. It describes the
demographics of the homeless population, and addresses a number of social factors responsible for the growing numbers of people who are without housing: deinstitutionalization, coupled with inadequate community support; lack of security of tenure; persistent unemployment; reduction of affordable housing; systemic gender inequality; and insufficient support for refugees. The article explores litigation strategies for promoting judicial recognition of a right to shelter in Canada. Specifically, it considers the potential value of using provincial welfare legislation, the Canada Assistance Plan, and sections 7, 12 & 15 of the Charter to advance the rights of Canada's homeless. The article also briefly considers the successes and failures of non-judicial efforts in New York City and Western Europe to attain housing for the homeless. Finally, it concludes by noting that social action, law reform, and litigation are all important for combating homelessness. [NOTE: does not specifically address disability]

**Legislation:**


*General Welfare Assistance Act*, R.S.O. 1980, c. 188.


**Cases:**

*Callahan v. Carey* (1979), No. 79-42582 (Sup. Ct. N.Y.) [unreported; U.S.].


*Pitts v. Black* (10 October 1984), No. 84 Civ. 5270 (S.D.N.Y.) [unreported; U.S.].


**Jurisdiction:** Canada (Toronto), with lessons from the United States of America and Europe


Published in 1988, this article highlights the significance of a complaint initiated by the Ontario Human Rights Commission, at the request of a women’s advocacy group, against the Ontario Ministry of Housing, Department of Social and Community Services, and the Ottawa-Carleton Regional Government alleging discrimination due to a relative lack of funding and services targeting homeless women. According to the writer, the complaint is significant because it demonstrates a new advocacy orientation on the part of the Commission;
moreover, it targets service equity, a concept that has received scant attention to date. [NOTE: does not specifically address disability]

Jurisdiction: Ontario, Canada


The author asserts the right to choose adequate housing for people with and without disabilities, which would ideally offer other services to help individuals live independently. Shea notes that the government of New Brunswick has made considerable efforts to de-institutionalise, and move towards residential supports for persons with disabilities, although vigilance is necessary to ensure restrictive laws are not passed in the future.

Jurisdiction: New Brunswick, Canada


Capponi discusses the rising importance of boarding homes due to deinstitutionalizations from psychiatric hospitals, and the lack of legal regulation or protection for the residents of these homes. Individuals who live in boarding homes do not have the right to receive mail; to basic standards of upkeep and cleanliness; to occupy their rooms, or to security of the person. Basic rights are being denied because health care professionals and landlords claim that the cost of enforcing tenant’s rights would force them to close the boarding houses that are “aiding” de-institutionalised individuals.

Jurisdiction: Ontario, Canada


Morin surveys de-institutionalization and zoning in Québec, including Section 158 of the Health and Social Services Act which denies municipalities the right to make regulations prohibiting the creation of reception/accommodation centres. After citing many examples of tactics to discourage the creation of accommodation centres, Morin discusses A part égale (a global document by the Office des personnes handicapées du Québec), and the establishment of a Board of Enquiry by the Union des Municipalités where all the groups involved in zoning issues can express their views.

Jurisdiction: Québec

Gehrke examines whether the Charter protects publically assisted housing. She argues the expansive definition of “security of the person” in Article 25 of the Universal Declaration of Human Rights (which includes housing and adequate standard of living) may be read into s. 7 of the Charter. Likewise, ICESCR and Universal Declaration rights may be read as rights s. 15 of the Charter protects, and that subsidized shelter is a “benefit” of the law. Gehrke argues that s. 15(2) protects publically subsidised housing, and that housing decisions made at the discretion of administrators may not pass the s. 1 “prescribed by law” test. [NOTE: does not specifically address disability]

Legislation/International Instruments:
National Housing Act, R.S.C. 1985, c. N-11

Cases:

Jurisdiction: Ontario, Canada


The authors explore legal and economic perspectives with respect to fairness in the allocation of low-income (i.e. public) housing in Canada. Writing in 1983, the authors highlight the promise that the Charter holds for promoting fairness in this area. They caution, however, that whether the promise of the Charter will be fulfilled is as yet unseen. Moreover, the authors emphasize the need to continue pursuing other avenues for achieving fairness in housing allocation, for housing is inherently a social and political problem; at most, law and economics can provide a framework for fair decision-making. Perspectives regarding fair allocation of public housing in the United States and the United Kingdom are also explored and compared and contrasted with those in Canada. [NOTE: does not specifically address disability]

Legislation:
Cases:

Jurisdiction: Canada (United States, United Kingdom)
Health:

Disability and Access to Health Care


Chisholm debates the constitutionality of the government of New Brunswick’s choice not to provide prosthetic limbs as a “medically necessary” service to amputees through the medicare system under Regulation 84-20, s. 2(d). Providing statistics and academic opinions Chisholm displays the medical necessity of prosthetics to amputees. Chisholm determines that the most promising way to challenge the constitutionality of not providing prosthetics through medicare is a s. 15 equality challenge, and provides a thorough analysis of how discrimination can be demonstrated under the Law framework, and the lack of governmental justification for the discriminatory treatment under s. 1. Chisholm surveys the manner in which other jurisdictions treat prosthetics, and makes recommendations for a program in New Brunswick.

Legislation:
Canada Health Act, S.C. 1984, c. 6.
Medical Services Payment Act, S.N.B. 1968, c. 85.

Cases:

Jurisdiction: New Brunswick

Finley discusses the case of *Auton v. British Columbia*, its implications, and theorizes as to why the Court held s. 15 of the *Charter* had not been violated. In *Auton* a group of B.C. parents claimed that their autistic children’s rights were violated when the government refused to provide them Lovaas treatment. The Court held that since the health care legislation did not provide the benefit of funding for all medically required treatment, refusal to provide Lovaas treatment was not a benefit subject to an equality claim. Finley outlines the s. 15 analysis, and legislation at issue in the case, then proposes that the Court’s holding was inconsistent with case law. Finley also suggests the Court limited s. 15 in the *Auton* case to deter future s. 15 claims to health care.

