

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

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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.

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Disability and Equality Rights

Models of Disability and Equality

Malhotra, Ravi. "A Critical Disability Theory Analysis of *R. v. Latimer* and the Empowerment of People with Disabilities" in R. Jochelson and K. Gorkoff (eds.), *Theorizing Justice* (Halifax: Fernwood, forthcoming 2012).

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:

Accessibility for Ontarians with Disabilities Act, 2005, S.O. 2005, c. 11.

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

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

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

Cases:

Granovsky v. Canada (Minister of Employment and Immigration), [2003] S.C.J. No. 29, [2000] 1 S.C.R. 703.

R. v. Latimer No. 1, [1997] 1 S.C.R. 217.

R. v. Latimer No. 2, [2001] 1 S.C.R. 3.

Jurisdiction: Canada

Malhotra, Ravi. "Martha Nussbaum's Capabilities Approach and Equality Rights for People with Disabilities: Rethinking the *Granovsky* Decision" in J. Magnet and B. Adell, (eds.), *The Canadian Charter of Rights at Twenty Five* (Toronto: LexisNexis Butterworths, 2009), 61-89 AND (2009) 45 Sup. Ct. L. Rev. 61-89.

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:

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.

Cases:

Granovsky v. Canada (Minister of Employment and Immigration), [2003] S.C.J. No. 29, [2000] 1 S.C.R. 703.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: Canada

Malhotra, Ravi. "The Implications of the Social Model of Disablement for the Legal Regulation of the Modern Workplace in Canada and the United States" (2009) 33 Man. L.J. 1-40.

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:

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

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

Human Rights Code, R.S.B.C. 1996, c. 210.

Human Rights Code, R.S.O. 1990, c. H-19.

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

Cases:

Adkins v. Childrens Hospital 261 U.S. 525 (1923).

Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999).

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.

Bardal v. The Globe and Mail (1960), 24 D.L.R. (2d) 140, [1960] O.W.N. 253 (H.C.J.).

Board of Trustees of Univ. of Alabama v. Garrett, (99-1240) 531 U.S. 356 (2001).

Borkowski v. Valley Central School District, 63 F.3d 131 (2d. Cir. 1995).
British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1990] 3 S.C.R. 3.
Carter v. Exxon Co. USA, 177 F3d 197 (3d Cir. 1999).
City of Cleburne v. Cleburne Living Centre, Inc., 473 U.S. 432 (1985).
Eaton v. Brant County Board of Education [1997] 1 S.C.R. 241, [1996] S.C.J. No. 98.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Flemming v. Nestor 363 U.S. 603 (1960).
Granovsky v. Canada (Minister of Employment and Immigration), [2003] S.C.J. No. 29, [2000] 1 S.C.R. 703.
Grutter v. Bollinger, 539 U.S. 306 (2003).
Holmes v. Canada (Attorney General), [1997] F.C.J. No. 577, aff'd [1999] F.C.J. No. 598.
International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20.
Lloyd's Bank v. Bundy, [1975] 1 Q.B. 326.
Lochner v. New York (1905) 198 U.S. 45.
Machtiger v. H.O.J. Industries Ltd., [1992] 1 S.C.R. 986, (1992), 91 D.L.R. (4th) 491;.
Newfoundland (Treasury Board) v. NAPE, [2004] 3 S.C.R. 381.
Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).
N.L.R.B. v. Jones and Laughlin Steel Corp. 301 U.S. 1 (1937).
Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.
Puiia v. Occupational Training Centre (1983), 43 Nfld. & P.E.I.R. 283, 127 A.P.R. 283 (P.E.I.C.A.), rev'g (1983) 43 Nfld. & P.E.I.R. 291, 127 A.P.R. 291 (P.E.I.S.C.).
Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).
Techform Products Ltd. v. Wolda [2000] O.J. No. 5676, 5 C.P.R. (4th) 25 (S.C.J.), supplementary reasons [2000] O.J. No. 5677 (S.C.J.), rev'd on other grounds [2001] O.J. No. 3822, 56 O.R. (3d) 1 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 603.
Toyota Motor Mfg., Kentucky Inc. v. Williams, 534 U.S. 184 (2002).
United Mineworkers of America v. Coronado Coal Co., 259 U.S. 344 (1922).
Vande Zande v. State of Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995).
Wallace v. Toronto-Dominion Bank, [1983] O.J. No. 2969, 41 O.R. (2d) 161 (C.A.).
Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, (1997) 152 D.L.R. (4th) 1.
Waxman v. Waxman, [2002] O.J. No. 2528, (2002) 25 B.L.R. (3d) 1 (Sup. Ct.), rev'd on other grounds [2004] O.J. No. 1765, (2004) 2 B.L.R. (4th) 1 (C.A.)

Jurisdiction: Canada, the United States

Malhotra, Ravi. "A Tale of Marginalization: Comparing Workers with Disabilities in Canada and the United States" (2009) 22 J.L. & Soc. Pol'y 79-113.

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:

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

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

Cases:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489

Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999).

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Board of Trustees of Univ. of Alabama v. Garrett, (99-1240) 531 U.S. 356 (2001)

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

Honda Canada Inc. v. Keays, [2008] 2 S.C.R. 362.

Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), [2008] 2 S.C.R. 561.

Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).

Nova Scotia (Workers' Compensation Board) v. Martin and Laseur, [2003] 2 S.C.R. 504.

Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

Jurisdiction: Canada, the United States

Malhotra, Ravi. "The Law and Economics Tradition and Workers with Disabilities" (2008) 39.2 Ottawa L.Rev. 249

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:

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).
Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
Canadian Transportation Act, S.C. 1996, c. 10, s. 5.
Human Rights Code, R.S.B.C. 1996, c. 210.
Human Rights Code, R.S.O. 1990, c. H-19.
Income Tax Act, R.S.C. 1985 (5th Supp.), c. 1.
The Civil Rights Act of 1991, 42 U.S.C. s. 1981 et. seq. (2006)

Cases:

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3.
Council of Canadians with Disabilities v. Via Rail Canada Inc. 2007 SCC 15, [2007] 1 S.C.R. 650, 279 D.L.R. (4th) 1.
Mohammad v. Mariposa Stores Ltd. (1990), 14 C.H.R.R. D/215 (British Columbia Council of Human Rights).
R. v. Hutchinson, 2005 BCSC 1421, 261 D.L.R. (4th) 171, 49 B.C.L.R. (4th) 331.
U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

Jurisdiction: Canada, United States

Malhotra, Ravi. "Evaluating the Relevance of Critical Schools of Law and Economics for the Equality Rights of Workers with Disabilities in Canada and the United States" (2008) 45 Alta. L. Rev. 935

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:

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).
Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
Norris-LaGuardia Act, 29 U.S.C. ss. 101-115 (1932)
Occupational Safety and Health Act, 29 U.S.C. ss. 651-78 (1970)
Wagner Act, 29 U.S.C. ss. 151-66 (1935).

Cases:

British Columbia v. Hutchinson, 2005 BCSC 1421, 261 D.L.R. (4th) 171.
Brown v. Board of Education 347 U.S. 483 (1954).

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),
Honda Canada Inc. v. Keays, [2008] 2 S.C.R. 362.
Memorial University of Newfoundland v. Matthews (1991), 15 C.H.R.R. D.399, aff'd (1994) 22 C.H.R.R. D.354 (Nfld. S.C.T.D).

Jurisdiction: Canada, United States

Rioux, Marcia H. & Valentine, Fraser. "Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy" in Pothier, Dianne & Devlin, Richard eds., *Critical Disability Theory: essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 47-69.

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:

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Cases:

E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388.
Eaton v. Brant Board of Education, [1997] 1 S.C.R. 241.
Eldridge v. British Columbia (A.G.), [1997] 3 S.C.R. 624.
Re B (a minor) (wardship: sterilization), [1987] 2 All E.R. 205 (H.L.).

Jurisdiction: Canada

Lee, Theresa Man Ling. "Multicultural Citizenship: The Case of the Disabled" in Pothier, Dianne & Devlin, Richard eds., *Critical Disability Theory: essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 87-105.

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:

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

Canadian Multiculturalism Act, 1988, 36-37 Eliz. II, vol. I, c. 31.

Cases:

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

Eldridge v. British Columbia (A.G.), [1997] 3 S.C.R. 624.

Jurisdiction: Canada

Rosenbaum, Pauline & Chadha, Ena. "Reconstructing Disability: Integrating Disability Theory Into Section 15" (2006) 33 Sup. Ct. L. Rev. (2d) 343-365.

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:

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

Cases:

Auton (Guardian ad litem) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.

E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388.

Eaton v. Brant County Board of Education, [1996] 1 S.C.R. 241.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

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

Nova Scotia (Workers' Compensation Board) v. Martin and Laseur, [2003] 2 S.C.R. 504.

Jurisdiction: Canada

Pothier, Dianne. "Appendix: Legal Developments in the Supreme Court of Canada Regarding Disability" in Pothier, Dianne & Devlin, Richard eds., *Critical Disability Theory: essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 305-317.

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:

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

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Cases:

Auton v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.

Battlefords and District Co-operative Ltd. v. Gibbs, [1996] 3 S.C.R. 566.

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

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868.

E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388.

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

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

Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, [2003] 2 S.C.R. 504.

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

O'Malley v. Simpson-Sears, [1985] 2 S.C.R. 536.

R. v. DeMers, [2004] 2 S.C.R. 489.

R. v. Latimer, [2001] 1 S.C.R. 3.

R. v. Parrott, [2001] 1 S.C.R. 178.

R. v. Swain, [1991] 1 S.C.R. 933.

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519.

Jurisdiction: Canada

Chadha, Ena. "The Social Phenomenon of Handicapping", in Sheehy, Elizabeth ed., *Adding Feminism to the Law: the Contributions of Justice Claire L'Heureux Dubé* (Toronto: Irwin Law, 2004).

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:

Americans with Disabilities Act, U.S.C. § 12101 (1990).

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

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

Cases:

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

Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 184 (2002).

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

Chadha, Ena & Schatz, Laura. "Human Dignity and Economic Integrity for Persons with Disabilities: A Commentary on the Supreme Court's Decisions in Granovsky and Martin", *Case Comment*, (2004) 19 J.L. & Soc. Pol'y 94.

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:

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.

Cases:

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

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

Workers' Compensation Board of Nova Scotia v. Martin et al., [2003] 2 S.C.R. 504.

Jurisdiction: Canada

Peters, Yvonne. "From Charity to Equality" in Stienstra, Deborah & Wight-Felske, Aileen eds. *Making Equality: History of Advocacy and Persons with Disabilities in Canada* (Concord, Ont.: Captus Press, 2003).

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:

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

Jurisdiction: Canada

Frazer, 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:

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Youth Bowling Council of Ontario v. McLeod (1990), 75 O.R. (2d) 451.

Jurisdiction: Canada

Bach, Michael. *Social Inclusion as Solidarity: Rethinking the Child Rights Agenda* (Toronto: Laidlaw Foundation, 2002).

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:

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Jurisdiction: Canada

Armstrong, Sarah. "Disability Advocacy in the Charter Era." (2002) 2:1 J.L. & Equality 1.

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:

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
Criminal Code R.S.C. 1985, c. C-46.

Cases:

Eaton v. Brant Board of Education, [1997] 1 S.C.R. 241.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703.
Law Society of British Columbia et al. v. Andrews, [1988] 1 S.C.R. 187.
Lovelace v. Ontario, [2000] 1 S.C.R. 950.
R. v. Latimer, [1995] 1 S.C.R. 517.
R. v. Rodriguez, [1993] 3 S.C.R. 519.

Jurisdiction: Canada

Fraze, Catherine. "Health Law in the 21st Century Disability Studies: the Unexpected Guest in Health Law Discourse" (2003) Health L.J. 257-262 – Special Edition.

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, Fraze promotes the view that disability is extrinsic, and a result of societal failure to accommodate diversity and promote inclusion.

Jurisdiction: Canada

Penney, Jonathan. "A Constitution for the Disabled or a Disabled Constitution? –Toward a New Approach to Disability for the purposes of Section 15(1)" (2002) 1 J.L. & Equality 83 – 115.

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:

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 15.

Cases:

British Columbia v. B.C.G.S.E.U., [1999] 3 S.C.R. 3.
Egan v. Canada, [1995] 2 S.C.R. 513.
Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703.
Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.
Québec v. Montreal (City), [2000] 1 S.C.R. 665.

Jurisdiction: Canada

“Supreme Court Rules on Disability Discrimination” Canadian HIV/AIDS Policy & Law Newsletter (Vol. 5, No. 2/3, Spring/Summer 2000).

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:

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

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), 2000 SCC 27, [2000] S.C.J. No. 24 (QL).

Jurisdiction: Québec

Rioux, Marcia H. And Frazee, Catherine L. “The Canadian Framework for Disability Equality Rights” in M. Jones and L.A. Basser Marks eds., *International Studies in Human Rights: Disability, Divers-ability and Legal Change*, vol. 56 (The Hague: Kluwer Law International, 1999).

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:

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

Canada Evidence Act, R.S. 1985, c. C-5.

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

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:

Clark v. Clark (1982) 40 O.R. (2d) 383, 4 C.H.R.R. D/1187 (Co. Ct).
E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388.
Eaton v. Brant County Board of Education, [1996] 1 S.C.R. 241.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
R. v. Latimer, [1997] 1 S.C.R. 217.

Jurisdiction: Canada

McKenna, Ian B. "Legal Rights for Persons with Disabilities in Canada: Can the Impasse be Resolved?" (1997-1998) 29 Ottawa L. Rev. 153.

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:

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.
Workers' Compensation Act, R.S.O. 1990, c.W. 11.
[Federal/ provincial human rights statutes]

Cases:

AirBC Ltd. and C.A.L.D.A. (1996), 50 L.A.C. (4th) 117.
Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561.
Bonner v. Ontario (Ministry of Health) (1992), 16 C.H.R.R. D/485.
Canadian Union of Postal Workers v. Canada Post (22 December 1992), 706-88-00029.
Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Howard v. University of British Columbia (1993), 18 C.H.R.R. D/353 (B.C.H.R.C.).
Quesnel v. Eidt (1995) (Unreported Ont. Bd. of Inquiry, Decision no. 95-021).
Roosma v. Ford Motor Co. of Canada (1996), 53 D.L.R. (4th) 90.
Woolworth Canada Inc. v. Human Rights Commission Newfoundland (1994), Nfld & P.E.I.R. 317.

Jurisdiction: Canada

Young, Margot. "Sameness/Difference: A Tale of Two Girls" (1997) 4 Rev. Const. Studies 150-166.

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:

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

Cases:

Eaton v. Brant County Board of Education (1997), 142 D.L.R. (4th) 385 (S.C.C.).
Re Blainey and Ontario Hockey Association et al. (1986), 54 O.R. (2d) 513 (C.A.); leave to appeal denied, [1986] 2 S.C.R. 573.

Jurisdiction: Canada

**Tremain, Shelley. "Dworkin on Disablement and Resources" (July 1996)
9 Can. J. L. & Juris. 343-359.**

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 bio-medical rather than socio-political.

Jurisdiction: International

**Rioux, Marcia H. "Towards a concept of equality of well-being:
overcoming the social and legal construction of inequality" (Jan. 1994)
7 Can. J.L. & Juris. 127-147.**

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

Peters, Yvonne. "The Constitution and the Disabled" (1993) 2:1 Health L. Rev. 17.

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:

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.

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R.143.

Canadian Odeon Theatres Limited v. Saskatchewan Human Rights Commission and Huck (1985), 3 W.W.R. 717 (Sask. C.A.).

Fernandes v. Manitoba (Director of Social Services, Winnipeg Central) [1992] M.J. No. 279 (QL).

R. v. Swain, [1991] 1 S.C.R. 933.

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:

Alberta Elections Act, R.S.A. 1980, c. E-2.
British Columbia Marriage Act, R.S.B.C. 1979, c. 251.
Canada Elections Act, R.S.C. 1985, c. E-2.
Mental Health Act, S.A. 1988, c. M-13.1.