**Legislation/International Instruments:**
Medicare Protection Act, R.S.B.C. 1996, c. 286.

**Cases:**

**Jurisdiction:** British Columbia, Canada


Ries discusses *Charter* challenges to the government’s refusal to fund health care services as discrimination on the basis of disability. To prove discrimination, the claimant has to show that a service is medically necessary, and that the refusal to fund impacts their dignity. A precise definition of medically necessary is unlikely, but it allows for the term to evolve with changing circumstances. Ries explains the Law test and several critiques of its dignity component, then focuses on the court’s assessment of medical necessity and dignity in the *Cameron* and *Auton* cases (at the trial and Court of Appeal levels). The lack of consensus in these cases indicates an unsettled area of law.

**Legislation/International Instruments:**

**Cases:**

Jurisdiction: British Columbia, Nova Scotia, Canada.


This article explores the possible grounds on which a lawsuit or petition might be brought against the government of British Columbia for its failure to provide adequate and effective treatment for persons who are addicted to intravenous drugs through implementation of safe injection facilities. The article focuses on two possible causes of action: the tort of negligence and a claim under sections 7 and 15 the Charter. It also considers advancing the argument that statutory interpretation and ministerial discretion as to whether to fund these facilities must be guided by the Charter value of protection of minorities.

Legislation:
Canada Health Act, R.S. 1985, c. C-6.
Health Act, R.S.B.C. 1996, c. 179.
Medicare Protection Act, R.S.B.C. 1996, c.286.

Cases:
Kings Cross Chamber of Commerce and Tourism Inc v. The Uniting Church of Australia Property Trust (NWS) & ors., [2001] NSWSC 245.
Lalonde v. Ontario (December 7, 2001) Docket C33809 (Ont. C.A.)

**Jurisdiction:** British Columbia, Canada


The author explores the issue of whether claims of disability discrimination, based upon a government’s failure to provide funding to treat a disabling condition, pose challenges to the social model of disability, as the language of these claims shifts concern from the social dimension of disability to treating impairment. This issue is considered in light of the B.C. Supreme Court’s ruling in Auton that the provincial government violated section 15 of the Charter by not funding a therapy for children with autism.

**Cases:**

**Legislation:**

**Jurisdiction:** Canada


Writing in 1997, the authors examine the purchaser provider model of health care funding and delivery in the United Kingdom, and they evaluate its impact on access to health care services for people with disabilities. Based on their review, they conclude that this model has potential to create significant inequities in access to health care for people with disabilities, and as such, it is not a model that should be adopted by provincial governments in Canada. The authors explain how such health care reforms in Canada could be challenged as violations of sections 7 and 15 of the Charter. They conclude by offering a statement of principles to guide Canadian health care reform in a manner that respects the rights of people with disabilities.

**Legislation:**

Cases:

Jurisdiction: Canada, United Kingdom


In this editorial, Peat highlights the significant barriers preventing people with disabilities from enjoying equal opportunities in society, including equal access to health care. While barriers to movement and communication in the physical environment (e.g. in physician’s offices) continue to obstruct persons with disabilities, attitudinal barriers can present even greater obstacles. Peat calls for health professionals to work with communities to change the attitudes, beliefs, and behaviors of policy-makers and the public. Education, he argues, holds the most promise in the long run for fostering an accessible society.

Legislation:

Jurisdiction: Canada


Blanchet discusses the legal framework guaranteeing equal treatment of children with disabilities under the Charter and Canadian Human Rights Act, leading cases, and challenges. The case of Stephen Dawson, who was removed by Child and Family Services when his parents refused medical treatment to prolong his life, is seen as the basis ensuring the right to treatment for children with disabilities. Despite positive jurisprudence and legislation, Blanchet reports that non-consensual sterilization and “do not resuscitate” policies are still common. He identifies educating the medical community about the right to treatment as essential to the realisation of children with disabilities’ medical rights.

Cases:

Jurisdiction: Canada
By examining health care related claims under sections 7 and 15 of the Charter, Llewellyn argues for a relational rights framework. The Supreme Court’s approach favours liberal rights (which protect the individual from the collective), rather than relational rights (which promote democratic dialogue and relationships reflective of society’s values). Sections 1 and 33 of the Charter may support relational rights since they require dialogue between individual rights and collective choices. The lack of a relational perspective means that comparisons in s. 15 claims focus more on the similarity between groups than the differences and relationships needed to foster equality; the subjective-objective aspect of human dignity inquiries fail to contextualise the claimant’s social and political relations; and s. 7 claims focusing on individual autonomy ignore rights exercised with collective support. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


Jackman discusses *Chaoulli*—which was before the Supreme Court at the time of writing—and considers the social implications of section 7 challenges to the health care system. Jackman contends that section 7 can have positive implications to the extent that it is invoked to advance equal quality care and open, accountable, inclusive decision-making; however, as *Chaoulli* illustrates, section 7 can also be used to promote increased government spending on acute health care, to the detriment of social welfare programs, and to advance privatization of health services. Jackman explains how these later outcomes are detrimental to low-income Canadians. She considers the important choices facing the Supreme Court in *Chaoulli*, and the implications of these choices for
the health-related interests of all Canadians. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**

**Jurisdiction:** Canada


This article details the differing conclusions of trial and Supreme Court decisions in Chaoulli. Jackman notes that while the court affirmed that health care is within the ambit of s. 7 of the Charter, the Supreme Court’s decision only complied with formal equality. Substantive equality is violated by the decision in Chaoulli because less economically advantaged, disabled, or chronically ill people will not be able to access private insurance to the same extent as their healthy, able, and economically advantaged counterparts. The willingness of some provinces to institute private health care in the wake of Chaoulli is also discussed.

**Legislation:**

**Cases:**

**Jurisdiction:** Alberta, Québec, Canada


According to the authors, rights-based litigation is increasingly used to reform health policy in Canada. The authors describe this trend as an example of “legal mobilization,” that is, use of the courts to achieve policy goals. They consider Chaoulli—a case challenging prohibitions on private insurance for services that
are provided through the public health care system—to explore the following questions about legal mobilization: How do cases of this kind get into the judicial system? Under what conditions are they likely to be successful? And what impact do their outcomes have on the broader policy environment?

**Legislation:**


*Health Insurance Act, R.S.Q. c. A-29.*

*Hospital Insurance Act, R.S.Q. c. A-28.*


**Cases:**

*Chaoulli v. Québec (Attorney General), 2005 SCC 35*

**Jurisdiction:** Canada

---


Porter outlines the decisions of the lower courts in *Chaoulli,* and critiques the decision of the Supreme Court. The decision of the majority of the Supreme Court was dismissive of equality arguments, protecting the affluent by taking the position that waiting lists interfere with s. 7 interests, rather than protecting the equal distribution of health care resources in accordance with human rights norms. Porter critiques both the majority and minority negative rights approach, and views *Chaoulli* not as a case where the Courts ruled against social and economic rights, but where they refused to positively and contextually engage them.

**Legislation:**


**Cases:**

*Chaoulli v. Québec (Attorney General), 2005 SCC 35.*

**Jurisdiction:** Québec, Canada

---


In this case comment Bakht provides an overview of the context (including the tension between the social model of disability and the medical model advocated by the claimants) and content of the *Auton* decision from pre-trial to the Supreme Court. Bakht criticises the Supreme Court’s decision because of its
mischaracterisation of the respondent’s claim, its formal equality analysis, and its consideration of factors under s. 15 (where the claimant has the burden of proof) that are more appropriate to governmental justification under s. 1. Other problematic features of the Auton decision include: excessive deference to government spending decisions; and international trends requiring practical, rather than declaratory legal, action.

**Legislation:**

**Cases:**

**Jurisdiction:** British Columbia, Canada.


Sossin argues that the Court’s approach to social rights in the areas of social assistance and health care is moving towards two-tiered constitutional rights. The Court’s analysis of poverty rights is outlined by the Gosselin case, and while initial health care cases (such as Auton and Eldridge) resembled the poverty analysis, Sossin demonstrates the departure in Chaoulli. To avoid a two-tier Constitution, Sossin determines that three barriers must be overcome: the positive/negative rights dichotomy, choice and moral responsibility determining constitutional rights, and a lack of judicial empathy for the poor. Although Chaoulli has certain regressive tendencies, Sossin believes there may yet be progressive results from the Court’s connection between the deprivation of necessities of life and fundamental rights. [NOTE: does not specifically address disability]

**Legislation/International Instruments:**

**Cases:**

**Jurisdiction**: Québec, Canada


Jackman provides analysis of s. 7 jurisprudence and the right to refuse, receive and provide health care in accordance with the principles of fundamental justice. S. 7 should guarantee the right to refuse medical treatment while courts have differed on the right to receive, and essentially rejected the right to provide health care. While initial costs of due process procedures may be high, Jackman predicts savings through more effective health care delivery in conformity with international and domestic human rights principles. A violation of fundamental justice should rarely be upheld under s. 1, but where the government shows evidence competing interests have been fairly balanced s. 1 may save s. 7 violations. [NOTE: this is an updated/edited version of “The Implications of Section 7 of the Charter for Health Care Spending in Canada: Discussion Paper No. 31]

**Legislation**:  

**Cases**:  

**Jurisdiction**: Canada


Focusing on sections 1, 6, 7, and 15 of the Charter, Greschner discusses Charter challenges dealing with the health care context. Greschner surveys the few health care related Charter challenges to 2004, and isolates judicial trends. S.15 litigation has dealt primarily with expensive uninsured services. The Courts may be reluctant to find s. 7 violations because they are rarely “contrary to the principles of fundamental justice”, and because of their economic aspect. s. 6 is likely to be limited to restrictions on medical practitioner’s residency, while s. 1 focuses on cogent evidence and balancing costs. Greschner discusses possible future developments and the impact of international law on Canada’s health care
spending. The appendices include sections of the Charter, and a table of the cases surveyed. [NOTE: does not specifically address disability]

Legislation/International Instruments:

Cases:

Jurisdiction: Canada


Ries discusses the likelihood of the Supreme Court of Canada holding s. 7 of the Charter positively obliges the government to provide health care as an aspect of life, liberty and security of the person. The author reviews the positive/negative rights debate, and unsuccessful claims to health care brought under s. 7. The Gosselin decision is also discussed, as it is indicative of the Supreme Court’s reluctance to find positive obligations under s. 7. If a positive right does exist under s. 7, it may be vague because of judicial incompetency over policy decisions. In her final assessment, Ries is doubtful a positive right to health care under s. 7 will be accepted by the Court.

Legislation:

Cases:
Other s. 7 health related cases are mentioned.

**Jurisdiction:** Canada


The author presents a proposed Constitutional Proclamation for amending the Constitution to include express recognition of healthcare and environmental conditions as rights. In addition to guaranteeing these rights, the proposed Proclamation would establish a mandatory, accountable system of federal transfers to provincial governments for designated areas of social spending, including: healthcare, environmental conservation and public health, social assistance, and social services. The Proclamation is supplemented with commentary, which highlights the urgency of safeguarding these rights in view of the threat to social supports posed by globalization.

**Legislation:**

**Jurisdiction:** Canada

**Jackman, Martha.** “*The Implications of section 7 of the Charter for Health Care Spending in Canada: Discussion Paper No. 31*” (Saskatoon: Commission on the Future of Health Care in Canada, 2002).

Jackman provides analysis of s. 7 jurisprudence and the right to refuse, receive and provide health care in accordance with the principles of fundamental justice. S. 7 should guarantee the right to refuse medical treatment while courts have differed on the right to receive, and essentially rejected the right to provide health care. While initial costs of due process procedures may be high, Jackman predicts savings through more effective health care delivery in conformity with international and domestic human rights principles. A violation of fundamental justice should rarely be upheld under s. 1, but where the government shows evidence competing interests have been fairly balanced s. 1 may save violations. A summary and highlights are also included. [NOTE: does not specifically address disability]

**Legislation:**

**Cases:**
**Auton (Guardian ad Litem of) v. British Columbia (Minister of Health),** [2000] B.C.J. No. 1547.


**Jurisdiction:** Canada

---


Friesen questions whether there is a right to health care in Canada. To begin her discussion, she reviews the libertarian and economic theories of health care which depend on the market and voluntary charity, versus the egalitarian approach which views health care as a human right. To determine whether the right to health care is a justiciable right in Canada, Friesen focuses on ss. 7 and 15 of the Charter. By reviewing international conventions and Canadian jurisprudence, Friesen finds it unlikely that the Courts will hold an independent right to health care is encompassed under s. 7. Jurisprudence under s. 15 shows greater judicial support for the right to egalitarian allocation of health care resources, although not to a free-standing constitutional right. [NOTE: does not specifically address disability]

**Legislation:**


*Canada Health Act, S.C. 1984, c. 6.*


Various other international instruments are referenced.