Cases:

Fleming v. Reid, (1991), 82 D.L.R. (4th) 298 (Ont. C.A.).
Ogg-Moss v. The Queen (1984), 11 D.L.R. (4th) 549 (S.C.C.).
Re Eve, [1986] 2 S.C.R. 388.
R. v. Swain, [1991] 1 S.C.R. 933.
Thwaites, [1988] 3 W.W.R. 217 (Man. C.A.).
W.(D.L.) v. Alberta (Minister of Social Services) (1992), 3 Alta. L.R. (3d) 281 (Mast.).

Jurisdiction: Alberta, British Columbia, Canada.

Sobsey, Dick. "Disability, Discrimination and the Law" (Feb. 1993) 2 Health L. Rev. No. 1, 6-10.

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:

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

Jurisdiction: Alberta, Canada

Lepofsky, M. David. "The Canadian Judicial Approach to Equality Rights: Freedom Ride or Rollercoaster?" (1992) 55 Law & Contemp. Probs. 167-199.

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:

Canadian Bill of Rights, R.S.C. 1970, c.S-19.

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

Cases:

Christie v. Central Alberta Dairy Pool, [1990] 2 S.C.R. 489.

Hess v. Regina, [1990] 2 S.C.R. 906.

Law Society of British Columbia v. Andrews, [1989] 1 S.C.R. 143.

McKinney v. Board of Governors of the University of Guelph, [1990] 3 S.C.R. 229.

R. v. Oakes, [1986] 1 S.C.R. 103.

R. v. Sheldon S., [1990] 2 S.C.R. 254.

Turpin v. The Queen, [1989] 1 S.C.R. 1296.

Various other mandatory retirement and *Charter* cases.

Jurisdiction: Canada

Pothier, Dianne. "Miles to Go: Some Personal Reflections on the Social Construction of Disability" (Mar. 1992) 14 Dalhousie L.J. 526-543.

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 remedying 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:

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

Jurisdiction: Canada, Australia

Echenberg, Havi. “Disability and the deserving poor” (Fall 1987) 5 Just Cause 7-9.

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

Ratushny, Edward. “Implementing Equality Rights: Standards of Reasonable Accommodation with Legislative Force” in Lynn Smith, Gisele Cote-Harper, Robin Elliot, & Magda Seydegart, eds., *Righting the Balance: Canada’s New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 255.

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:

Aeronautics Act, R.S.C. 1970, c. A-3.

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

Canadian Human Rights Act, S.C. 1976-7, c. 33.

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.

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:

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

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

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

Employment Insurance Act, S.C. 1996, c. 23.

Federal-Provincial Fiscal Arrangements Act, R.S.C. 1985, c. F-8.

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.

Québec Pension Plan, An Act respecting the, R.S.Q. c. R-9

Jurisdiction: Canada

Druar, Laura and Ryan, Karen. *Disability Rights: An Annotated Bibliography* (Ottawa: Dept. of Justice Canada, Corporate Policy & Programs Sector, Law Reform, Research & Development Directorate, 1993).

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:

Canada Labour Code, R.S.C. 1985, c. L-2.

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

Employment Equity Act, S.C. 1986, c. 31

Vocational Rehabilitation of Disabled Persons Act, R.S.C. 1985, c. V-3.

Various Canadian Human Rights Codes.

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 stat. 327 (codified as amended at 42 U.S.C. § 12101).

Various American Acts related to the rights of persons with disabilities.

International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171 Can. T.S. 1976 No. 47.

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Cases:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489.

Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561.

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.

Young, William R. *Disability: Socio-Economic Aspects and Proposals for Reform* (Ottawa: Library of Parliament, Research Branch, 1996).

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:

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

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

Vocational Rehabilitation of Disabled Persons Act, R.S.C. 1970, c. V-7.

Various income and support service legislation that impacts persons with disabilities.

Jurisdiction: Canada

The Canadian Charter of Rights and Freedoms

Réaume, Denise G. "Dignity, Equality, and Second Generation Rights" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007).

Reaume 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, Reaume 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, Reaume submits that the reduction of social assistance benefits was a violation of dignity in *Gosselin*.

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:

Eldridge v. British Columbia (Attorney General), [1997] 2 S.C.R. 624.
Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada

Gilbert, Daphne & Majury, Diana. "Critical Comparisons: The Supreme Court Dumps Section 15" (2006) 24 Windsor Y.B. Access Justice 111-142.

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:

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

Cases:

Auton (guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657, 245 D.L.R. (4th) 1.

British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance), [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1.

Falkiner v. Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services), 212 D.L.R. (4th) 633, 59 O.R. (3d) 481.

Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, 186 D.L.R. (4th) 1.

Hodge v. Canada (Minister of Resources and Development), [2004] 1 S.C.R. 497, 244 D.L.R. (4th) 257.

Jurisdiction: Canada

Keene, Judith. "The Supreme Court, the *Law* Decision, and Social Programs: The Substantive Equality Deficit" in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 345-370.

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:

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.

[Human rights legislation, generally]

Cases:

Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429.

Gwinner v. Alberta (Minister of Human Resources and Employment) (2002), 44 C.H.R.R. D/52, 2002 ABQB, appeal to Alta. C.A. dismissed.

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

Jurisdiction: Canada

Essert, Christopher. "Dignity and Membership, Equality and Egalitarianism: Economic Rights and Section 15 (2006) 19 Can. J. L. & Juris. 407.

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:

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.

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Brown v. Board of Education, 347 U.S. 483 (1954).

Egan v. A.G. Canada, [1995] 2 S.C.R. 513.

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

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 *Thibaudeau*); 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:

Canadian Bill of Rights, R.S.C. 1970, c.S-19.

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 s. 15.

Cases:

Andrews v. The Law Society of British Columbia, [1989] 1 S.C.R. 143.

Egan and Nesbitt v. Canada, [1995] 2 S.C.R. S13.
Eldridge et al. v British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429
Law v. Canada, [1999] 1 S.C.R. 497.
Miron v. Trudel, [1995] 2 S.C.R. 418.
R. v. Turpin, [1989] 1 S.C.R. 1296.
Thibaudeau v. Canada, [1995] 2 S.C.R. 627.
Trociuk v. British Columbia (Attorney General), [2003] 1 S.C.R. 835.
Vriend v. Alberta (Attorney General), [1998] 1 SCR 499.
Nova Scotia (Attorney General) v. Walsh, [2002] 4 S.C.R. 325.

Jurisdiction: Canada

Sampson, Fiona. "Granovsky v. Canada (Minister of Employment and Immigration): Adding Insult to Injury?" (2005) 17 Can. J. Women & L. 71-85.

Sampson reviews the *Granovsky* decision, in which the Supreme Court of Canada held that disability related "drop out" provisions in the *CPP* did not discriminate against Granovsky. 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:

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 7, s. 15.
Canada Pension Plan Act, R.S.C, 1985, c. C-8

Cases:

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

Jurisdiction: Canada

Peters, Yvonne. "Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference? An Assessment by the Council of Canadians with Disabilities" (Winnipeg: Council of Canadians with Disabilities, 2004).

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:

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

Cases:

Bhinder v. Canadian National Railway Company, [1985] 2 S.C.R. 561.
British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance), [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1.
Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.
Eldridge v. British Columbia (A.G.), [1997] 3 S.C.R. 624.
Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, [2003] SCC 54, [2003] S.C.R. 504.
Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536.
R. v. Latimer, [2001] 1 S.C.R. 3.

Jurisdiction: Canada

Moreau, Sophia R. "The Wrongs of Unequal Treatment" (2004) 54 U. Toronto L.J. 291-326.

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:

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.

Cases:

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Jurisdiction: Canada

Peters, Yvonne. *Overview of Mobility Rights in Canada (Winnipeg: Prepared for the Council of Canadians with Disabilities, 2003).*

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:

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.

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

Federal-Provincial Fiscal Arrangements Act, R.S. 1985, c. F-8.

Old Age Security Act, R.S. 1985, c. O-9.

Cases:

Black v. Law Society of Alberta, [1989] 1 S.C.R. 591.

British Columbia Native Women's Society and Jane Gottfriedson v. Canada, [2001] F. CT. 646.

Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157.

EGALE Canada Inc. v. Canada (Attorney General), [2001] B.C.S.C. 1365.

Eldridge v. British Columbia (A.G.), [1997] 3 S.C.R. 624.

Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357.

Jurisdiction: Canada

Réaume, Denise G. "Discrimination and Dignity" (2002) 63 La. L. Rev. 645-696.

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:

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.

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R.143.

Egan v. A.G. Canada, [1995] 2 S.C.R. 513.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Miron v. Trudel, [1995] 2 S.C.R. 418.

Jurisdiction: Canada

McCallum, Dulcie. *An analysis of the Impact of Law v. Minister of Human Resources Development (1999), 170(4th) 1 (S.C.C.) (North York, Ontario: Canadian Association for Community Living: 2001).*

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:

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

Cases:

Bese v. Director, FPI et al. (1999), 175 D.L.R. (4th) 275 (S.C.C.).

Eaton v. Brant County Board of Education (1997), 142 D.L.R. (4th) 385.

Eldridge et al. V. AGBC et al. (1997), 151 D.L.R. (4th) 577.

Law v. Minister of Human Resources Development (1999), 170 (4th) 1 (S.C.C.).

Winko v. Direction (FPI) (1999), 175 D.L.R. (4th) 193 (S.C.C.).

Jurisdiction: Canada

Grant, Isabel & Mosoff, Judith. "Hearing Claims of Inequality: *Eldridge v. British Columbia (A.G.)*" (1998) 10 Can. J. Women & L. 229-243.

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:

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

Cases:

Eaton v. Brant County Board of Education (1997), 142 D.L.R. (4th) 385 (S.C.C.).
Eldridge v. British Columbia (A.G.) (1997), 151 D.L.R. (4th) 577 (S.C.C.).

Jurisdiction: Canada

Jackman, Martha. "Giving Real effect to Equality:" *Eldridge v. British Columbia (Attorney General)* and *Vriend v. Alberta*" (1998) 4 Rev. Constit. Studies 352-371.

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:

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

Cases:

Eldridge v. British Columbia (Attorney General), [1998] 3 S.C.R. 624.
Vriend v. Alberta, (1998) 156 D.L.R. (4th) 385 (S.C.C.).

Jurisdiction: Canada

Lepofsky, David. "The Charter's Guarantee of Equality to People with Disabilities – How Well is it Working?" (1998) 16 Windsor Y.B. Access Justice 155-214.

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:

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

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Eaton v. Brant (County) Board of Education (1997), 142 D.L.R. (4th) 385 (S.C.C.).

R. v. Turpin, [1989] 1 S.C.R. 1296.

Jurisdiction: Ontario, Canada

Pothier, Dianne. "Eldridge v. British Columbia (Attorney General): How the Deaf Were Heard in the Supreme Court of Canada", (May 1998) 9 N.J.C.L. 263-276.

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:

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

Cases:

Eaton v. Brant (County) Board of Education (1997), 142 D.L.R. (4th) 385 (S.C.C.).

Eldridge v. British Columbia (Attorney General) (1997), 218 N.R. 161 (S.C.C.).

Jurisdiction: Canada

Lepofsky, David. "A Report Card on the *Charter's* Guarantee of Equality to Persons with Disabilities after 10 Years—What Progress? What Prospects?" (May 1997) 7 N.J.C.L. 263-431.

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:

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

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Eaton v. Brant (County) Board of Education (1995), 22 O.R. (3d) 1 (C.A.) rev'd (1996), 142 D.L.R. (4th) 385 (S.C.C.)

R. v. Turpin, [1989] 1 S.C.R. 1296.

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

Pothier, Dianne. "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (May 1996) 6 N.J.C.L. 295-345.

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:

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

Cases:

Egan v. Canada, [1995] 2 S.C.R. 513.

Eldridge v. British Columbia (Attorney General) (1995), 7 B.C.L.R. (3d) 156 (C.A.).

Miron v. Trudel, [1995] 2 S.C.R. 418.

Thibaudeau v. R., [1995] 2 S.C.R. 513.

Jurisdiction: Canada

Beatty, David. "The Canadian Conception of Discrimination" (1996) 4 C.L.E.L.J. 263-282.

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:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561.

Egan v. A.G. Canada, [1995] 2 S.C.R. 513.

Large v. Stratford (City) Police Department, [1995] 3 S.C.R. 733.

Ontario Human Rights Commission et al. v. Borough of Etobicoke, [1982] 1 S.C.R. 202.

Saskatchewan (Human Rights Commission) v. Saskatoon (City), [1989] 2 S.C.R. 1297.

Jurisdiction: Canada

Iyer, Nitya. "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1995) 19 Queen's L.J. 179-208.

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:

Canada (A.G.) v. Mossop, [1993] 1 S.C.R. 554.

Symes v. Minister of National Revenue, [1991] 3 F.C. 507 (F.C.A.).

Jurisdiction: Canada

Trakman, Leon E. "Section 15: Equality? Where?" (1995) 6:4 Constitutional Forum 112-125.

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:

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.

Cases:

Egan v. A.G. Canada, [1995] 2 S.C.R. 513.

Miron v. Trudel, [1995] 2 S.C.R. 418.

Thibaudeau v. Canada, [1995] 2 S.C.R. 627.

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:

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.
[Federal/ provincial human rights legislation, generally]

Cases:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489.
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.
Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561.
Fenton v. British Columbia (Forensic Psychiatric Services Commission), [1991] 5 W.W.R. 600 (B.C. C.A.).
Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.
Trofimenkoff v. Saskatchewan (Minister of Education), [1991] 6 W.W.R. 97 (Sask. C.A.).

Jurisdiction: Canada

Sheppard, Colleen N. "Equality in Context: Judicial Approaches in Canada and the United States" (1990) 39 University of New Brunswick Law Journal 111-125.

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:

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:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.
Brown v. Board of Education of Topeka, 347, U.S. 483 (1954).
City of Richmond v. J.A. Croson Co., 57 U.S.L.W. 4132 (1987).
McCleskey v. Kemp, 481 U.S. 279 (1987).
Plessy v. Ferguson, 163 U.S. 537 (1896).
Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
Washington v. Davis, 426 U.S. 229 (1976).

Jurisdiction: Canada, United States

Colvin, Eric. "Section Seven of the Canadian Charter of Rights and Freedoms" (1989) 68 Can. Bar Rev. 560.

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:

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

Cases:

Morgentaler, Smoling and Scott v. The Queen, [1986] 1 S.C.R. 30.
Reference Re s. 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486.

Jurisdiction: Canada

Bickenbach, Jerome. "Equality, the Charter and Disabled Canadians" (1988) 5:4 Just Cause 11.

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:

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.

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:

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.

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:

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.

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:

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

Various Human Rights Acts.

Cases:

Bhinder v. C.N.R., [1985] 2 S.C.R. 561.

Ontario Human Rights Commission v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536.

Jurisdiction: Canada

Savage, Harvey & Mckague, Carla. "The Coming Charter Battles" (Excerpt from the book "Mental Health Law in Canada") (1987) 5:2 Just Cause 22.

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:

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.

Cases:

Reference re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.

E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388.

Jurisdiction: Canada

McKague, Carla. "The Charter of Rights and Freedoms" (Excerpt from the book "Mental Health Law in Canada") (1986) 4:2 Just Cause 3.

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:

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.

Jurisdiction: Canada

Federal/Provincial/Territorial Legislation

Pooran, Brendon D. & Wilkie, Cara. "Failing to Achieve Equality: Disability Rights in Australia, Canada, and the United States (2005) 20 J.L. & Soc. Pol'y 1.

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.
Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).
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.
Canadian Human Rights Act, R.S.C. 1985, c. H-6.
Disability Discrimination Act 1992 (Cth.), s. 3.
Fair Employment and Housing Act, CA Civ. Code §§ 12900-12996.
Ontarians with Disabilities Act, S.O. 2001, c. 32.
Ontario Human Rights Code, R.S.O. 1990, c. H.19.
Victoria Equal Opportunity Act 1995, s. 3.

Jurisdiction: Canada, Australia, United States of America

Lepofsky, David. "The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the Ontarians with Disabilities Act -- The First Chapter" (2004) 15 Nat'l J. Const. L. 125.

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:

Ontarians with Disabilities Act, 2001, S.O. 2001, c. 32.

Jurisdiction: Canada

Gordon, Phyllis, Beatty, Harry & Holder, Bill. "An Analysis of the Ontarians with Disabilities Act, 2001" (Spring 2002) 17 J.L. & Social Pol'y 15-38.

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:

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 stat. 327 (codified as amended at 42 U.S.C. § 12101).

Building Code Act, 1992, S.O. 1992 c. 23 as amended.

Ontario Human Rights Code, R.S.O. 1990, c. H-19, as amended.

Ontarians with Disabilities Act, 2001, S.O. 2001, c. 32.

Jurisdiction: Ontario

Mosoff, Judith. "Is the Human Rights Paradigm "Able" to Include Disability: Who's in? Who Wins? What? Why?" (Fall 2000) 26 Queen's L.J. 225-276.

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Human Rights Code, R.S.B.C. 1996, c. 210.

Human Rights Code, R.S.O. 1990, c. H-19.

Human Rights Act, R.S.N.S. 1989, c. 214.

Cases:

Various *Charter* and human rights cases.

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

L'Heureux-Dubé, Claire. "Volatile Times: Balancing Human Rights, Responsibilities, and Resources" (Oct. 1996) 25 C.H.R.R. No. 6, C/1-C/5.

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

Taylor, Catherine. "Human Rights Legislation and the Disabled" (1993) 2 Health L. Rev. 11.

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:

Individual's Rights Protection Act, R.S.A. 1980, c. I-2.

Cases:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489.

Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561.

Clarence Levac and Canadian Human Rights Commission v. Canadian Armed Forces (1992), 15 C.H.R.R. D/175. (Canadian Human Rights Tribunal).

E. (S.T.) v. Bertelsen (1989), 10 C.H.R.R. D/6294 (Alberta Board of Inquiry).

James Robinson and Canadian Human Rights Commission v. Canadian Armed Forces (1992), 15 C.H.R.R. D/95 (Canadian Human Rights Tribunal).

Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.

Ontario Human Rights Commission et al. v. Borough of Etobicoke, [1982] 1 S.C.R. 202.

Ontario (Human Rights Commission on behalf of Carolyn Maddox) v. Vogue Shoes and George Goldford (1991), 14 C.H.R.R. D/425 (Ont. Board of Inquiry).

Robert Gillingham v. Westminster Guard & Patrol Ltd. and Nagur Meeraiya (1991), 13 C.H.R.R. D/495 (B.C. Human Rights Council).

Jurisdiction: Alberta

Lemonde, Lucie. "Québec Charter of Rights and Freedoms" (1986) 4:2 Just Cause 12.

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:

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

Que (Commission des droits de la personne) v. Montreal Nord (Ville), [1984] C.S. 53 (QCSC).

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

Jurisdiction: Québec

Gender

Sampson, Fiona. "Globalization and the Inequality of Women with Disabilities" (2003) 2 J.L. & Equality 18.

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 counter-parts. 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:

Employment Insurance Act, S.C. 1996, c. 23.

Jurisdiction: Canada

Roehrer Institute, The. *Disability Related Support Arrangements, Policy Options and Implications for Women's Equality* (Ottawa: Status of Women Canada, 2001).

This report focuses on women with disabilities, the women who provide care-giving 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 care-giving relationships, factors that promoting equality, and possible policy directions are also included.

Jurisdiction: Canada

Doucette, Joanne. "Disabled women and poverty: double oppression" (Fall 1987) 5 Just Cause 13-15.

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, Fiona. "The Law Test for Discrimination and Gendered Disability Inequality" in Faraday, F., Denike, M., and M. K. Stephenson eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006).

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:

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

Cases:

Andrews v. The Law Society of British Columbia, [1989] 1 S.C.R. 143.

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Hodge v. Canada (Minister of Resources and Development), [2004] 1 S.C.R. 497, 244 D.L.R. (4th) 257.

Law v. Canada, [1999] 1 S.C.R. 497.

Turpin v. The Queen, [1989] 1 S.C.R. 1296.

Various cases elaborating on the *Law* test.

Jurisdiction: Canada

Frazer, Catherine, Gilmour, Joan, & Mykitiuk, Roxanne. "Now You See Her, Now You Don't: How Law Shapes Disabled Women's Experience of Exposure, Surveillance, and Assessment in the Clinical Encounter" in Pothier, Dianne & Devlin, Richard eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 223-247.

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:

Ontario disability Support Program Act, 1997, being Schedule B to the *Social Assistance Reform Act*, S.O. 1997, c. 25.

Cases:

McInerney v. MacDonald (1992), 93 D.L.R. (4th) 415 (S.C.C.).
R. v. Dyment, [1988] 2 S.C.R. 417.

Jurisdiction: Ontario, Canada

Children

Bach, Michael. *Social Inclusion as Solidarity: Rethinking the Child Rights Agenda* (Toronto: Laidlaw Foundation, 2002).

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:

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Jurisdiction: Canada

Richler, Diane. "The United Nations Convention on the Rights of the Child: A Tool for Advocacy" in *L'Institut Roehrer Institute, As if Children Matter: Perspectives on Children, Rights and Disability* (North York: Roehrer Institute, 1995) 57-65.

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 fetuses with disabilities may be aborted later in a pregnancy than "healthy" fetuses).

Cases:

Commission scolaire Chauveau et al. v. Commission des droits de la personne du Québec et Rouette, May 20, 1994 (Québec Court of Appeal).

Re Eve, [1986] 2 S.C.R. 388.

Re S.D., [1983] 3 W.W.R. 597 (B.C. Prov. Ct.); [1983] 3 W.W.R. 618 (B.C. Sup. Ct.).

Jurisdiction: Canada

Social and Economic Rights

Porter, Bruce. *Draft Social Charter* (Toronto: Centre for Equality Rights in Accommodation, February 25, 1992) online: Equality Rights, <<http://www.equalityrights.org/cera/docs/SOCHART2.htm>>.

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, Bruce. "Social Rights and the Question of a Social Charter" in Browne, Leduc P. ed. *Finding Our Collective Voice, Options for a New Social Union* (Ottawa: Canadian Centre for Policy Alternatives, 1998) online: Poverty and Human Rights, <<http://www.povertyandhumanrights.org/ldsearch.php?s=cera>>.

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:

Finlay v. Canada (Minister Of Finance), [1986] 2 S.C.R. 607.

Jurisdiction: Canada

MacMillan, C. Michael. "Social versus Political Rights" (1986) 19 Can. J. Pol. Sci. 283-304.

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:

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Jurisdiction: N/A

The Canadian Charter of Rights and Freedoms

Porter, Bruce & Jackman, Martha. "Justiciability of Social and Economic Rights in Canada (Pre-Publication Draft)" in M. Langford, ed., *Socio-Economic Rights Jurisprudence: Emerging Trends in Comparative International Law* [Forthcoming].

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:

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.
International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Cases:

Irwin Toy v. Attorney General of Québec, [1989] 1 S.C.R. 927.
Auton (Guardian ad litem of) v. British Columbia (Attorney General) (2002), 6 B.C.L.R. (4th) 201 (C.A.).
Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.
Sparkes v. Newfoundland & Labrador (Ministry of Health & Community Services) (2002), 45 C.C.H.R. D/225 (N.L. Bd. of Inquiry), aff'd (2004), 48 C.C.H.R. D/457 (Nfld SCTD).
Vriend v. Alberta, [1998] 1 S.C.R. 493.
Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038.
Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.
Finlay v. Canada, [1986] 2 S.C.R. 607.
Chaoulli v. Québec (Attorney General), 2005 SCC 35, [2005] 1 S.C.R. 791
Falkiner v. Ontario (Ministry of Community and Social Services) (2002), 59 O.R. (3d) 481.
Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016.
New Brunswick (Minister of Health and Community Service) v. G.(J.), [1999] 3 S.C.R. 46.
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).
Mahe v. Alberta, [1990] 1 S.C.R. 342.

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3.

Jurisdiction: Canada

Kinsella, Noël A. "Can Canada Afford a Charter of Social and Economic Rights? Toward a Canadian Social Charter" (2008) 71 Sask. L. Rev. 7.

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:

A Framework to Improve the Social Union for Canadians. An Agreement between the Government of Canada and the Governments of the Provinces and Territories (4 February 1999).

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.

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

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Jurisdiction: Canada

Billingsley, Barbara & Carver, Peter. "Sections 7 and 15(1) of the Charter and Access to the Public Purse: Evolution in the Law?" (2007) 36:2 S.C.L.R. 221.

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:

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.

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Auton (Guardian ad litem of) v. British Columbia (Attorney General) (2002), 6 B.C.L.R. (4th) 201 (C.A.).

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

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

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20.

Jurisdiction: Canada

Brodsky, Gwen. “The Subversion of Human Rights by Governments of Canada” in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007).

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:

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

Cases:

Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381.

Jurisdiction: Canada

Buckley, Melina. "The Challenge of Litigating the Rights of Poor People" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007).

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:

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

Cases:

Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016.

R. v. Prosper, [1994] 3 S.C.R. 236.

Jurisdiction: Canada

McIvor, Sharon Donna. "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 96.

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:

Bill C-31, *An Act to Amend the Indian Act*, S.C. 1985, c. 27, reprinted in R.S.C. 1985, 1st Supp., c. 32.

Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

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(1) & 28.

Indian Act, R.S.C. 1970, c. I-6.

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

Cases:

B.C. Native Women's Society v. Canada, [2000] 1 F.C. 304 (T.D.).
British Columbia Native Women's Society v. Canada, [2001] 4 F.C. 191 (T.D.)
Derrickson v. Derrickson, [1986] 1 S.C.R. 285.
Lavell v. Canada (A.G.), [1974] S.C.R. 1349.
McIvor v. Canada (Registrar, Indian Affairs and Northern Development and A.G.), Vancouver, Doc. A941142 (B.C.S.C.).
Metis National Council of Women v. Canada (Attorney General), 2006 F.C.A. 77.
Native Women's Association of Canada v. Canada, [1994] 3 S.C.R. 627.
Pauktuutit, Inuit Women's Association of Canada v. Canada (2003), 229 F.T.R. 8.
Paul v. Paul, [1986] 1 S.C.R. 306.
Report of the Human Rights Committee, Lovelace v. Canada, UN GAOR, 36th Sess., Supp. No. 40, Annex XVIII, UN Doc. A/36/40 (1981) 166.

Jurisdiction: Canada

Norman, Ken. "The Charter as an Impediment to Welfare Rollbacks: A Meditation on "Justice as Fairness" as a "Bedrock Value" of the Canadian Democratic Project" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007).

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:

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

Cases:

Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016.
Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.
Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.
Schacter v. Canada, [1992] 2 S.C.R. 679.

Jurisdiction: Canada

Pieterse, Marius. "The Legitimizing/Insulating Effect of Socio-economic Rights" (2007) 22:1 Can. J.L. & Society 1.

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:

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.
Constitution of the Republic of South Africa Act, 1996, No. 108 of 1996.
International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Cases:

Chaoulli v. Québec (Attorney General), 2005 SCC 35, [2005] 1 S.C.R. 791
Minister of Public Works v. Kyalami Ridge Environmental Association 2001 (3) SA 1151(CC).
New Clicks South Africa v. Tshabalala-Msimang; Pharmaceutical Society of South Africa v. Re Wilson and Medical Services Commission of British Columbia (1989), 53 D.L.R. (4th) 171 (B.C. C.A.).
Tshabalala-Msimang 2005 (2) SA 530 (C).

Jurisdiction: Canada, South Africa

Porter, Bruce. "Claiming Adjudicative Space: Social Rights, Equality and Citizenship" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007).

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:

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

Cases:

Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607.

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Masse v. Ontario, [1996] O.J. No. 363 (Gen. Div.).

Jurisdiction: Ontario, Canada

Pothier, Dianne. "But It's for Your Own Good" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 40.

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:

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.

Cases:

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Jurisdiction: Canada

Shaw, Mary. "The Politics of Poverty: Why the Charter Does Not Protect Welfare Rights" (2007) 12 Appeal 1 – 9.

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:

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 7, s. 15.

Cases:

Brown v. Board of Education, 349 U.S. 294 (1955).

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada, United States of America

Schneiderman, David. "Social Rights and "Common Sense": *Gosselin* through a Media Lens" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 57.

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:

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.

Cases:

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada

Wiseman, David. "Taking Competence Seriously" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007).

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:

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

Cases:

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada

Young, Margot. "Why Rights Now? Law and Desperation" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007).

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:

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

Cases:

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada

Eliadis, Pearl. "Inscribing Charter Values in Policy Processes" (2006) 33 S.C.L.R. (2d) 229.

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:

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.

[International human rights law, generally]

Cases:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.
Falkiner v. Ontario (Ministry of Community and Social Services) (2002), 49 O.R. (3d) 564 (C.A).

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Gwinner v. Alberta (Human Resources and Employment), 2004 ABCA 210, (2004) 354 A.R. 91.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Polewsky v. Home Hardware Stores Ltd. (2003), 60 O.R. (3d) 600 (Div. Ct.).

Jurisdiction: Canada

Jackman, Martha. "Section 15 Can Help Bring Legitimacy to Our Democracy" (18 August 2006) 26:14 *Lawyers Weekly* 11.

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:

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.

Jurisdiction: Canada

Porter, Bruce. "Expectations of Equality" (2006) 33 *Supreme Court Law Review* 23.

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:

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

Cases:

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.

Jurisdiction: Canada

Wiseman, David. "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51 McGill L.J. 503.

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:

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.

Cases:

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Irwin Toy v. Attorney General of Québec, [1989] 1 S.C.R. 927.

M. v. H., [1999] 2 S.C.R. 3.

Mahe v. Alberta, [1990] 1 S.C.R. 342.

Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20 (Ont. C.A.).

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

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713.

R. v. Prosper, [1994] 3 S.C.R. 236.

Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act, [1987] 1 S.C.R. 313.
Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3.
Thomson Newspapers Co. v. Canada (A.G.), [1998] 1 S.C.R. 877.

Jurisdiction: Canada

Bryden, Philip. "Section 7 of the Charter Outside the Criminal Context" (2005) 38 U.B.C. L. Rev. 507-537.

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:

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:

Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 S.C.R. 307.
Chaoulli v. Quebec (Attorney General), 2005 SCC 35, 1 S.C.R. 791.
Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429.
Irwin Toy v. Attorney General of Quebec, [1989] 1 S.C.R. 927.
Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177.
Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3.
Wilson v. British Columbia (Medical Services Commission) (1987), 36 D.L.R. (4th) 31, (S.C.), rev'd (1988), 53 D.L.R. (4th) 171 (C.A.).

Jurisdiction: Canada

Porter, Bruce. "ReWriting the Charter at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada" in Wesley Cragg & Christine Koggel, eds., *Contemporary Moral Issues*, 5th ed., (Toronto: McGraw-Hill Ryerson, 2005) 373.

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:

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

Cases:

Gosselin v. Québec (Procureur Général) [1992] R.J.Q. 1647.

Louise Gosselin c. Procureur général du Québec (6 April 1999) Montreal 500-09-001092-923 (C.A.).

Gosselin v. Québec (Attorney General) 2002 SCC 84, [2002] 4 S.C.R. 429.

Jurisdiction: Canada

Porter, Bruce. "Social and Economic Rights and the Canadian Charter of Rights and Freedoms" (Paper presented to the International Conference on Social and Economic Rights: Models of Enforcement, hosted by the Irish Human Rights Commission, Dublin, Ireland, December 10-11, 2005).

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:

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.

[International human rights legislation, generally]

Cases:

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657
Chaoulli v. Québec (Attorney General), 2005 SCC 35, 1 S.C.R. 791.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.
Irwin Toy v. Attorney General of Québec, [1989] 1 S.C.R. 927.
Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381.
Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038.
Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: Canada

Pottie, Laura & Sossin, Lorne. "Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare" (2005) 38 U.B.C. L. Rev. 147-187.

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:

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.

Cases:

Ainsley Financial Corporation v. Ontario Securities Commission (1994), 21 O.R. (3d) 104 (C.A.).
Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.
Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.
Bell Canada v. Canadian Telephone Employees' Association, 2003 SCC 36, [2003] 1 S.C.R. 884.
Dassonville-Trudel (Guardian ad Litem of) v. Halifax Regional School Board, 2004 NSCA 82, (2004), 224 N.S.R. (2d) 294.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Falkiner v. Ontario (Ministry of Community and Social Services) (2002), 59 O.R. (3d) 481.
Glasgow v. Nova Scotia (Minister of Community Services) (1999), 178 D.L.R. (4th) 181 (N.S.S.C.)
Little Sisters Book and Art Emporium v. Canada (Minister of Justice), 2000 SCC 69, [2000] 2 S.C.R. 1120.