**Cases:**


Various s. 7 cases are referenced, but not discussed in detail.

**Jurisdiction:** Canada
Disability and Personal Supports


The author describes recent legislative changes in Alberta’s child welfare laws. She introduces Alberta’s new Family Support for Children with Disabilities Act, contending that this legislation will ensure better supports for families who care for a child with a disability. She also introduces the Child, Youth and Family Enhancement Act, which replaces the old Child Welfare Act, describing how this legislation improves Alberta’s child welfare system.

Legislation:

Jurisdiction: Alberta


Torjman looks at the disability support system in Canada, and the wide variations between the provinces. The report focuses on the need for personal supports for individuals with disabilities to be able to participate equally in society, as guaranteed under the Charter. The regional types of services available, and the providers of these services, are detailed. Problematic areas include Access (availability, regional disparities, complexities, and affordability); Eligibility (age, cause of disability, and income); and Responsiveness (type of service and delivery method). Policy options that promote inclusion, citizenship and self determination are also discussed.

Legislation:

Jurisdiction: Canada


Carpenter explains the principles of independent living as: consumer control, consumer integration, consumer-community participation, and shared advocacy.
The most effective ways to ensure consumer control is to have consumers (defined as users of services, parents or advocates) sitting on Boards; to integrate consumers and respect autonomy; by creating community supports to facilitate integration; and for all governments, individuals, and communities to advocate together.

**Jurisdiction:** Canada
Disability and Services (Generally)


The author discusses the Charter as an instrument of classical liberalism (which protects negative rights/interference by the state), and discusses whether human rights legislation can step in and “fill the Charter gap” by promoting social democratic rights (and egalitarian values) in the private sector. Although Anderson asserts human rights codes have great promise, the way “services available to the public”, mandatory retirement, housing for the poor, and systemic discrimination have been interpreted indicates human rights legislation is failing to live up to its potential. Anderson notes more similarities than differences between the Charter and human rights legislations in their institutional design, and their identification of rights formally or substantively with the public/private divide. [NOTE: does not specifically address disability]

Legislation/International Instruments:

Cases:

Jurisdiction: Alberta, British Columbia, Ontario, Québec, Canada

In this commentary on the *Turnbull* case—which involved allegations of discrimination at Famous Players theatres in Ontario between 1993 and 1996—the authors analyze how inaccessible movie theatres in Ontario can still exist in the 21st century. They argue that the inadequacy of legislation for enforcing accessible services is partly to blame: an individualized, complaint-driven human rights process is not an efficient way to address a systemic problem. Furthermore, the jurisprudence—as exemplified in *Turnbull*—may deter people from seeking to enforce their rights. The authors note, for instance, that the Board of Inquiry in *Turnbull* adhered to a medical model of disablement and displayed insensitivity to the complainants’ experiences.

**Legislation:**


**Cases:**


**Jurisdiction:** Ontario

---


This article outlines the Saskatchewan Court of Appeal’s ruling in *Canadian Odeon Theatres Ltd. v. Huck* that Canadian Odeon Theatres violated the *Saskatchewan Human Rights Code* by not making their theatres accessible for persons using wheelchairs. The author heralds the judgment as a “landmark decision,” which establishes a strong precedent that people with disabilities are part of the public and have a right to accessible public services and facilities. She concludes by considering the implications of this decision in employment settings and also for other equality-seeking groups.

**Legislation:**


**Cases:**


**Jurisdiction:** Saskatchewan, Canada
Disability and Child Care:


Dobby considers the position of adult “children of the marriage” with disabilities upon the divorce of their parents, and how financial support should be apportioned between parents and the Canadian government. Dobby supports a partnership approach, wherein parents and the government both support adult “children” with disabilities. The author surveys the poverty levels of single mothers and persons with disabilities, and reflects on the restructuring of the welfare state which has placed financial obligations that were formerly public into free market/private concerns. Through reviewing the case law, Dobby illustrates public/private and worthy of public support/unworthy of public support distinctions, and the implications the source of support can have on the autonomy of persons with disabilities.

Legislation:
Divorce Act, R.S.C. 1985, c.3.

Cases:

Jurisdiction: Canada.

This document discusses issues faced by parents receiving social assistance who have children with disabilities. A literature review revealed that little writing focused on the parents discussed in this report. The legislative framework and policy on housing, social assistance, childcare, education and services in British Columbia, Alberta and Ontario are surveyed, as well as the experience of parents accessing these services. Policy improvements are also suggested. Notably, the Appendix contains a summary of Canadian law in relation to childcare for children with disabilities whose parents are seeking access to the labour force in Alberta, Ontario, British Columbia and federally. While there is no freestanding right to childcare in Canada, both human rights legislation and the Charter obligate the government to provide childcare non-discriminatorily within certain limits.

Legislation/International Instruments:

Cases:

Irwin, Sharon Hope. “Inclusive Child Care in Canada: Advances at Risk” in L’Institut Roeher Institute, As if Children Matter: Perspectives on Children, Rights and Disability (North York: Roeher Institute, 1995) 77-89.

Irwin argues that, while Canada’s social safety net is generally more expansive than the United States of America’s, Canadian children with disabilities have fewer rights to services. There is no Canadian equivalent of American legislation mandating “free and appropriate education in the least restrictive environment”, leaving the promise of the Charter unfulfilled. Irwin summarizes the types of child care options available from the 1960s-1980s, and legislative policy and practice in the 1990s. Legislation is only beginning to mirror the practice of inclusive child care. Irwin provides an otherwise progressive day care as an example of the fragility of inclusion without legislation supporting the practice.

Legislation/International Instruments:

Jurisdiction: Canada, United States of America
Disability and Transportation:


This article provides an overview of the seven-year battle fought by the Council of Canadians with Disabilities against VIA Rail’s purchase of inaccessible trains and their refusal to make them accessible. The authors herald the ruling of the Supreme Court of Canada as a “landmark decision” that advances a substantive norm of equality. They outline the various ways in which this decision advances an interpretation of equality rights that promotes full and equal citizenship of persons with disabilities. Nevertheless, the authors note that the case is also instructive for revealing the numerous barriers facing equality seekers to accessing justice in order to enforce their rights—barriers that the Supreme Court failed to address in its ruling.