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

Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038.

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3.

Jurisdiction: Canada

Porter, Bruce. "Twenty Years of Equality Rights: Reclaiming Expectations" (2005) 23 Windsor Yearbook of Access to Justice 145.

Porter reviews the expectations of the s. 15 *Charter* guarantee by various equality seeking groups (such as Women, Gays and Lesbians, Aborigines, 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:

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

Cases:

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.

Jurisdiction: Canada

Young, Margot. "Section 7 and the Politics of Social Justice" (2005) 38 U.B.C. L. Rev. 539.

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:

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:

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

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

Jurisdiction: Canada

Jackman, Martha. "Canadian Charter Equality at Twenty: Reflections of a Card-carrying Member of the Court Party" (Dec.2005-Jan.2006) 27:1 Policy Options 72-77.

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:

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

Cases:

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

Jurisdiction: Canada

Cowper, D. Geoffrey. "Equality Rights and Social Benefit Programs." (Summer 2005) Supreme Court Law Review 29, 93-109.

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:

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

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

Cases:

Andrews v. Law Society of British Columbia, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143.
Auton (Guardian ad litem of) v. British Columbia (Attorney General), 2004 SCC 78, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657.
Brooks v. Canada Safeway Ltd., [1989] S.C.J. No. 42, [1989] 1 S.C.R. 1219.
Chaoulli v. Québec (Attorney General), 2005 SCC 35, [2005] S.C.J. No. 33.
Eldridge v. British Columbia (Attorney General), [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624.
Gosselin v. Québec (Attorney General), [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429.
Granovsky v. Canada (Minister of Employment and Immigration), [2003] S.C.J. No. 29, [2000] 1 S.C.R. 703.
Law v. Canada (Minister of Employment and Immigration), [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497.
Lovelace v. Ontario, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950.
McKinney v. University of Guelph, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229.
Nova Scotia (Workers' Compensation Board) v. Martin, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504.
Tétreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] S.C.J. No. 41, [1991] 2 S.C.R. 22.

Jurisdiction: Canada

Chadha, Ena & Sheldon, C. Tess. "Promoting Equality: Economic and Social Rights for Persons with Disabilities under Section 15" (2004) 16 Nat'l J. Const. L. 27.

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.
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.
Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with Disabilities*, UN ESCOR, 11th Sess., U.N. Doc E/C.12/1994/13 (1994).
Declaration on the Rights of Disabled Persons, GA Res. 3447 (XXX), 30 UN GAOR, Supp. No.34, UN Doc. A/10034 (1975) 88.

International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), 21 UN GAOR (Supp. No. 16) 52, UN Doc. A/6316 (1966), 99 U.N.T.S. 171, Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Standard Rules on the Equalization of Opportunities for Persons with Disabilities, GA Res 48/96, UN GAOR, 48th Session, Supp. No. 49, U.N. Doc A/48/49 (1993).

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Cases:

Auton (Guardian ad litem of) v. British Columbia (Attorney General) (2002), 6 B.C.L.R. (4th) 201 (B.C. C.A.).

British Columbia (Public Service Employee Relations Commission) v.

B.C.G.S.E.U., [1999] 3 S.C.R. 3.

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868.

Brown v. British Columbia (Minister of Health) (1990), B.C.L.R. (2d) 294 (B.C. S.C.).

Cameron v. Nova Scotia (Attorney General) (1999), 204 N.S.R. (2d) 1. (N.S. C.A.).

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Fernandes v. Director of Social Services (Winnipeg Central) (1992), 93 D.L.R. (4th) 402 (Man. C.A.).

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

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

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Shulman v. Ontario (Attorney General) (2001), 90 C.R.R. (2d) 82 (Ont. Div. Ct.).

Sparkes v. Newfoundland & Labrador (Ministry of Health & Community Services) (2002), 45 C.C.H.R. D/225 (N.L. Bd. of Inquiry), *aff'd* (2004), 48 C.C.H.R. D/457 (Nfld SCTD).

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Workers' Compensation Board of Nova Scotia v. Martin et al., [2003] 2 S.C.R. 504.

Jurisdiction: Canada

Glenn, Jane Matthews. "Enforceability of Economic and Social Rights in the Wake of *Gosselin*: Room for Cautious Optimism" (2004) 83 Can. Bar Rev. 929.

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:

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.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

Anufrijeva v. London Borough of Southwark, [2003] EWCA Civ. 1406.

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

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

R. (on the application of 'Q' and others) v. Secretary of State for the Home Department, [2003] 2 All E.R. 905.

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:

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.

[International human rights legislation, generally]

Cases:

Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R. (4th) 224 (N.S.C.A).

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Falkiner v. Ontario (Ministry of Community and Social Services) (2002), 59 O.R. (3d) 481.

Finlay v. Canada, [1986] 2 S.C.R. 607.
Finlay v. Canada (Minister of Finance), [1993] 1 S.C.R. 1080.
Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.
Johnson v. Ontario (Attorney General), [2003] O.J. No. 3085.
People on Welfare for Equal Rights v. Constable Michael Spurr (Nova Scotia Police Review Board Decision, Halifax, October 8, 1991).
R. v. Clarke, [2003] O.J. No. 3883.
R. v. Wu, [2003] 3 S.C.R. 530.
RJR-MacDonald Inc. v Canada (A.G.), [1995] 3 S.C.R. 199.

Jurisdiction: Canada

Brodsky, Gwen. "Gosselin v. Quebec (Attorney General): Autonomy with a Vengeance", Case Comment, (2003) 15 Can. J. Women & L. 194-214.

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:

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.
Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada

Cameron, Jamie. "Positive Obligations Under Sections 15 and 7 of the Charter: A Comment on *Gosselin v. Québec*" (2003) 20 Sup. Ct. L. Rev. (2d) 65-91.

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:

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.

Cases:

Auton (Guardian ad litem of) v. British Columbia (Attorney General) (2002), 6 B.C.L.R. (4th) 201 (B.C. C.A.).

Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429.

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

R. v. Askow, [1990] 2 S.C.R. 1199.

R. v. Prosper, [1994] 3 S.C.R. 236.

Reference re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.

Reference re ss. 193 and 195.1(1) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123.

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: Canada

Michelman, Frank I. "The Constitution, Social Rights, and Liberal Political Justification" (2003) 1 Int'l J. Const. L. 13-34.

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 which 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)

Minister of Public Works v. Kyalami Ridge Environmental Association 2001 (3) SA 1151(CC).

Legislation:

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

Constitution of the Republic of South Africa, Act 108 of 1996.

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

Anderson, Gavin W. "Social Democracy and the Limits of Rights Constitutionalism" (2004) 17 Can. J.L. & Jur. 31-59.

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:

Blinkfüer (1969) 25 BVerfGE 256.

Costello-Roberts v. United Kingdom, Series A, vol. 247-C., (1995) 19 E.H.R.R. 112.

Dagenais v. C.B.C. (1994) 120 D.L.R. (4th) 12.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Lüth (1958) 7 BVerfGE 198.

McKinney v. University of Guelph, (1990) 76 D.L.R. (4th) 545.

RWDSU v. Dolphin Delivery (1986), 33 D.L.R. (4th) 174

Shelley v. Kraemer (1948) 334 U.S. 1.

Stoffman v. Vancouver General Hospital (1990), 76 D.L.R. (4th) 700.

Sunday Times, Series A. vol. 30, (1979-80) 2 E.H.R.R. 245.

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: North America, Europe

Parkes, Debra. "Baby Steps on the Way to a Grown-Up Charter: Reflections on 20 Years of Social and Economic Rights Claims" (2003) 52 U.N.B. L.J. 279.

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

economic policy. Parkes concludes by considering the future of social and economic rights adjudication. [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.

Cases:

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2002] B.C.J. No. 2258 (C.A.).

Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016.

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada

Petrykowski, Lukasz. "Sisyphean Labours in Canadian Poverty Law: Gosselin v. Québec (Attorney General)" (2003) 16 W.R.L.S.I. 23.

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:

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.

Cases:

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada

Brodsky, Gwen & Day, Shelagh. "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 Can. J. Women & L. 185.

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:

Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

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.

Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, UN GAOR, 34th Sess., (Supp. no. 46), UN Doc. A/34/46 (1981), 1249 U.N.T.S. 13.

International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), 21 UN GAOR (Supp. No. 16) 52, UN Doc. A/6316 (1966), 99 U.N.T.S. 171, Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Bliss v. Canada (Attorney General), [1979] 1 S.C.R. 183.

Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Gosselin v. Procureur general du Québec, [1999] R.J.Q. 1033 (C.A.).

New Brunswick (Min. of Health) v. G. (J.), [1999] 3 S.C.R. 46.

Schachter v. Canada, [1992] 2 S.C.R. 679.

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: Canada

Lessard, Hester. "The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring" (2001) 39 Osgoode Hall L.J. 717-771.

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:

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.

Cases:

Catholic Children's Aid Society of Toronto v. C.M., [1994] 2 S.C.R. 165.
New Brunswick (Minister of Health and Community Service) v. G.(J.), [1999] 3 S.C.R. 46.

Jurisdiction: Canada

Martin, Sheilah. "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299-373.

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:

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

Cases:

Adler v. Ontario, [1996] 3 S.C.R. 609.
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.
Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358.
Corbière v. Canada, [1999] 2 S.C.R. 203.
Deslisle v. Canada (Deputy Attorney General), [1999] S.C.J. No. 43, September 2, 1999.
Egan v. Canada, [1995] 2 S.C.R. 513.
Irwin Toy v. Quebec (A.G.), [1989] 1 S.C.R. 927.
Granovsky v. Canada (Minister of Employment and Immigration), 2000 SCC 28, [2000] 1 S.C.R. 703.
Law v. A. G. Canada, [1999] 1 S.C.R. 497.
Lovelace v. A.G. Ontario, 2000 SCC 37, [2000] 1 S.C.R. 950.
M. v. H., [1999] 2 S.C.R. 3.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229.
Miron v. Trudel, [1995] 2 S.C.R. 418.
R.J.R. MacDonald v. Canada (A.G.), [1995] 3 S.C.R. 199.
R. v. Oakes, [1986] 1 S.C.R. 103.
R. v. Turpin, [1989] 1 S.C.R. 1296.
Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483.
Tétrault-Gadoury v. Canada (ECIC), [1991] 2 S.C.R. 22.
Thibaudeau v. Canada, [1995] 2 S.C.R. 627.
Vriend v. Alberta, [1998] 1 S.C.R. 493.
Weatherall v. Canada, [1993] 2 S.C.R. 872.
Various other s. 15 and s.1 decisions.

Jurisdiction: Canada

**Wiseman, David. "The Charter and Poverty: Beyond inaccessibility"
(Fall, 2001) 51 U.T.L.J. 425-458.**

Wiseman reviews and critiques Lorne Sossin's analysis of the law of accessibility in Canada, and the principle that courts should not adjudicate cases beyond their capacity. He identifies areas accessibility 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 accessibility and deference (at the s. 1 and remedial stages of *Charter* analysis), stating that accessibility 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:

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

Cases:

Clark v. Peterborough Utilities Commission (1995), 24 O.R. (3d) 7 (Gen. Div.).
Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20 (Ont. Gen. Div.).
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, Michael. "Social and Economic Rights in Canada: Why Class Matter" (2000), 11 N.J.C.L. 225.

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:

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Jurisdiction: Canada

Jackman, Martha. "What's Wrong With Social and Economic Rights?" (2000) 11 N.J.C.L. 235.

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:

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.

Jurisdiction: Canada

Keene, Judith. Claiming the Protection of the Court: Charter Litigation Arising from Government "Restraint" (1998) 9 N.J.C.L. 97-115

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:

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.

Cases:

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Irwin Toy v. Attorney General of Quebec, [1989] 1 S.C.R. 927.

M v. H, (1996) 27 O.R. (3d) 593 (Ont. Gen. Div.).

Jurisdiction: Canada

Young, Margot. "Change at the Margins: *Eldridge v. British Columbia (A.G.)* and *Vriend v. Alberta* (1998) 10 Cdn. J. Women & Law 244-263.

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:

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:

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: Canada

Bakan, Joel. "Equality and the Liberal Form of Rights" in *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), 45-62.

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:

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

Cases:

Symes v. MNR (1993), 161 N.R. 243 (S.C.C.).

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

Jurisdiction: Canada

Jackman, Martha. “Protecting Rights and Promoting Democracy: Judicial Review under Section 1 of the Charter” (1996) 34 Osgoode Hall L.J. 661-680.

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:

Egan v. A.G. Canada, [1995] 2 S.C.R. 513.

Eldridge v. British Columbia (A.G.) (1995), 7 B.C.L.R. (3d) 156 (C.A.).

R. v. Oakes, [1986] 1 S.C.R. 103.

RJR-MacDonald Inc. v Canada (A.G.), [1995] 3 S.C.R. 199.

Jurisdiction: Canada

Pothier, Dianne. "The Sounds of Silence: Charter Application when the Legislature Declines to Speak" (1996) 7:4 Constitutional Forum 113-120.

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:

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:

Eldridge v. British Columbia (A.G.) (1995), 7 B.C.L.R. (3d) 156 (C.A.).
Vriend v. Alberta (1996), 132 D.L.R. (4th) 595 (Alta. C.A.).

Jurisdiction: Canada

Ellsworth, Randall et al. "Poverty Law in Ontario: The Year in Review" (Fall 1994) 10 J.L. & Social Pol'y 1-70.

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-1.
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.
Land Lease Statute Amendment Act, S.O. 1994, c. 4.
Municipal Amendment Act, (Vital Services), S.O. 1994, c. 7.
Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990 c. M-56.

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.
Unemployment Insurance Act, R.S.C. 1985, c. U-1, as amended.
Worker's Compensation Act, R.S.O 1990, c. W-11.

Cases:

Burns v. Minister of National Health and Welfare (1993), C.E.B. & P.G.R. 8522.
Canada v. Brissette, (1993), 168 N.R. 60 (Fed. C.A.), (Appeal No. A-1342-92).
Conrad v. County of Halifax, (April 1994), C.A. No. 02923 (N.S.C.A.).
Furac v. Ontario (Workers' Compensation Board) (16 November 1993), Court File # 344/93 Ontario Court (General Division) Divisional Court [unreported].
Kasvand v. MNR, (1994), 167 N.R. 63 (F.C.A.).
Ontario Human Rights Commission v. Ontario, (1994), 190.R. (3d) 387 (C.A.).
R. v. Rehberg, (1993), 127 N.S.R.(2d) 331 (N.S.S.C.T.D.).
Storto v. The Minister of National Health and Welfare (30 December 1993), Appeal: CP 2690 (Pension Appeals Board) [unreported].
Symes v. MNR (1993), 161 N.R. 243 (S.C.C.).
Thibaudeau v. MNR (1994), 167 N.R. 161 (F.C.A.).
Various Housing Cases.
Various Workers' Compensation Board Decisions.

Jurisdiction: Ontario, Canada

Ellsworth, Randall et al. "Poverty Law in Ontario: The Year in Review" (Fall 1993) 9 J.L. & Social Pol'y 1-61.

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:

An Act to Guide for Government Expenditure Restraint, S.C. 1993, c. 13.
Proclaimed in force April 3, 1993.
Canada Pension Plan, R.S.C. 1985, c. C-8, as amended.
Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
Co-Operative Statute Amendment Act, S.O. 1992, c. 19.
Income Tax Act, S.C. 1970-71-72, c. 63, as amended.
Landlord and Tenant Act, R.S.O. 1990, c. L-7 as amended.
Ontario Human Rights Code, R.S.O. 1990, c. H.19.
Rent Control Act, S.O. 1992, c. 11.
Social Contract Act, S.O. 1993, c. 5.
Unemployment Insurance Act, R.S.C. 1985, c. U-1.

Worker's Compensation Act, R.S.O 1990, c. W-11.

Cases:

A & L Investments Ltd. v. Ontario (1993), 13 O.R. (3d) 799 (O.C.J.).
Canada v. Duffenais, (1993), 154 N.R. 203 (F.C.A.).
Conrad v. County of Halifax, (August 11, 1993) C.H. No. 70286 (N.S.S.C.T.D) [unreported].
Director of Income Maintenance v. Wedekind, (1993), 62 O.A.C. 70 (Div.Ct.).
Director of Income Maintenance v. Roper (1993), 62 O.A.C. 76 (Div.Ct.).
Egan and Nesbit v. Canada, (1993), 153 N.R. 161 (F.C.A.).
Elliot v. Epp Centres Ltd. (June 27, 1993), Ont. Rd. of Inquiry [unreported].
Finlay v. Canada (Minister of Finance) (1993), 150 N.R. 81 (S.C.C.).
Peplinski v. Canada, [1993] 1 F.C. 222 (T.D.).
Minister of National Health and Welfare v. Reichel (1991), C.E.B. & P.G.R. 9218.
Minister of National Health and Welfare v. Sinclair (1992), C.E.B. & P.G.R. 8501.
R. v. Diggs, (May 19, 1993), Dartmouth #299880 -299909 (N.S. Prov. Ct.) [unreported].
R. v. Mascia, [1993] O.J. No. 638 (O.C.J.) (QL) [unreported].
Schaff v. Canada, (August 5, 1993), Action No. 92-1054(I'1) (T.C.C.) [unreported].
Simon v. Toronto (1993), 61 O.A.C. 389 (Div.Ct.).
Thwaites v. Canadian Armed Forces (June 7, 1993) Can. Human Rights Trib. [unreported].
Various Housing Cases.
Various Workers' Compensation Board Decisions.
Yaholnitsky v. Canada, (June 23, 1993), Action No. T-3006-91 (F.C.T.D.) [unreported].

Jurisdiction: Ontario, Canada

Jackman, Martha. "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 *Queen's L. J.* 65.

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:

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.

Cases:

Alcoholism Foundation of Manitoba v. Winnipeg (City) (1990), 69 D.L.R. (4th) 697 (Man. C.A.).

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Bernard v. Dartmouth Housing Authority (1988), 53 D.L.R. (4th) 81 (N.S.C.A.).

Brown v. British Columbia (Minister of Health) (1990), 66 D.L.R. (4th) 44 (B.C.S.C.).

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

Federated Anti-Poverty Groups v. British Columbia (A.G.) (1991), 70 B.C.L.R. (2d) 325 (B.C.S.C.).

Fenton v. British Columbia (Forensic Psychiatric Services Commission) (1991), 82 D.L.R. (4th) 27 (B.C.C.A.), rev'g (1989), 29 C.C.E.L. 168 (B.C.S.C.).

Fernandes v. Director of Social Services (Winnipeg Central) (1992), 93 D.L.R. (4th) 402 (Man. C.A.).

George v. Canada (A.G.) (1990), 116 N.R. 185 (F.C.A.).

Gosselin v. Québec (Procureur general), [1992] R.J.Q. 1647 (C.S.).

Irwin Toy v. Attorney General of Québec, [1989] 1 S.C.R. 927.

Newfoundland and Labrador Housing Corporation v. Ryan (1987), 62 Nfld. & P.E.I.R. 287 (Nfld. C.A.).

Newfoundland and Labrador Housing Corporation v. Williams (1987), 62 Nfld. & P.E.I.R. 269 (Nfld. C.A.).

Ontario Nursing Home Association v. Ontario (1990), 72 D.L.R. (4th) 166 (Ont. H.C.J.).

Reference Re Family Benefits Act, Section 5 (N.S.) (1987), 75 N.S.R. (2d) 338 (N.S.C.A.).

Schachter v. Canada, [1992] 2 S.C.R. 679.

Silano v. British Columbia (1987), 42 D.L.R. (4th) 407 (B.C.S.C.).

Thunder Bay Seaway Non-Profit Apartments v. Thunder Bay (City), (1991), 85 D.L.R. (4th) 229 (Ont. Ct. Gen. Div.).

Jurisdiction: Canada

Certosimo, Matthew. "A Social Charter Within Reach" (Nov. 1992) 2 N.J.C.L. 249-263.

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]

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:

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, Matthew. "Does Canada Need a Social Charter?" (Fall 1992) 15 Dalhousie L.J. 568-614.

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:

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

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

Ellsworth, Randall & Morrison, Ian. "Poverty Law in Ontario: The Year in Review" (Fall 1992) 8 J.L. & Social Pol'y 1-53.

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.

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

Class Proceedings Act, S. O. 1992 c. 6.
Family Benefits Act, R.S. O. 1990 c. F-2.
General Welfare Assistance Act, R.S.O. 1990 c. G-6.
Income Tax Act, S.C. 1970-71-72, c. 63, as amended.
Indian Act, R.S.C. 1985, c. I-5.
Unemployment Insurance Act, R.S.C. 1985, c. U-1.
Worker's Compensation Act, R.S.O 1990, c. W-11.

Cases:

Fernandes v. Director of Social Services (Winnipeg Central) (10 June 1992), Suit No. AI 91-30-00477 (Man. C.A.) [unreported].
Finlay v. Canada (1990), 71 D.L.R. (4th) 422 (F.C.A.).
Gosselin v. Procureur General du Québec (27 May 1992), No. 500-06-000012-860 (Que. S.C.) [unreported].
Marinakis v. Minister of National Health and Welfare (1991), CEB & PGR #9201.
Minister of National Health and Welfare v. Trudell Herritt (1991), CEB & PGR #9209.
Minister of National Health and Welfare v. Helen Johnston (1991), CEB & PGR #9214.
Mireau v. Saskatchewan (13 December 1991), No. Q.B. 3758/91 (Sask. Q.B.) [unreported].
Our House Ottawa Inc. et al v. Regional Municipality of Ottawa-Carleton (19 May 1992), File No. 750/89 (Ont. Ct. (Gen. Div.) Div. Ct.) [unreported].
R. v. Beals (1991), 68 C.C.C. (3d) 277 (N.S. Co.Ct.).
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].
Williams v. The Queen (1992), 90 D.L.R. (4th) 129 (SCC).

Jurisdiction: Ontario, Canada

Morrison, Ian. "Poverty Law and the Charter: The Year in Review" (Fall 1990) 6 J.L. & Social Pol'y 1-29.

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:

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

Cases:

Andrews v. Law Society of B.C. (1989), 56 D.L.R. (4th) 1, 119891 2 W.W.R. 289.

Brown v. British Columbia (Minister of Health) (1990), 66 D.L.R. (4th) 444 (B.C.S.C.).
McInnis v. Director of Social Planning Department, (1989), 92 N.S.R. (2d) 254, 237 A.P.R. 254 (S.C.T.D.).
Ontario Nursing Home Association v. Ontario (1990), 74 O.R. (2d) 365 (H.C.J.).

Jurisdiction: Canada

Bakan, Joel. "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 Can. Bar Rev. 307.

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:

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

Cases:

R. v. Morgentaler, [1988] 1 S.C.R. 30.

Jurisdiction: Canada

McBean, Jean. "Implications of entrenching Property Rights in Section 7 of the Charter of Rights" (1987-88) 26 Alta. L. Rev. 548-583.

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.

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

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:

Budge v. Workers Compensation Board (Alberta), Number 2, (1987) 80 A.R. 207 (Alta. Q.B.).

The Queen in Right of New Brunswick v. Fisherman's Wharf Ltd. (1982) 135 D.L.R. (3d) 307.

R. v. Morgentaler, (1985) 48 C.R. (3d) 1, 11 O.A.C. 81 (Ont. C.A.).

R. v. Edward Brooks and Art Ltd., [1986] 2 S.C.R. 713, (1987) 35 D.L.R. (4th) 6, 30 C.C.C. (3d) 385.

Re Mia and Medical Services Commission of B.C. (1985) 17 D.L.R. (4th) 385.

Reference Re Section 94(2) of the Motor Vehicle Act R.S.B.C. 1979 c. 288, [1985] 2 S.C.R. 486, (1986) 24 D.L.R. (4th) 536, [1986] 1 W.W.R. 481.

Singh v. Minister of Employment and Immigration (1985), 17 D.L.R. (44th) 422.

Jurisdiction: Canada

Hutchinson, Allan C. & Petter, Andrew. "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278-297.

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:

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.

Cases:

Hunter v. Southam Inc., [1984] 2 S.C.R. 145.

Re Blainey and Ontario Hockey Association (1986), 26 D.L.R. (4th) 729 (Ont. C.A.).

RWDSU v. Dolphin Delivery, [1986] 2 S.C.R. 573.

Jurisdiction: Canada

Jackman, Martha. "The Protection of Welfare Rights under the Charter" (1988) 20 Ottawa L. Rev. 257-338.

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.

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.

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

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

U.S. Const. am. 5.

Cases:

Goldberg v. Kelly (1970), 397 U.S. 254.

Harris v. McRae 448 U.S. 297 (1980).

Martineau v. Matsqui Institution Disciplinary Board (No. 2), [1980] 1 S.C.R. 602.

Mathews v. Eldridge 424 U.S. 319 (1976).

Napoli v. Workers' Compensation Board (1981), 28 B.C.L.R. 371 (C.A.).

Re Attorney-General of Canada and Bertrand (1982), 136 D.L.R. (3d) 710 (F.C.A.D.).

Re Nicholson and Haldimand-Norfolk Regional Bd. of Comm'rs of Police, [1979] S.C.R. 311.

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

Re Webb and Ontario Housing Corporation (1978), 22 O.R. (2d) 257 (C.A.).

Jurisdiction: Canada

Fudge, Judy. "What Do We Mean by Law and Social Transformation?" (1990) Can. J.L. & Soc. 47-70.

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:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R.143.

R. v. Morgentaler, [1988] 1 S.C.R. 30.

RWDSU v. Dolphin Delivery, [1986] 2 S.C.R. 573.

Jurisdiction: Canada

Howse, Robert. "Another Rights Revolution? The Charter and the Reform 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:

Brown et al. v. Minister of Health et al. (1990) 66 D.L.R. (4th) 444 (B.C.S.C.).

Canada Employment and Immigration Commission et al. v. Tetrault-Gadoury, [1991] 2 S.C.R. 22.

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.).

Gosselin v. Québec (A.G.), [1992] R.J.Q. 1647.

Manitoba Rice Farmers Association v. Human Rights Commission (1987), 50 Man. R. (2d) 92.

McKinney v. Board of Governors of the University of Guelph et al., [1990] 2 S.C.R. 229.

Ontario Nursing Home Association et al. v. The Queen in Right of Ontario et al., (1990) 72 D.L.R. (4th) 166.
Re Shewchuck and Ricard (1986), 28 D.L.R. (4th) 429.
R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.
Schacter v. Canada, [1992] 2 S.C.R. 679.
Schaff v. Canada, [1993] 2 C.T.C. 2695 (T.C.C.).
Silano v. The Queen in Right of British Columbia (1987), 42 D.L.R. (4th) (B.C.S.C.) 407.
Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038.
Sparks v. Dartmouth/Halifax Regional Housing Authority (1993), N.S.R. (2d) (C.A.).
Symes v. Canada, [1993] 4 S.C.R. 695.
Thibaudeau v. MNR, [1994] F.C. 189 (F.C.A.).

Jurisdiction: Canada

Porter, Bruce “The Uninvited Guests: Reflections on the Brief History of Poor People Seeking Their Rightful Place in Equality Jurisprudence” in *Roads to Equality Vol. 3*, (Canadian Bar Association, Continuing Legal Education Program, Annual General Meeting, 1994).

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:

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.

Cases:

Conrad v. County of Halifax (1993), 124 N.S.R. (2d) 251,aff'd (1994), 130 N.S.R. (2d) 305 (N.S.C.A.).
Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R. (4th) 224.
Federal Anti-Poverty Groups of British Columbia v. British Columbia (Attorney General) (1990), 70 B.C.L.R. (2d) 325.
Fernandes v. Director of Social Services (Winnipeg Central) (1992), 93 D.L.R. (4th) 402 (Man. C.A.).
Gosselin v. Procureur general du Quebec, [1992] R.J.Q. 1647 (Quebec S.C.).
R. v. Prosper, [1994] 3 S.C.R. 236.

Symes v. Canada, [1989] 4 S.C.R. 695.
Thibaudeau v. Canada (1994), 114 D.L.R. (4th) 261 (F.C.A.).

Jurisdiction: Canada

Pocklington, T.C. "Some Drawbacks of the Politics of Constitutional Rights" (Winter 1991) 2 Constitutional Forum 42-43.

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:

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

Jurisdiction: Canada

Petter, Andrew. "The Politics of the Charter" (1986) 8 Supreme Court Law Review 473-505.

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:

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.

Cases:

Gay Alliance Toward Equality v. Vancouver Sun, [1979] 2 S.C.R. 435.
Harrison v. Carswell, [1976] 2 S.C.R. 200.
Hunter v. Southam Inc., [1984] 2 S.C.R. 145.
Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357.
Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441.
Quebec v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.
R. v. Therens, [1985] 1 S.C.R. 613.
Rahn v. R., [1985] 1 S.C.R. 659.
Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177.
Trask v. R., [1985] 1 S.C.R. 655.

Jurisdiction: Canada

Hutchinson, Allan C. "Charter Litigation and Social Change: Legal Battles and Social Wars" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 357-381.

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:

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.

Cases:

Bliss v. Canada (Attorney General), [1979] 1 S.C.R.183.
Brown v. Board of Education, 347 U.S. 483 (1954).
Hunter v. Southam Inc., [1984] 2 S.C.R. 145.
Reference re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.
Roe v. Wade, 410 U.S. 113 (1973).

Jurisdiction: Canada (with lessons from the United States)

Hathaway, James C. "Poverty Law and Equality Rights: Preliminary Reflections" (1985) 1 J.L. & Soc. Pol'y 1-16.

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:

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

Cases:

Dandridge v. Williams, 397 U.S. 471 (1970).
James v. Valtierra, 402 U.S. 137 (1971).

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:

Canadian Bill of Rights, R.S.C. 1970, App. III.
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:

Curr v. The Queen (1972), 26 D.L.R. (3d) 603.
Lochner v. New York, 198 U.S. 45 (1905).
R. v. Campagna (1982), 141 D.L.R. (3d) 485 (B.C. Prov. Ct.).
R. v. City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 (S.C.C.).
R. v. Gustavson (1982), 143 D.L.R. (3d) 491 (B.C. S.C.).
Re Mason and the Queen (1983), 35 C.R. (3d) 393 (Ont. H.C.).
Re Potma and the Queen (1983), 41 O.R. (2d) 43 (C.A.).
Reference re Section 94(2) of Motor Vehicle Act (1983), 33 C.R. (3d) 22 (B.C.C.A.).
The Queen v. Fisherman's Wharf (1982), 135 D.L.R. (3d) 307.
West Coast Hotel v. Parrish, 300 U.S. 379 (1937).
Westendorp v. R. (1983), 32 C.R. (3d) 97 (S.C.C.).

Jurisdiction: Canada

Roman, Andrew. "The Charter of Rights: Renewing the Social Contract?" (1982) 8 Queen's L.J. 188-203.

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:

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.

Bill of Rights of 1689

U.S. Bill of Rights

Cases:

Minister of Justice Canada v. Borowski (1982), 39 N.R. 331.

Switzman v. Elbling, [1957] S.C.R. 285.

Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138.

Waddell v. Schreyer et al. (1981), 126 D.L.R. (3d) 431.

Jurisdiction: Canada (But, considers American and British constitutional models, political philosophies, and theories of rights)

Federal/Provincial/Territorial Legislation

Lamarche, Lucie. "The "Made in Québec" Act to Combat Poverty and Social Exclusion: The Complex Relationship between Poverty and Human Rights" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 139.

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:

Act to Combat Poverty and Social Exclusion, R.S.Q. 2002, c. L-7.

Charter of Human Rights and Freedoms, R.S.Q. 1975, c. C-12.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Cases:

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Québec

L'Heureux-Dubé, Claire. "A Canadian Perspective on Economic and Social Rights" in Ghai, Yash and Cottrell, Jill eds., *Economic, Social And Cultural Rights In Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interrights, 2004), 42-49.