Legislation:
Canada Transportation Act, S.C. 1996, c. 10

Cases:

Jurisdiction: Canada


The author critically examines the Federal Court of Appeal’s approach to the equality rights of people with disabilities in Via Rail Canada Inc. v. Canadian Transportation Agency. He outlines a number of flaws with the Court’s reasoning, in particular, its failure to recognize the fundamental inequality that results when an organization, which provides an important service to the public, creates new, preventable, barriers for people with disabilities. The author identifies more appropriate ways of addressing the accessibility issues that are at the heart of this case.

Legislation:
Canada Transportation Act, S.C. 1996, c. 10

Cases:

**Jurisdiction**: Canada


Manderscheid discusses municipal “paratransit” systems designed to accommodate the mobility needs of people with physical disabilities. He argues that paratransit has come to refer to the accessibility of the public transit system for people with physical disabilities, rather than the type of vehicle providing transportation. Using case law, and citing American and Canadian statutory provisions, Manderscheid describes how minor adjustments to the public transit system can accommodate, rather than segregate, individuals with physical disabilities. He argues that as transit providers, municipalities owe a duty to ensure the rights of those who cannot use the traditional transit system.

**Legislation**:

**Cases**:

**Jurisdiction**: Canada, United States of America


Chadha discusses paratransit services in Ontario under the *Human Rights Code* (*Code*) in anticipation of the Ontario Human Rights Commission’s decision whether to include paratransit services under the s. 14(1) special programs/affirmative action provision of the *Code* (thereby shielding them from discrimination claims). By reviewing the history of Ontarian paratransit services, the jurisprudential/interpretive background of s. 14(1), and how the paratransit system fails under the non-discrimination and accommodation provisions (s. 1 and 17) of the *Code* Chadha argues that as a matter of substantive equality for persons with disabilities paratransit services should be seen as an element of the duty to accommodate, and not as a special program.

**Legislation/International Instruments**:
Accessibility for Ontarians with Disabilities Act, S.O. 2005, c. 11.

Cases:

Jurisdiction: Ontario


In his Final Report to the Council of Canadians with Disabilities, Baker reviews Canada’s contemporary approach to transportation accessibility, and he compares this approach with the regulatory frameworks governing accessibility in the United States, the United Kingdom, the European Community, and Australia. Baker’s report demonstrates that while similar countries are making sustained progress towards full accessibility, Canada is weakening its regulatory standards and is, instead, relying upon ineffective voluntary codes of practice. Baker’s report provides recommendations for reforming Canada’s unsatisfactory approach to transportation accessibility. His chief recommendation is that Canada replaces its voluntary guidelines with mandatory regulations based upon the American model.

Legislation:
Accessibility for Ontarians with Disabilities Act, S.O. 2005, c. 11.
[A number of regulations from each jurisdiction]
Cases:

Jurisdiction: Canada, U.S., U.K., Europe, Australia


During 2001, the Ontario Human Rights Commission (OHRC) consulted with transit providers, seniors’ organizations, disability consumer groups, labour organizations, advocacy groups, and individuals with respect to the status of accessible transportation in Ontario. This report collates the many and varying perspectives presented to the OHRC in the course of public consultations. It begins by outlining the current status of accessible transportation in Ontario. Next, it examines conventional and paratransit transit services in Ontario and discusses three critical issues which were raised throughout consultations: funding, standards, and the roles/responsibilities of the key players. The report recommends ways that transit providers, municipalities, and senior levels of government can enhance accessible public transportation. It also commits the OHRC to taking specific steps toward this end.

Legislation:
Human Rights Code, R.S.O. 1990, c. H.19 as am.

Jurisdiction: Ontario

Seaman notes that the constitutional guarantee to legal equality, in section 15 of the Charter, has little relevance to people who cannot afford to pursue their claims in court. He considers whether there is a constitutional right in Canada to access the judicial system. Noting that various courts have affirmed the existence of this right, Seaman asserts that a persuasive argument could be made that poverty is an analogous ground of discrimination under section 15. Nevertheless financial barriers in private civil matters continue to impede universal access to the judicial system. Seaman concludes by highlighting the potential significance of a test case initiated in 2005 by the Canadian Bar Association for establishing a constitutional right to receive public legal aid in civil matters. [NOTE: does not specifically address disability]

Legislation:

Cases:

Jurisdiction: Canada


Buckley discusses the transformative potential of s. 15, the barriers to s. 15 Charter litigation, and possible solutions. The adversarial system itself is onerous, and when combined with a lack of support and resources, it creates a significant barrier to effective s. 15 litigation for disadvantaged individuals. Equal access to justice and substantive equality will only be achieved by positive measures to remove these barriers. As a response to these inadequacies Buckley proposes institutional changes to Charter litigation procedures, expanding the Court Challenges Program, increased funding for Legal Aid, and reforming cost awards.

Legislation:
**Jurisdiction**: Canada

**McChesney, Allan. “Promoting Disability Accommodation in Legal Education and Training: The Continuing Relevance of the 1990 Lepofsky Recommendations” (Ottawa: Reach, 2003).**

This guidebook is the outcome of research conducted by Reach in 2002-2003. Following-up on the observations and recommendations that David Lepofsky presented in 1990 to the Council of Canadian Law Deans, it considers the accessibility of legal education and its effectiveness in preparing future lawyers to serve clients who have disabilities. It provides “survival tips” to law students who have a disability; advises educational personnel with regard to “best practices” for accommodating disability and for preparing all students to serve clients who have disabilities; and highlights the continuing relevance of the Lepofsky’s recommendations.

**Jurisdiction**: Canada

**McChesney, Allan, Nolan, Richard & Schmieg, Martin. “Advancing Professional Opportunities and Employment Accommodation for Lawyers and Other Law Graduates Who Have Disabilities” (Ottawa: Reach, 2001).**

This guidebook is the outcome of research conducted by Reach in 2000-2001. It considers the employment of law students and graduates, articling students, and lawyers who have disabilities. Informed significantly by the experiences and insights of present/former law students who have disabilities, this guidebook was written for legally-trained persons who have a disability, people and organizations who may employ them, as well as advocates of disability accommodation. It addresses hiring practices and accommodation efforts that are or ought to be in place, offers suggestions and “survival tips” for legally-trained persons with a disability, and details supports and incentives available to employers who hire/accommodate a person who has a disability.