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:

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

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

Baker v. Canada (minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

Eldridge v. British Columbia, [1997] 3 S.C.R. 624.

Gosselin v. Québec (Attorney General), [1999] J.Q. 1365.

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

Jurisdiction: Canada

Jackman, Martha & Porter, Bruce. "Women's Substantive Equality and the Protection of Social and Economic Rights Under the *Canadian Human Rights Act*" in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 43.

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Kearney et al. v. Bramalea Limited et al., [1998] 21 O.H.R.B.I.D., Decision No. 98-021.

Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20.

R. v. Ewanchuk, [1999] 1 S.C.R. 330.

Slight Communications v. Davidson, [1989] 1 S.C.R. 1038.

Jurisdiction: Canada

Falardeau-Ramsay, Michelle. "Human Rights Legislation: The Path Ahead" (1998) 47 U.N.B.L.J. 165-176.

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

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

Universal Declaration of Human Rights, G.A. res. 217A (III), UN GAOR, 3rd Sess., Supp. No. 13, U.N. Doc A/811 (1948).

Jurisdiction: Canada

Grounds of Discrimination

Iding, Lynn A. "In a Poor State: The Long Road to Human Rights Protection on the Basis of Social Condition" (2003) 41 Alta. L. Rev. 513.

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:

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.

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Cases:

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

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada

Sheppard, Colleen. "Grounds of Discrimination: Towards a Contextual and Inclusive Approach" (Oct. 2001) 80 Can. Bar Rev. 893-916.

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:

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

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Charter of Human Rights and Freedoms, R.S.Q. 1997, c. C-12.

Cases:

Canada (Attorney-General) v. Mossop, [1993] 1 S.C.R. 554.

Commission des droits de la personne et des droits de la jeunesse v. Maison des jeunes and C.T. and A.T., (1998) File No. 500-53-00078-970 (Québec Human Rights Tribunal).

Egan v. Canada, [1995] 2 S.C.R. 513.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229.

Three employment discrimination cases based on “perceived handicap”.

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: Québec, Canada

Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel under the Authority of the Minister of Justice and the Attorney General of Canada, 2000).

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Jurisdiction: Canada

Sheppard, Colleen. “Grounds of Discrimination: Towards an Inclusive and Contextual Approach” in *Les 25 ans de la Charte québécoise (2000)* (Cowansville, Québec.: Éditions Yvon Blais, 2000), p. 91-117.

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:

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

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Charter of Human Rights and Freedoms, R.S.Q. 1997, c. C-12.

Cases:

Canada (Attorney-General) v. Mossop, [1993] 1 S.C.R. 554.

Commission des droits de la personne et des droits de la jeunesse v. Maison des jeunes and C.T. and A.T., (1998) File No. 500-53-00078-970 (Québec Human Rights Tribunal).

Egan v. Canada, [1995] 2 S.C.R. 513.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229.

Three employment discrimination cases based on "perceived handicap".

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: Québec, Canada

Day, Shelagh & Brodsky, Gwen. "Women's Economic Inequality and the Canadian Human Rights Act" in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports (Ottawa: Status of Women Canada, 1999) 113.*

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

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).

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U. (1997), 30 C.H.R.R. D/83 (B.C. C.A.).

Brooks v. Canada Safeway Ltd. (1989), 10 C.H.R.R. D/6183 (S.C.C.).

Canadian National Railway Co. v. Canada (Human Rights Commission) (1987), 8 C.H.R.R. D/4210 (S.C.C.).

Canadian Odeon Theatres v. Huck (1986), 6 C.H.R.R. D/2682 (Sask. C.A.).
Corbiere v. Canada (1999), 173 D.L.R. (4th) 1 (SCC).
D'Aoust v. Vallieres (1993), 19 C.H.R.R. D/322 (Que. Trib.).
Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R. (4th) 224.
Dumont-Ferlatte v. Canada (Employment and Immigration Comm.) (1997), 27 C.H.R.R. D/365 (Can. Trib.).
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Janzen v. Platy Enterprises Ltd. (1989), 10 C.H.R.R. D/6205 (S.C.C.).
Lambert v. Québec (Ministère du tourisme) (No. 3) (1997), 29 C.H.R.R. D/246 (Que. Trib.).
Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.
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.).
Québec (Comm. des droits de la personne) v. Ianiro (1996), 29 C.H.R.R. D/79 (Que. Trib.).
Québec (Comm. des droits de la personne) v. Whittom (1993) 20 C.H.R.R. D/349 (Que. Trib.).
Saskatchewan Teachers' Superannuation Comm. v. Anderson (1995), 24 C.H.R.R. D/177 (Sask. C.A.).
Thibaudeau v. Canada (1994), 114 D.L.R. (4th) 261 (F.C.A.).
Vriend v. Alberta, [1998] 1 S.C.R. 493.
Weatherall v. Canada (Attorney General), [1993] 2 S.C.R. 872.

Jurisdiction: Canada

Greschner, Donna & Prescott, Mark. "Should the CHRA Mirror the Charter?" in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 1.

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.
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.
Human Rights Code, R.S.M. 1987, c. H175.

The Human Rights Code of British Columbia (1973), S.B.C. 1973 (2nd session), c.119 (repealed).

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Corbiere v. Canada (1999), 173 D.L.R. (4th) 1 (SCC).

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: Canada

Mackay, A. Wayne, Piper, Tina & Kim, Natasha. "Social Condition as a Prohibited Ground of Discrimination Under the Canadian Human Rights Act" Submission to the Canadian Human Rights Act Review Panel (December 1999).

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

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:

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

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 91 N.R. 255, 56 D.L.R. (4th) 1 (S.C.C.).

Egan and Nesbit v. Canada (1993), 153 N.R. 161 (F.C.A.), (1995) C.E.B. & P.G.R. #8216 (S.C.C.), S.C.J. File No: 23636.

Eldridge v. British Columbia (26 May 1995), B.C.J. No. 1168 (B.C.C.A.) [unreported].

Fernandes v. Director of Social Services (Winnipeg Central)(1992), 7 Admin. L.R. (2d) 153 (Man C.A); leave to appeal to S.C.C. refused (1993), 10 Admin. L.R. (2d) 56n (S.C.C.).

Miron v. Trudel (1991), 4 O.R. (3d) 623, 83 D.L.R. (4th) 766 (Ont. C.A.), [1995] S.C.J.

Re Eaton v. Brant County Board of Education (1995), 22 O.R. (3d) 1 (C.A.).

Rodriguez v. British Columbia (A.G.) (1993), 158 N.R. 1 (S.C.C.).

Thibaudeau v. Canada (1994), 167 N.R. 161 (F.C.A.), [1995] S.C.J. File No. 24154.

Jurisdiction: British Columbia, Manitoba, Canada

Jackman, Martha. "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law" (1994) 2 Rev. Constit. Studies 76-122.

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:

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

Charter of Human Rights and Freedoms, R.S.Q. 1997, c. C-12.

Various Human Rights Codes.

Cases:

Alcoholism Foundation of Manitoba v. Winnipeg (1990), 69 D.L.R. (4th) 697.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R. (4th) 224.

Elizabeth Wiebe v. The Queen in Right of Ontario et al., Ontario Human Rights Commission Complaint No. 20-106S.

Haig and Birch v. Canada (1992), 9 O.R. (3d) 495.

R. v. Turpin, [1989] 1 S.C.R. 1296.

Jurisdiction: Ontario, Manitoba, Québec, Canada

Turkington, Sheilagh. "A Proposal to amend the Ontario Human Rights Code: recognizing povertyism" (Fall 1993) 9 J.L. & Social Pol'y 134-191.

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:

Ontario Human Rights Code, R.S.O. 1990, c. H-19.

Unemployment Insurance Act, R.S.C. 1985, c. V-1.

Jurisdiction: Ontario, Canada, United Kingdom

Lamarche, Lucie. *Social Condition as a Prohibited Ground of Discrimination in Human Rights Legislation: Review of the Quebec Charter of Human Rights and Freedoms*. (Ottawa: Canadian Human Rights Act Review Panel, 2000), online: Department of Justice Canada, <<http://www.justice.gc.ca/chra/eng/sc1-cs1.html>>.

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Jurisdiction: Québec, Canada.

Berry, Helen & Lepage, Mimi M. *Social Condition – Literature Search*. (Ottawa: Canadian Human Rights Act Review Panel, 2000), online: Department of Justice Canada, <<http://www.justice.gc.ca/chra/eng/sclit-csdoc.html>> .

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Cases:

D'Aoust c. Vallières (1993), 19 C.H.R.R. D/322.

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.

Lambert v. Québec (Ministère du tourisme) (1996), 29 C.H.R.R. D/246.

Québec (Comm. des droits de la personne) v. Gauthier (1993) 19 CHRR D/312.

Québec v. Ianiro (1996) 29 CHRR D/79.

Jurisdiction: Québec, Canada

Wesson, Murray. “Social Condition and Social Rights” (2006) 69 Sask. L. Rev. 101, 749-784.

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:

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 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.
Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

Eldridge v. British Columbia, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577.
Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46, [2000] S.A.J. No. 57 (Const. Ct.) (QL).
Harksen v. Lane NO 1998 (1) SA 300, [1997] S.A.J. No. 12 (Const. Ct.) (QL).
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.).
San Antonio School District v. Rodriguez 411 U.S. 1, 93 S. Ct. 1278 (1973).
South Africa (Minister of Health) v. Treatment Action Campaign 2002 (5) SA 721, [2002] S.A.J. No. 48 (Const. Ct.) (QL).
United States v. Carolene Products 304 U.S. 144, 58 S. Ct. 778 (1938).

Jurisdiction: Canada, South Africa, United States of America

Pothier, Dianne. "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 Can. J. Women & L. 35, 37-73.

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, analagous 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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.
Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

Cases:

British Columbia Government and Service Employees' Union v. British Columbia (Public Service Employee Relations Commission), [1999] 3 S.C.R. 3.
British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868.
Corbière v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203.

Dunmore v. Ontario (Attorney General) (1997), 37 O.R. (3d) 287 (G.D.), affirmed by the Ontario Court of Appeal on 26 January 1999; leave to appeal to the Supreme Court of Canada granted 24 February 2000, *S.C.C. Bulletin*, 2000, at 353 (per L'Heureux-Dubé, Bastarache, and Louis LeBel JJ.); Notice of appeal filed 24 March 2000, *S.C.C. Bulletin*, 2000, at 624.

Egan v. Canada, [1995] 2 S.C.R. 513.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

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

Hugo v. South Africa (President), [1997] S.A.J. No. 4 (Const. Crt); online at QL (SAJ).

Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Lovelace v. Ontario, [2000] 1 S.C.R. 950.

Miron v. Trudel, [1995] 2 S.C.R. 418.

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.

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: Canada

Implementation/Interpretation of International Law

Cohen, Marjorie Griffin. "Collective Economic Rights and International Trade Agreements: In the Vacuum of Post-National Capital Control" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 183.

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:

Canada-United States Free Trade Agreement, 22 December 1987 and 2 January 1988, Can. T.S. 1989 No. 3.

General Agreement on Trade in Services, Annex 1B of the *Marrakech Agreement Establishing the World Trade Organization*, 15 April 1994 (1994) 33 I.L.M. 15.

North American Free Trade Agreement, 22 December 1992, Can. T.S. 1994 No. 2.

Jurisdiction: International

Day, Shelagh. "Minding the Gap: Human Rights Commitments and Compliance" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 201.

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:

Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, UN GAOR, 34th Sess., (Supp. no. 46), UN Doc. A/34/46 (1981), 1249 U.N.T.S. 13.

Jurisdiction: Canada

McKeever, Gráinne & ni Aoláin, Fionnuala. "Enforcing Social and Economic Rights at the Domestic Level: A Proposal" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007).

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

Arbour, Louise & Lafontaine, Fannie. "Beyond Self-congratulation: The Charter at 25 in an International Perspective" (2007) 45 *Osgoode Hall L.J.* 239-275.

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:

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 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

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

Cases:

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada, International.

Porter, Bruce & Nolan, Aoife. "The Justiciability of Social and Economic Rights: An Updated Appraisal" (January 2006) Just News: Human Rights in Northern Ireland.

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, Bruce. "Housing and ESC Rights Law Canadian Constitutional Challenge to NAFTA Raises Critical Issues of Human Rights in Trade and Investment Regimes" (2005) 2 ESC Law Quarterly.

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:

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

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

Jurisdiction: Canada

Porter, Bruce. "The Right to be Heard: What's at Stake?" (Paper Presented to the High Level Experts' Seminar on Economic, Social and Cultural Rights, Nantes, France September 5 - 7, 2005).

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:

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Cases:

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

Jurisdiction: International

Porter, Bruce. "Toward a Comprehensive Framework for ESC Rights Practice, revised and updated version of 'The Crisis in ESC Rights and Strategies for Addressing It'" in Bret Thiele and Malcolm Langford, eds., *Litigation of Economic, Social and Cultural Rights: The State of Play* (Sydney: University of South Wales Press, 2005).

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 CESCR's General Comment No. 9. [NOTE: does not specifically address disability]

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:

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.

Chaoulli v. Québec (Attorney General), [2005] 1 S.C.R. 791.

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381.

Jurisdiction: Canada, International

Dhir, Aaron A. "Human Rights Treaty Drafting through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities." (Summer 2005) 41 *Stanford Journal of International Law* No. 2 181-216.

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:

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Cases:

British Columbia (Pub. Serv. Employee Relations Comm.) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3.

Daugherty v. Stall, [2002] 48 E.T.R. (2d) 8.

Purohit and Moore v. Gambia, Communication 241/200, African Comm. on Human & Peoples' Rights, 33d Sess., Sixteenth Activity Report 2002-2003, Annex VII (2003).

Project Release v. Prevost, 722 F.2d 960 (2d Cir. 1983).

Starson v. Swayze, [2003] 1 S.C.R. 722.

Youngberg v. Romero, 457 U.S. 307 (1982).

Jurisdiction: Canada, United States of America, International.

Weiser, Irit. "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System" (2004) 37 *U.B.C.L. Rev.* 113-156.

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:

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 Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171 Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Vienna Convention on the Law of Treaties 23 May 1969, 1155 U.N.T.S. 331, Can T.S. 1980 No. 37.

Various other international instruments.

Cases:

Baker v. Canada (Minister of Citizenship and Immigration), [1997] 142 D.L.R. 555 (Can.)

Canada (Attorney-General) v. Ontario (Attorney-General), Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of work Act, [1937] 1 D.L.R. 673, [1937] 1 W.W.R. 299 (P.C.).

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982.

R. v. Advance Cutting & Coring Ltd., [2001] 3 S.C.R. 209, 2001 SCC 70.

Thomson v. Thomson, [1994] 3 S.C.R. 551.

United States v. Burns, [2001] 1 S.C.R. 283, 2001 SCC 7.

Various *Charter* challenges dealing with international law.

Jurisdiction: Canada, International

Brodsky, Gwen. "Montreal Principles on Women's Economic, Social, and Cultural Rights." (2004) 16 Can. J. Women & L. 400.

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:

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

[*Montreal Principles*, reprinted in (2004) 26(3) *Human Rights Quarterly* 760.]

Jurisdiction: Canada, International

Porter, Bruce. "The Domestic Implementation of the ICESCR: The Right to Effective Remedies, the Role of Courts and the Place of the Claimants of ESC Rights" Remarks for the Workshop for Judges and Lawyers in North East Asia on the Justiciability of Economic, Social and Cultural Rights hosted by the Office of the United Nations High Commissioner for Human Rights and the International Commission of Jurists (Ulaan Bataar, Mongolia, January 26-28, 2004).

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:

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

General Comment No. 3 Need Citation

General Comment No. 9 Need Citation

Cases:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

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

Jurisdiction: Canada, International

Bahdi, Reem. "Litigating Social and Economic Rights in Canada in Light of International Human Rights Law: What Difference Can It Make?" (2002) 14 Can. J. Women & L. 158.

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:

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, O.A.S. Treaty Series no. 69 (1988), signed November 17, 1988.

American Convention on Human Rights, O.A.S. Treaty Series no. 36, 1144 U.N.T.S. 123 (entered into force 18 July 1978).