**Jurisdiction**: Canada

**McChesney, Allan. “Navigating Law School and Beyond: A Practical Guide for Students who have Disabilities” (Ottawa: Reach, 2000).**

This guidebook is the outcome of a study of Canadian law schools and bar admission programs, which was conducted by Reach in 1999-2000. Informed considerably by the experiences and insights of law students/graduates who have disabilities, this guidebook describes educational barriers, useful accommodation measures, and “survival tips” for law students who have disabilities—from preparing for law school through to participating in bar
admission courses. While imparting practical information to current/prospective law students, it provides useful instruction to universities, law schools, bar admission course instructors/ administrators, and disability service providers for implementing effective accommodation.

**Jurisdiction:** Canada


Although legal aid clients in civil matters are predominantly women, the legal aid needs of women have largely been ignored; thus, women’s needs are not adequately addressed by the current system. This report articulates principles that should inform the design and delivery of civil legal aid services for women. It begins by considering the evolution of legal aid services as well as the legal aid needs of women in Canada. This is followed by an examination of assessments that have considered legal aid services provided to women in different regions and a brief overview of available quantitative data on the use and delivery of legal aid services in Canada. Next, the results of focus group discussions considering women’s experiences with civil legal aid in Ontario and Manitoba are provided. The report concludes by identifying principles which should structure the design and delivery of legal aid services for women; the author emphasizes the need to take the equality guarantees of the Charter into consideration. [NOTE: does not specifically address disability]

**Legislation:**

**Jurisdiction:** Canada


This article considers the barriers that confront persons with a disability in Canada’s justice system. The author outlines an array of obstacles that preclude persons with disabilities from full participation in the judicial process—whether as parties, witnesses, counsel, judges, jurors, court staff, or public spectators. The author offers recommendations to assist in removing these barriers and to promote inclusivity and equality in the justice system. He concludes that the rights of persons with a disability will not be fully realized until the justice system, which is responsible for enforcing rights, resolves its own barriers and discriminatory practices.

**Legislation:**

Provincial/ territorial human rights legislation, generally
Various provincial Jury Acts

Jurisdiction: Canada


Doe relates the barriers imposed by the justice system when a child with a disability is abused. By allowing children to testify in court (if they affirm they understand the concept of “promising to tell the truth”) they are given both credibility and access to the justice system. Children with disabilities who have communicative impediments lack this access because the law requires witnesses to conform to a communicative norm. Furthermore, the segregation children with disabilities face often facilitates abuse, which is compounded by an unresponsive justice system. Doe suggests systemic reorganization is required to eliminate abuse in the first instance.

Jurisdiction: Canada


The author addresses two related issues concerning Canadian law schools and persons with disabilities. First, he considers how law schools can effectively accommodate students with disabilities so as to ensure that they have equal access to careers in law. Second, the author considers how the law school curriculum can be improved to ensure that graduates will be prepared to effectively serve their clients with disabilities. He provides a number of practical recommendations, which can be implemented by law schools to respond to each of these issues.

Jurisdiction: Canada


Mossman assesses whether Charter rights guarantee Legal Aid for individuals who cannot otherwise afford legal representation. Early cases dealing with legal counsel under sections 7 and 11 of the Charter relied on the discretion of the court to appoint counsel, rejecting any new Charter rights, although the affirmative wording of s. 10(b) should guarantee the right to counsel for someone charged with an offence. Using American and International jurisprudence and conventions to assess the wording of the Charter, Mossman concludes that the Charter contains a broad equality guarantee, and promotes
reading s. 15, s. 10(b) and s. 11 together to guarantee the right to Legal Aid. [NOTE: does not specifically address disability]

**Legislation/International Instruments:**
Canadian Bill of Rights, 1960, c. 44.

**Cases:**
Re MacKay and the Queen and Legal Aid Society of Alberta (February 15, 1983).

**Jurisdiction:** Canada, Ireland, United States, International
Immigrants/Refugees with disabilities:


MacIntosh discusses the Hilewitz case involving two individuals applying for permanent residency challenging the decision that their children did not qualify for residency because of excessive social service expenses relating to disability. MacIntosh discusses tensions evident in arguments and the decision relating to the differential treatment of citizens/non-citizens with disabilities; whether disability theory is inclusive of citizens/non-citizens and physical/mental disability; and the consistency of an economic model of disability in the immigration context, and an inclusive social model in the Charter context. The author criticizes the court’s narrow interpretation of the legislative history of immigration law, and the ability of medical practitioners to assess the individualized costs related to disability for potential immigrants.

Legislation/International Instruments:
Immigration and Refugee Protection Act, S.C. 2001, c. 27.

Cases:
Hilewitz v. Canada (Minister of Citizenship and Immigration); de Jong v. Canada (Minister of Citizenship and Immigration) 2005 SCC 57.

Jurisdiction: Canada


This article summarises the Chester decision which ruled that the medical inadmissibility provision in the Immigration Act did not violate s. 15 or s. 7 of the Charter. Ms. Chester challenged the provision when she was found medically inadmissible because of multiple sclerosis. The court held that there was no direct discrimination as she was treated in the same manner as any “family class” immigrant, and that her s. 7 rights had not been violated as she did not have the right to enter Canada. The author criticises the decision (especially the Court’s failure to do a cost/benefit analysis), and the likelihood its reasoning would make it difficult for individuals with HIV to immigrate.

Legislation:

**Cases:**
*Chesters v Canada (Minister of Citizenship and Immigration)*, [2002] 1 FC 361 (TD).

**Jurisdiction:** Canada


Fitz-James provides a summary of Angela Chesters’s challenge to the *Immigration Act*’s medical inadmissibility provisions, which allowed Canada to deny admission to individuals with disabilities who may place excessive demands on the public health care system. While Justice Heneghan of the Federal court held that the act was not discriminatory, the government responded and passed legislation removing the excessive demand criteria.