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

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.

Charter of the Organization of American States, 119 U.N.T.S. 3 (entered into force 13 December 1951).

International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), 21 UN GAOR (Supp. No. 16) 52, UN Doc. A/6316 (1966), 99 U.N.T.S. 171, Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Cases:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.
Gosselin v. Procureur general du Québec, [1999] R.J.Q. 1033 (C.A.).

Jurisdiction: Canada, International

Quinn, G. and Degener, T. *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (New York & Geneva: Office of the United Nations High Commissioner on Human Rights, 2002).

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.

Convention on the Elimination of all Forms of Discrimination Against Women, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980).

Convention on the Rights of the Child, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989).

International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171 Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966).

Cases:

Akhidenor et al. v. Canada, CAT/C/21/D/67/1997.

Francis v. Jamaica, Communication No. 606/1994, Views adopted by the Committee on 3 August 1995 (CCPR/C/54/D/606/1994).

Hamilton v. Jamaica, communication No. 616/ 1995, Views adopted by the Committee on 28 July 1999 (CCPR/C/66/D/616/1995).

Jurisdiction: International

McGregor, Gaile. "The International Covenant on Social, Economic, and Cultural Rights: Will It Get Its Day in Court?" (2002) 28 Man. L.J. 321.

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:

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.

International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), 21 UN GAOR (Supp. No. 16) 52, UN Doc. A/6316 (1966), 99 U.N.T.S. 171, Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R.143.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Irwin Toy v. Attorney General of Québec, [1989] 1 S.C.R. 927.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20.

R. v. Crown Zellerbach, [1988] 1 S.C.R. 401.

Re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313.

Jurisdiction: Canada, International

Arneil, Barbara. "The Politics of Human Rights" (2000) 11 N.J.C.L. 213.

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:

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.

International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), 21 UN GAOR (Supp. No. 16) 52, UN Doc. A/6316 (1966), 99 U.N.T.S. 171, Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Jurisdiction: Canada

Porter, Bruce. "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 J.L. & Soc. Pol'y 117.

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:

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.

Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, UN GAOR, 34th Sess., (Supp. no. 46), UN Doc. A/34/46 (1981), 1249 U.N.T.S. 13.

International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), 21 UN GAOR (Supp. No. 16) 52, UN Doc. A/6316 (1966), 99 U.N.T.S. 171, Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Cases:

Conrad v. County of Halifax (1993), 124 N.S.R. (2d) 251,aff'd (1994), 130 N.S.R. (2d) 305 (N.S.C.A.).

Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R. (4th) 224.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Fernandes v. Director of Social Services (Winnipeg Central) (1992), 93 D.L.R. (4th) 402 (Man. C.A.).

Gosselin v. Procureur general du Québec, [1999] R.J.Q. 1033 (C.A.).

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

Irwin Toy v. Attorney General of Québec, [1989] 1 S.C.R. 927.

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.).

R. v. Ewanchuk, [1999] 1 S.C.R. 330.

Schachter v. Canada, [1992] 2 S.C.R. 679.

Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038.

Jurisdiction: Canada

Schabas, William A. "Freedom from Want: How Can We Make Indivisibility More Than a Mere Slogan?" (2000) 11 N.J.C.L. 189.

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:

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.

International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), 21 UN GAOR (Supp. No. 16) 52, UN Doc. A/6316 (1966), 99 U.N.T.S. 171, Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Cases:

Gosselin v. Procureur general du Québec, [1992] R.J.Q. 1647 (Québec S.C.).

Irwin Toy v. Attorney General of Québec, [1989] 1 S.C.R. 927.

R. v. Jones, [1986] 2 S.C.R. 284.

S.E.I.U., Local 204 v. Broadway Manor Nursing Home, (1983), 44 O.R. (2d) 392 (Ont. Div. Ct.).

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

Jurisdiction: Canada, International

Jackman, Martha. "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees through Charter of Rights Review" (1999) 14 J.L. & Social Pol'y 69.

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:

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.
Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.
Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act, R.S.C. 1985, c.F-8.
International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.
Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Cases:

Brown v. British Columbia (Minister of Health) (1990), B.C.L.R. (2d) 294 (B.C. S.C.).
Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20.
Newfoundland and Labrador Housing Corporation v. Williams (1987), 62 Nfld & P.E.I.R. 269.
Fernandes v. Director of Social Services (Winnipeg Central) (1992), 93 D.L.R. (4th) 402 (Man. C.A.).
Gosselin v. Procureur general du Québec, [1992] R.J.Q. 1647 (Québec S.C.).
Vriend v. Alberta, [1998] 1 S.C.R. 493.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
New Brunswick (Min. of Health) v. G. (J.), [1999] 3 S.C.R. 46.
Irwin Toy v. Attorney General of Québec, [1989] 1 S.C.R. 927.
Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177.

Jurisdiction: Canada

McChesney, Allan. "The Current Dialogue on Economic, Social and Cultural Rights" Discussion Paper for the Roundtable on Economic, Social and Cultural Rights—Prepared for the Canadian Centre for Foreign Policy Development (Ottawa, May 1999).

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:

Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, UN GAOR, 34th Sess., (Supp. no. 46), UN Doc. A/34/46 (1981), 1249 U.N.T.S. 13.

Convention on the Rights of the Child, GA Res. 44/25, annex, 44 UN GAOR (Supp. No. 49) at 167, UN Doc. A/44/49 (1989).

Declaration on the Right to Development, G.A. res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986).

International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), 21 UN GAOR (Supp. No. 16) 52, UN Doc. A/6316 (1966), 99 U.N.T.S. 171, Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Declaration on the Right to Development, G.A. res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986).

Jurisdiction: Canada, International

Scott, Craig. "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (Summer 1999) 10 *Constit. Forum* 97-111.

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:

International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Cases:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] S.C.J. No. 39.

Jurisdiction: Canada, International

Foster, John W. "Meeting the Challenges: renewing the progress of economic and social rights" (1998) 47 *U.N.B. L.J.* 197-206.

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

National Association of Women and the Law, *Canadian Women and the Social Deficit: A presentation to the International Committee on Economic, Social and Cultural Rights on the occasion of the Consideration of Canada's Third Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Ottawa: National Association of Women and the Law, 1998).*

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:

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Jurisdiction: Canada, International

Scott, Craig. "Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights" (1999) 21 Hum. Rts. Q. 633-660.

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:

European Social Charter, opened for signature 18 Oct. 1961, Europ. T.S. No. 35 (entered into force 26 Feb. 1965).

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171 Can. T.S. 1976 No. 47.

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Various other covenants which can be read in conjunction with the *ICESCR* and *ICCPR*.

Cases:

Airey v. Eire, 32 Eur. Ct. H.R. (ser. A) (1979), reprinted in 2 Eur. H.R. Rep. 305 (1979).

Baker v. Canada (Minister of Citizenship and Immigration), [1997] 142 D.L.R. 555 (Can.) (S.C.C. No. 25823) (filed with the Registrar of the Supreme Court of Canada 4 Sept. 1998).

Kosiek v. Federal Republic of Germany, 105 Eur. Ct. H.R. (ser. A) (1986), reprinted in 9 Eur. H.R. Rep. 328 (1986).

Jurisdiction: International

Leckie, Scott. "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights" (1998) 20 Hum. Rts. Q. 81-124.

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:

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Jurisdiction: International

Justice Abella, Rosalie Silberman. "Diversity in Rights Theory: Untangling the Difference between Civil and Human Rights" (1997) 7 N.J.C.L. 255-261.

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, Rodrigo Carazo. "The Rights of Children and Economic Prosperity: Competing Claims?" in L'Institut Roehner Institute, *As if Children Matter: Perspectives on Children, Rights and Disability* (North York: Roehner Institute, 1995) 1-9.

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:

Convention on the Rights of the Child, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989).

Jurisdiction: International, South America

Robertson, R. E. "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights." (1994) 16 Human Rights Quarterly 693-719.

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:

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Jurisdiction: International

Robertson, Robert E. "The Right to Food—Canada's Broken Covenant" (1989-90) 6 Can. Hum. Rts. Y.B. 185-216.

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:

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

The Canada Assistance Plan, R.S.C. 1985 Vol. 1, C-1.

Cases:

Finlay v. Canada (Min. Of Finance), [1986] 2 S.C.R. 607.

Various s. 7 and s. 15 cases.

Jurisdiction: Canada, International

Scott, Craig. "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (Winter 1989) 27 Osgoode Hall L.J. 768-878.

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 Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

International Covenant on Civil and Political Rights

Jurisdiction: Canada, International

Socio-Economic Rights Abroad: Lessons for Canada

Pillay, Karrisha. "Litigating Socio-Economic Rights in South Africa: How Far Will the Courts Go?" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007).

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:

South Africa Constitution, 1996, Act no. 108.

Cases:

Government of the Republic of South Africa and Others v. Grootboom and Others, [2000] 1 B. Const. L.R. 265 (S. Afr. Const. Ct.).

Minister of Health and Others v. Treatment Action Campaign and Others, (No. 2) [2002] 5 S. Afr. L.R. 721.

Soobramoney v. Minister of Health, Kwa Zulu Natal, [1998] 1 S. Afr. L.R. 765.

Jurisdiction: South Africa

Kerzner, Lana and Baker, David. "A Canadians with Disabilities Act?" (14 May 1999) online: Council of Canadians with Disabilities, <<http://www.ccdonline.ca/>>.

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:

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

Broadcasting Act, S.C. 1991, c. 11.

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

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

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

Disability Discrimination Act 1992, Act No. 135 of 1992 as amended.

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

Telecommunications Act, S.C. 1993, c. 38.

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:

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.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Jurisdiction: Canada, International

Gender:

Day, Shelagh & Brodsky, Gwen. *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs (Ottawa: Status of Women Canada, 1998).*

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:

Budget Implementation Act 1995, S.C. 1995, c.17.

Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

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.

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

Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, UN GAOR, 34th Sess., (Supp. no. 46), UN Doc. A/34/46 (1981), 1249 U.N.T.S. 13.

International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), 21 UN GAOR (Supp. No. 16) 52, UN Doc. A/6316 (1966), 99 U.N.T.S. 171, Can. T.S. 1976 No. 47.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

[Provincial human rights statutes, generally]

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Bliss v. Canada (Attorney General), [1979] 1 S.C.R. 183.

Brooks v. Canada (Treasury Board) v. Robichaud, [1987] 2 S.C.R. 84.

Canada Safeway Ltd., [1989] 1 S.C.R. 1219.

Canadian National Railway Co. v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114.

Canadian Odeon Theatres v. Saskatchewan Human Rights Commission and Huck (1985), 3 W.W.R., 717.

Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R. (4th) 224 (N.S.C.A).

Egan v. A.G. Canada, [1995] 2 S.C.R. 513.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20.
Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.
Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038.
Symes v. Canada, [1989] 4 S.C.R. 695.
Thibaudeau v. Canada, [1995] 2 S.C.R. 627.
Winterhaven Stables Ltd. V. Canada (A.G.) (1988), 53 D.L.R. (4th) 413 (Alta. C.A.).

Jurisdiction: Canada

**Day, Shelagh. "The Indivisibility of Women's Human Rights" (2000)
20:3 Canadian Women Studies 11.**

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

Cox, Rachel. *Welfare Rights are Women's Rights: Report on the Consultation Held by the National Association of Women and the Law on the Gosselin Case* (Ottawa: NAWL, 2001).

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

Fudge, Judy. "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485-554.

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:

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.

Cases:

Action Travail des Femmes v. C.N.R., [1987] 1 S.C.R. 1114.
Andrews v. Law Society of British Columbia (1986), 23 C.R.R. 273 (B.C.C.A.).
Andrews v. Minister of Health (1988) (Unreported) (Ont. S.Ct.).
Apsit v. Manitoba Human Rights Commission (1986), 23 D.L.R. (4th) 277 (Man.Q.B.).
Attorney General of Nova Scotia v. Phillips (1986), 34 D.L.R. (4th) 633 (N.S.C.A.).
Bliss v. Canada (Attorney General), [1979] 1 S.C.R. 183.
California Fed. Savings & Loan Assn. v. Guerra, 758 F.2d 390 (9th Circ, 1985).
Canadian Newspapers Co. Ltd. v. A.G. of Canada (1985), 49 O.R. (2d) 557.
MacVicar and Superintendent of Family and Child Services et al. (1988), 34 D.L.R. 488 (B.C.S.C.).
R. v. Howell (1986), 26 C.R.R. 267 (Newfoundland District Court).
R. v. Monk (1985), 43 Sask. R. 318 (Sask. Q.B.).
R. v. Morgentaler, [1988] 1 S.C.R. 30.
R. v. Seaboyer (1987), 58 C.R. (3d) 289 (Ont. C.A.).
RWDSU v. Dolphin Delivery, [1986] 2 S.C.R. 573.

Reference Re Family Benefits Act (N.S.), Section 5 (1986), 75 N.S.R. (2d) 338 (N.S.C.A.).
Regina v. Lucas (1985), 16 C.R.R. 1 (Ont. Dist. Ct.).
Shewchuk v. Ricard (1986), 2 B.C.L.R. (2d) 324 (B.C.C.A.).
Weatherall v. Attorney-General of Canada, [1987] 11 F.T.R. 279.

Jurisdiction: Canada

National Standards/Accountability in Social Welfare

Cameron, Barbara. "Accounting for Rights and Money in the Canadian Social Union" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 162.

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:

A Framework to Improve the Social Union for Canadians. An Agreement between the Government of Canada and the Governments of the Provinces and Territories (4 February 1999).

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

Day, Shelagh & Brodsky, Gwen. *Women and the Canada Social Transfer: Securing the Union* (Ottawa: Status of Women Canada, 2007).

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:

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

Federal-Provincial Fiscal Arrangements Act, R.S.C. 1985, c. F-8.

Cases:

Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381.

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

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

Jurisdiction: British Columbia, Canada

Prince, Michael J. "Canadian Federalism and Disability Policy Making" (Dec. 2001) 34 Can. J. Pol. Sc. 791-817.

Prince discusses collaborative/executive federalism, and inter-provincial/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.

Vocational Rehabilitation of Disabled Persons Act, R.S.C. 1985, c. V-3.

Jurisdiction: Canada

Sossin, Lorne. "Salvaging the Welfare State?: The Prospects for Judicial Review of the Canada Health and Social Transfer" (1998) 21 Dalhousie L.J. 141.

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:

Budget Implementation Act 1995, S.C. 1995, c.17.

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.

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

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public L. No. 104-193, 110 Stat. 2105 (August 22, 1996) (U.S.): check citation.

Cases:

Dunmore v. Ontario (Attorney General) (1997), 37 O.R. (3d) 287 (Gen. Div.).

Egan v. A.G. Canada, [1995] 2 S.C.R. 513.

Federated Anti-Poverty Groups of B.C. v. British Columbia (Minister of Social Services), [1996] B.C.J. No. 2088 (S.C.).

Ferrell v. Ontario (A.G.), [1997] O.J. No. 2765 (Q.L.) (Gen. Div.).

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

Haig v. Canada, [1993] 2 S.C.R. 995.

Hamilton-Wentworth (Reg. Mun.) v. Ontario (Min. of Tran.) (1991), 78 D.L.R. (4th) 289 (Ont. Div. Ct.).

Irwin Toy v. Attorney General of Québec, [1989] 1 S.C.R. 927.

Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20.

Re Canada Assistance Plan, [1991] 2 S.C.R. 525.

Service Employees International Union, Local 204 v. Ontario (A.G.), [1997] O.J. No. 3563 (Q.L.) (Gen. Div.).

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: Canada

Jackman, Martha. "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) 8 Can. J. Women & L. 371-410.

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:

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

Federal-Provincial Fiscal Arrangements Act, R.S.C. 1985, c. F-8.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Jurisdiction: Canada

Scott, Craig. "Covenant Constitutionalism and the Canada Assistance Plan", (Spring 1995) 6 *Constit. Forum* 79-87.

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.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Jurisdiction: Canada, International

Beatty, Harry. "Federal-Provincial Fiscal Arrangements: Their Impact on Social Policy and the Current Prospects for Reform" (1988) 3 J.L & Social Pol'y 36.

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 Assistance Plan, R.S.C. 1970, C. C-1.