**Jurisdiction:** Canada


Anani discusses the immigration of refuges with disabilities to Canada from a human rights viewpoint. She surveys the domestic and international disability rights frameworks, including American and provincial disability related legislation; the development of Canadian disability rights organizations; the UN’s stance on disability rights as human rights; international guidelines and instruments; and the World Programme of Action Concerning Disabled Persons. Anani critiques the Canadian and UNHCR focus on the medical model of disability as, contrary to international law, it leads to considerations of medical expenses over investments in removing barriers and fulfilling individual potential.

**Jurisdiction:** Canada, International


The author argues that the “medical inadmissibility” criteria in Canada’s *Immigration Act* discriminate against people with disabilities. These criteria—which exclude persons with disabilities from admission to Canada—reflect a discriminatory norm based on bio-medical/ economic models of disablement. The author argues that a non-discriminatory process, grounded in the socio-political model of disability, is necessary to bring immigration law in line with the *Charter* and other human rights legislation. Furthermore, a “paradigm shift” in Canadian
immigration law is required, whereby foreign non-residents are recognized as having rights.

**Legislation:**

**Cases:**

**Jurisdiction:** Canada

---


Written in 1999, this article considers the historical and ideological context to the exclusion of persons with a disability from immigration to Canada. The author examines the historical and current provisions of immigration legislation that discriminate against people with disabilities. In particular, she considers the denial of family unification when applicants have a disability and discusses how these exclusions are being justified. The author also considers whether recent proposed changes to admissibility criteria will remedy this situation. She argues that the social model of disability and *Charter* values should inform immigration policy, and that all exclusions based explicitly or implicitly on disability should be eliminated from considerations of family class immigration.

**Legislation:**

**Jurisdiction:** Canada
Relevant Government Reports


This report profiles disability in Canada through statistical analysis of persons with disabilities, and highlights government initiatives which have advanced inclusion in Canadian society. The report focuses on disability supports; skills development, learning and employment; income; injury prevention and health promotion; and capacity of the disability community. In each of these areas a series of indicators are used to gauge where progress is needed, and the outcome of government initiatives. The appendices have several useful features, such as a chronology of disability related legislation and initiatives, and guides to the definition of disability in various government programs (Canada Pension Plan, Disability Tax Credit, Employment Equity, and Veteran’s Disability Pension).

Legislation:
Aspects of various Acts which relate to disability are mentioned, although mostly in terms of expenditure.

Jurisdiction: Canada


This report reviews the underlying policy of the Disability Tax Credit (DTC), and the concerns of individuals with disabilities and disability advocacy groups surrounding the restrictiveness of this credit. Numerous recommendations are made, including: apologising and explaining requests for recertifying eligibility for the tax credit; expanding the ambit of conditions/limitations that qualify for the credit; redefining key terms; expanding the list of qualified professionals able to complete DTC forms and governmental funds for these services; reformating DTC application forms; amending the Income Tax Act (ITA) to facilitate the application process; modifying the application/appeal process; educating the public about the DTC; and an extensive review of ITA provisions that aim to support persons with disabilities.

Legislation:
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

Jurisdiction: Canada
Federal/Provincial/Territorial Ministers Responsible for Social Services.

This report builds on the 1998 *In Unison* framework, and relates statistical data and personal stories to indicate how Canadians with disabilities are faring as compared to persons without disabilities. The disability community was widely consulted for this report, and it attempts to convey their perspectives. Challenges in the areas of disability supports, employment, and income are discussed, and effective programs are highlighted. The report emphasizes supports have to be flexible, allowing for increased participation in the labour market, and that increased integration and cooperation with all levels of government is needed to ensure full citizenship for persons with disabilities. [NOTE: the government of Québec did not participate in this report]

**Jurisdiction:** Canada

Federal/Provincial/Territorial Ministers Responsible for Social Services.

This document is an inter-jurisdictional framework to promote the integration of persons with disabilities in Canada through policy and barrier removal. The social situation of persons with disabilities in Canada and a vision of policies promoting equality and inclusion are outlined. The report establishes disability supports (including improved access and portability), employment (to encourage training, availability of positions and accommodation, and reduce reliance on income supports), and income (ensuring economic independence and availability) as three building blocks to full citizenship. Ideally, future policy will guarantee accountability (as with the Employability Assistance for People with Disabilities initiative), and reduce the need for Charter litigation. [NOTE: the government of Québec did not participate in this report]

**Jurisdiction:** Canada


The Federal Task Force on Disability Issues was commissioned to examine the appropriate role for the Federal Government in the area of disability. In the course of its investigation, the Task Force held 15 public forums with persons with disabilities and others across Canada, received briefs from organizations, businesses, unions, and community groups, commissioned research studies from experts, and involved officials from federal departments to foster the
development of realistic approaches. This report highlights the themes and issues that emerged from this investigation, along with recommendations to the Government of Canada for removing barriers and enabling equal citizenship for Canadians with disabilities.

**Legislation:**

**Jurisdiction:** Canada

---


The document discusses Alberta’s changing economic, political and demographic trends—which show increased economic competitiveness, "populism", and an aging population. The Klein “Revolution” has changed the way business is done in Alberta, and increased the emphasis on outcomes, needs based services, and the promotion of individual economic accountability and self-reliance. The document emphasizes community values as the marker for future development, and speculates that community care could differ radically based on the values of the community one lives in. The authors also emphasize the end of the welfare state and the importance of economic independence for persons with disabilities so that charitable/pitiable attitudes do not return.

**Jurisdiction:** Alberta

---


This report evaluates how far the “open house” vision of full inclusion and equal participation of people with disabilities has come in the past two decades, and makes recommendations for future government policies. The report includes a historical overview of past reports and measures taken by the government, while acknowledging that disability friendly social policy has not been systematically achieved. Several different strategies to achieve the “open house” vision are detailed, including: the national strategy (its inception, origin and criticisms), intra-departmental coordination, and human resources development. Disability
related supports and services, as well as the disability income system are flagged as issues that will continue to be challenges in the future.

**Legislation:**

**Jurisdiction:** Canada


In its Third Report, the Standing Committee on Human Rights and the Status of Disabled Persons discusses the relationship between taxation and issues of social policy affecting people with disabilities. Moreover, it identifies specific taxation issues that need to be addressed. The Standing Committee makes a number of recommendations for changing the tax system, noting that all changes should reflect the following principles: taxes paid by people with disabilities should be reduced by measures that off-set all disability-related costs, the tax system should be used to deliver benefits to lower-income persons with disabilities, and the tax system should reduce/eliminate disincentives to employment for persons with disabilities.

**Jurisdiction:** Canada


This report reviews the status of Aboriginal peoples with disabilities in Canada, and although there have been improvements many issues have not changed since the *Obstacles* report of 1981. Services are fragmented throughout governmental departments, and Aboriginal groups are not consistently consulted in service design, while government initiatives focus more on data collection and co-ordination between programs than on service provision. Federal/Provincial jurisdictional barriers have led to unequal service provision to status Indians as opposed to other Canadian citizens. The Committee’s recommendations centre on mechanisms for greater monitoring and accountability, in addition to increased inter-jurisdictional and local cooperation.

**Jurisdiction:** Canada

**Parliament, Standing Committee on Human Rights and the Status of Disabled Persons,** “A Consensus for action: the economic integration of

This report reflects on the good intentions of the Canadian government over the past decade to promote increased economic integration of persons with disabilities, as contrasted with actual government inaction. Rhetoric in government and committees, and the s. 15 Charter guarantee, has created high expectations for integration, while there has been inconsistent implementation, leaving the burden on individuals to go to court. Most persons with disabilities experience poverty or disincentives to work (such as cessation of disability benefits, and lack of education/supports). The committee stresses the American model, which involved disability organizations and analysed the cost to the economy if persons with disabilities are not integrated into the workforce. The committee also lists a series of recommendations.

Jurisdiction: Canada


The standing committee echoes many of the points made in the “Consensus for Action” report, and comments on the government’s response to the recommendations contained in that report. Again, the Canadian government restates its vision for integrating persons with disabilities, but its commitments (be it to surveys, committees, releasing strategies, audits, etc.) lack specific details, budgets, and implementation strategies, leaving the standing committee to fear that this will be another example of rhetoric over action.

Jurisdiction: Canada


This report considers the Court Challenges Program (which funded test-case litigation relating to language and equality rights), and makes recommendations about its operation, and continuance. The appendix includes the Government’s response to the First Report, the Contribution Agreement between the government and University of Ottawa, several letters from prominent members of the legal community urging the maintenance of the Court Challenges Program, as well as a list of witnesses and minutes of proceedings.

Jurisdiction: Canada

This report was prepared as a submission to the United Nations, and is meant to inform Canadians of obligations and measures taken under the International Covenant on Economic, Social and Cultural Rights Articles 10-15 (protection of the family, adequate standard of living, mental and physical health, education, and the right to take part in cultural life). The report discusses the implementation of treaties in a federal state, decisions of the Supreme Court of Canada, and legislative measures taken federally and provincially/territorially concerning rights under Articles 10-15. [NOTE: does not specifically address disability]

Legislation:

Cases:
Various cases involving issues in Articles 10-15 of the ICESCR.

Jurisdiction: Canada, International


In support of Ontario’s proposal for a Canadian Social Charter, this background paper provides encouraging examples of the treatment of social and economic rights under national constitutions, and regional and international treaties. The paper reviews the entrenchment of social and economic rights in half the constitutions worldwide, and regional/international treaty mechanisms for protecting social and economic rights. The paper provides valuable frameworks for a Canadian Social Charter including: various means of constitutionally entrenching social and economic rights; reporting/recommendations mechanisms which avoid problems of “justiciability”; gradual implementation through “opt-in” provisions; and public participation in the protection of social and economic rights. [NOTE: does not specifically address disability]

Legislation:

Jurisdiction: Canada, International

In its First Report, the Standing Committee on Human Rights and the Status of Disabled Persons present the results of its study of the Court Challenges Program. The report opens with a history of the program, followed by an overview of its achievements through the funding of test cases. Recommendations are provided for the future of the program, from the perspective of the study’s witnesses and the Standing Committee itself. Among other things, the Standing Committee recommends the program’s continuation, asserting its value in assisting disadvantaged groups and minorities benefit fully from Canada’s Constitution.

Legislation:

Jurisdiction: Canada

Parliament, Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, “Mental Disability” in *Equality for All, House of Commons, No. 29 (October, 1985).*

The authors discuss the appropriate definition of mental disability under the *Charter*, and urge it should include mental impairment, learning disability and mental disorder whether it is previous or existing, actual or perceived. They recommend the repeal of s. 14(4)(f) of the *Canada Elections Act* which prohibits individuals involuntarily confined because of mental disability from voting. As of 1985 the *Unemployment Insurance Act* was inconsistent with the *Charter* because individuals with mental disabilities have to work longer periods to gain special benefits (such as sickness benefits) than regular benefits. Amendments to the criminal code providing increased procedures and protection of the law for persons with mental disabilities are also reviewed. [NOTE: Chapter 8, “Immigration” refers to recommendations to review Canadian medical admissions criteria for immigrants with disabilities]

Legislation/International Instruments:

Jurisdiction: Canada

This chapter discusses the continuing need for employment equity, aspects of employment equity plans, and the Constitutional basis for employment equity. The authors detail initiatives from World War II to the 1980s, contract compliance, and the duties of the Human Rights Commission concerning employment equity. Areas needing improvement include: federal employment; training; equal pay for equal work; employment-related expenses for persons with disabilities; medical and physical tests; child care; and reasonable accommodation. The sub-committee’s recommendations centre on the need for increased monitoring by the Human Rights Commission, improved employment equity legislation, and consultation with groups underrepresented in the job market.

**Legislation/International Instruments:**

**Jurisdiction:** Canada

---


This chapter reviews access to services for persons with physical disabilities, with an emphasis on recommendations from the *Obstacles* report of 1981 and how these issues have been addressed in light of the guarantee of equal access to facilities and services in s. 15 of the *Charter*. Access to transportation, buildings, polling stations, television/radio, modes of communication, and information are isolated as key areas. The authors note frustration with slow progress on the recommendations from the *Obstacles* report because of bureaucratic delays. They call for action and recommend inter-jurisdictional cooperation, consultation with people with disabilities, and timelines for implementation.

**Legislation/International Instruments:**

**Cases:**

**Jurisdiction:** Canada