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

Federal-Provincial Fiscal Arrangements and Post-Secondary Education and Health Contributions Act, 1977, S.C. 1984, c. 6.

Vocational Rehabilitation of Disabled Persons Act, R.S.C. 1970, c. V-7.

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.)
R. v. Hamilton, R. v. Asselin, R. v. McCullagh, 57 O.R. (2d) 412.

Jurisdiction: Canada

Nader, Aymen. "Providing Essential Services: Canada's Constitutional Commitment under Section 36" (1996) 19 Dalhousie L.J. 306-372.

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:

Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441.

PSAC v. Canada, [1987] 1 S.C.R. 313.

Re Canada Assistance Plan, [1991] 2 S.C.R. 525.

Reference re Constitution of Canada, [1981] 1 S.C.R. 745.

Jurisdiction: Canada

Income and Social Assistance

National Council of Welfare, *Another Look at Welfare Reform* (Ottawa: Public Works and Government Services Canada, 1997).

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

Morrison, Ian & Pearce, Gwyneth. "Under the Axe: Social Assistance in Ontario in 1995" (1995) 11 J.L. & Soc. Pol'y 1-18.

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:

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.

General Welfare Assistance Act, R.S.O. 1990, c. G.6 (and its regulations)

Cases:

Clark and Baker v. Peterborough Utilities Commission (15 June 1995) No 6605/91 (Ont. Ct. Gen. Div.).

Director, Income Maintenance Branch, Ministry of Community and Social Services v. Nicolitsis; *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].

R. v. Lalonde (1995), 22 O.R. (3d) 275 (Ont. Ct. Gen. Div.).

Re Jeevaratnam and The Attorney General of Ontario (File No. RE 4874/95).
Wedekind v. Ontario (Ministry of Community & Social Services) (1994), 21 O.R. (3rd) 289 (C.A).

Jurisdiction: Ontario

Greschner, Donna. "Why Chambers is Wrong: A Purposive Interpretation of Offered to the Public" (1988) 52 Sask. L. Rev. 161-190.

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 concludes 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:

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

The Saskatchewan Human Rights Code, Stat. Sask. 1979, c. S-24.1.

The Saskatchewan Assistance Act, R.S.S. 1979, c. S-8.

Cases:

Chambers and Sask. Human Rights Commission v. Gov't of Sask (1987), 8 C.H.R.R. D/4139.

Peters v. University Hospital Board, [1983] 5 W.W.R. 193 (Sask C.A.).

Re Ontario Human Rights Commission v. Simpson-Sears Ltd. (1985), 23 D.L.R. (4th) 321 (S.C.C.).

Winnipeg School Division No. 1 v. Craton (1985), [1985] 2 S.C.R. 150, [1985] 6 W.W.R. 166.

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

Jurisdiction: Saskatchewan

Disability Income Supports and Social Assistance:

Mosher, Janet E. "Welfare Reform and the Re-Making of the Model Citizen" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 119.

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.

Ontario Works Act, 1997, S.O. 1997, c. 25, Schedule A.

Jurisdiction: Ontario, North America

Doe, Tanis & Rajan, Doris with Abbott, Claire. *Re/Working Benefits: Continuation of Non-Cash Benefits Support for Single Mothers and Disabled Women* (Ottawa: Status of Women Canada, 2002).

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

Sabharwal, Alexander. "Persons with Disabilities Face Inequality under CPP" (2000) 17:1 ARCHtype 14-19.

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:

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:

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

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Jurisdiction: Canada

Doe, Tanis & Kimpson, Sally. "Enabling Income: CPP Disability Benefits and Women with Disabilities" (Ottawa: Status of Women Canada, 1999).

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

Beatty, Harry. "Ontario Disability Support Program: Policy and Implementation" (1999) 14 J. L. & Soc. Pol'y 1-68.

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 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:

Assured Income for the Severely Handicapped Act, R.S.A. 1980, c.A-48

Disability Benefits Program Act, R.S.B.C. 1996 (Supp.), c.97.

Family Benefits Act, R.S.O. 1990, c.F.2.

General Welfare Assistance Act, R.S.O.1990, c.G.6.

Ontario Disability Support Program Act, 1997, S.O. 1997, c.25, Sch.B.

Ontario Works Act, 1997, S.O. 1997, c.25, Sch.A.

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

Jurisdiction: Ontario, Alberta, British Columbia

Pearce, Gwyneth. "Under Siege: Canada's Public Pension System in 1995" (Fall 1995) 11 J.L. & Social Pol'y 19-40.

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:

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

Old Age Security Act, R.S.C. 1985, c. O-9.

Cases:

Elwood v. The Minister of Employment and Immigration (June 1994), C.E.B. & P.G.R. 8541.

Giampa v. The Minister of Employment and Immigration (1994), C.E.B. & P.G.R. 8557.

Leduc v. Minister of National Health and Welfare (1988), C.E.B. & P.G.R. 8546.

Various cases on disability pensions, pension credit splitting, the definition of spouse, and survivor's pensions.

Jurisdiction: Canada

Schwartz, Bryan. "A New Federal Role in Building the Social Safety Net for Disabled Persons" (1994) 22 Man. L.J. 395-425.

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:

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

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

Vocational Rehabilitation of disabled Persons Act, R.S.C. 1985, c. V-3.

Cases:

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

Winterhaven Stables Ltd. v. Canada (Attorney General) (1986), 29 D.L.R. (4th) 394 (Alta. Q.B.), *aff'd* (1988), 53 D.L.R. (4th) 413 (C.A.), leave to appeal to S.C.C. refused (1989).

Jurisdiction: Canada

Schulze, David. "The Industry of the Living Dead: A Critical Look at Disability Insurance" (Fall 1993) 9 J.L. & Social Pol'y 192-221.

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:

Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219.

Various cases about disability insurance.

Jurisdiction: Ontario, Canada

Beatty, Harry. "Comprehensive Disability Compensation in Ontario: Towards an Agenda" (1991) 7 J. L. & Soc. Pol'y 100-142.

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:

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

Family Benefits Act, R.S.O. 1980, c. 151.

Insurance Act, R.S.O. 1980, c. 218.

Workers' Compensation Act, R.S.O. 1980. c. 539.

Jurisdiction: Ontario, Canada

Ison, Terence G. "Rights to Employment under the Workers' Compensation Acts and Other Statutes" (1990) 28 Osgoode Hall L. J. 839.

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

Torjman, Sherri. *Income Insecurity: The disability income system in Canada* (York: G. Allan Roeher Institute, 1988).

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

Lowenberger, Lois, Wilkie, Cindy & Abner, Erika. "Welfare: Women, Poverty and the Charter" (1985) 1 *J.L. Soc. Pol.* 42.

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:

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.

Family Benefits Act- Need 1985 citation

General Welfare Assistance Act- Need 1985 citation

Jurisdiction: Ontario

Right to Adequate Social Assistance:

Jackman, Martha. "Reality Checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases" in Margot Young, Susan B. Boyd, Gwen Brodsky, & Shelagh Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 23.

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:

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.

Cases:

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada

Givner, Jessie. "Child Poverty and Social Assistance: *Gosselin v. Québec (Attorney General)*" (2005) 24 C.F.L.Q. 105.

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:

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.
Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Jurisdiction: Canada

Reynolds, Graham. "Investigating Alternative to Rights: The Hungarian Constitutional Court and the Protection of a Minimum Level of Assistance" (2005) 14 Dalhousie J. Legal Stud. 163.

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:

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.

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Hungarian Benefits Case, 43/1995 (VL30) AB Decision, [1997] 4 E. Eur. Case Rep. Const. L. 64 (Hungarian Constitutional Court).

Jurisdiction: Canada, Hungary

Matas, David. "Gosselin v. Québec (Attorney-General): is starvation illegal? The Enforceability of the right to an adequate standard of living." (May 2003) 4.1 Melbourne Journal of International Law 217.

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 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Cases:

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Jurisdiction: Canada, International

Elliot, Amber. "Social Assistance and the Charter: Is There a Right to Welfare in Canada?" (2001) 7 Appeal 74.

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.
Goldberg v. Kelly (1970), 397 U.S. 254.
Gosselin v. Procureur general du Québec, [1999] R.J.Q. 1033 (C.A.).
Irwin Toy v. Attorney General of Québec, [1989] 1 S.C.R. 927.
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.).
Rodriguez v. British Columbia (Attorney General) (1993), 158 N.R. 1 (S.C.C.).
Wilson v. British Columbia (Medical Services Commission) (1988), 53 D.L.R. (4th) 171.

Jurisdiction: Canada

Scassa, Teresa. "Social Welfare and Section 7 of the Charter: *Conrad v. Halifax (County of)*" (1994) 17 Dalhousie L. J. 187-205.

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:

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

Cases:

Bernard v. Dartmouth Housing Authority (1989), 88 N.S.R. (2d) 190, (1988), 53 D.L.R. (4th) 81 (N.S.A.D.)

Conrad v. Halifax (County of) (1993), 124 N.S.R. (2d) 251, 345 A.P.R. 251 (N.S.S.C.).

Irwin Toy Ltd. v. Québec (A.G.), [1989] 1 S.C.R. 927.

Reference Re Public Service Employees Relations Act (Alta.), [1987] 1 S.C.R. 313.

Re Webb and Ontario Housing Corporation (1979), 93 D.L.R. (3d) 187.

Jurisdiction: Nova Scotia, Canada

Hasson, Reuben. "What's Your Favourite Right?: The Charter and Income Maintenance Legislation" (Fall 1989) 5 J. L. & Social Pol'y 1-34.

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:

Canada Assistance Plan, R.S.C. 1970, C. C-1.

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

US Const.

Cases:

Alden v. Gaglardi, (1972), [1973] S.C.R. 177, 30 D.L.R. (3d) 760.
A.G. of Canada v. Bibi Alli (1988), 51 D.L.R. (4th) 555 (F.C.A.).
A.G. Of Canada v. Vincer, [1988] 1 F.C. 714 (F.C.A.).
Bliss v. A.G. of Canada (1978), [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417.
Bregman v. A.G. of Canada, (1986), 55 O.R. (2d) 596 (Ont. H.C.).
Alden v. Gaglardi, (1972), [1973] S.C.R. 177, 30 D.L.R. (3d) 760.
Finlay v. Minister of Finance (1989), 57 D.L.R. (4th) 211.
Phillips v. Social Assistance Board (1986), 73 N.S.R. 415 (N.S.T.D.).
Re Clifton v. Director of Income Maintenance (1985), 53 O.R. (2d) 33 (Ont. H.C.).
Re Fawcett (1973), 1 O.R. (2d) 772 (Ont. C.A.).
Re LeBlanc v. City of Transcona (1973), [1974] S.C.R. 1261, 38 D.L.R. (3d) 549.
Re Shewchuk v. Ricard (1986), 28 D.L.R. (4th) 429 (B.C.C.A.).
Re Tetreault-Gadoury and Canada Employment and Immigration (1988), 53 D.L.R. (4th) 384 (F.C.A.).
R. v. Hebb, (1989), 89 N.S.R. (2d) 137 (N.S.S.C.).
R. v. King (1988), 50 D.L.R. (4th) 564 (Ont. C.A.).
Schacter v. R (1988), 52 D.L.R. (4th) 525 (Fed. Ct. T.D.).
Silano v. The Queen in Right of British Columbia (1987), 42 D.L.R. (4th) 407 (B.C.S.C.).
Symes v. R (31 May 1989), Case T-1989-152 [unreported].
Goldberg v. Kelly 397 U.S. 254 (1970).
Matthews v. Eldridge 424 U.S. 319 (1976).
Shapiro v. Thompson 394 U.S. 618 (1969).
Re Kras 409 U.S. 434 (1973).
Wyman v. James 400 U.S. 309 (1971).
Various Canadian and American cases where courts deal with "social problems".

Jurisdiction: Canada, United States of America

Morrison, Ian. "Security of the Person and the Person in Need: Section Seven of the Charter and the Right to Welfare" (1988) 4 J. L. & Soc. Pol'y 1.

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:

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:

Cholak v. Wostock, [1944] 1 W.W.R. 139 (Alta Q.B.), affd. [1944] 3 W.W.R. 256 (C.A.).

Goldberg v. Kelly, 397 U.S. 254 (1969).

Minister of Finance of Canada v. Finlay (1986), 33 D.L.R. (4th) 321 (S.C.C.).

R. v. Morgentaler, [1988] 1 S.C.R. 30.

Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177.

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

Jurisdiction: Canada

Johnstone, Ian. "Section 7 of the Charter and Constitutionally Protected Welfare" (1988) 46 U.T. Fac. L. Rev. 1-47.

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:

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.

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

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Cases:

Arnett v. Kennedy (1974), 416 U.S. 134.

Board of Regents v. Roth (1972), 408 U.S. 564

Canada (Eve Studio) v. Winnipeg, [1984] W.W.R. 507 (Man. Q.B.).

Cleveland Board of Education v. Loudermill (1985), 105 S.Ct.1487.

Goldberg v. Kelly (1970), 397 U.S. 254.

Jones v. The Queen , [1986] 2 S.C.R. 284.

Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441.

R v. Fisherman's Wharf (1982) 135 D.L.R. (3d) 307 (N.B.Q.B.).

R v. Neale (1985), 17 C.R.R.282 (Alta. Q.B.).

Re Latham and Solicitor General of Canada (1984), 9 D.L.R. (4th) 393.

Re Mia and Medical Services Commission of British Columbia (1985), 17 C.R.R. 233 (B.C.S.C.).

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

Re Singh and the Minister of Employment and Immigration (1985), 17 D.L.R. (4th) 422 (S.C.C).
Reference re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.
Reference Re Compulsory Arbitration (1987), 74 N.R. 99 (S.C.C.).
Wilson v. Medical Services Commission of British Columbia (1987), 9 B.C.L.R. (4th) 350 (B.C.S.C.).

Jurisdiction: Canada (with lessons from the United States)

Tax: Equity and Social Policy

Larre, Tamara. "Pity the Taxpayer: The Tax Exemptions for Personal Injury Damages as Disability Policy" (2007), 33 Queen's L.J. 217-247.

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.).

I.R.C. (1998).

Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1838

Cases:

Cirella v. M.N.R., [1978] C.T.C. 1 (F.C.T.D.), rev'g [1976] C.T.C. 2292 (T.R.B.)

Jurisdiction: Canada, United States of America.

Smart, Michael & Stabile, Mark. "Tax Support for the Disabled in Canada: Economic Principles and Options for Reform" (2006) 54 Can. Tax J. 407.

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, Raquel. "The Disability Tax Credit and Amputees: It's Time for a Reality Check" (2003) 2 J.L. & Equality 156.

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:

Bérubé v. Canada, [1999] 3 C.T.C. 2032 (T.C.C.).

Bouchard v. Canada, [2000] 2 C.T.C. 2529 (T.C.C.).

Hamilton v. M.N.R., [2002] 2 C.T.C. 152 (F.C.A.).

Johnston v. Canada, [1998] F.C.J. No. 169 (F.C.A.) at para. 10 (QL).

Keating v. Canada, [1995] 1 C.T.C. 2202 (T.C.C.).

Radage v. Canada, [1996] 3 C.T.C. 2510 (T.C.C.).

Wiberg v. Canada, [2000] 4 C.T.C. 2678 (T.C.C.).

Jurisdiction: Canada

Philipps, Lisa. "Disability, Poverty and the Income Tax: The Case for Refundable Credits" (Spring 2001) 16 J.L. & Soc. Pol'y 77.

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:

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

Jurisdiction: Canada

Duff, David G. "Disability and the Income Tax" (July 2000) 45 McGill L.J. 797-889.

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:

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

Jurisdiction: Canada

Young, Claire F.L. "(In)visible Inequalities: Women, Tax and Poverty" (1995) 27 Ottawa L. Rev. 99-127.

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:

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

Income Tax Act, R.S.C. 1985, c. I-5.

Ontario Human Rights Code, R.S.O. 1990, c. H-19.

Cases:

Symes v. Canada, [1993] 4 S.C.K. 695, 110 D.L.R. (4th) 470, [1994] 1 C.T.C. 40 (101).

Thibaudeau v. Canada (M.N.R.), [1995] 2 S.C.R. 627, [1995] S.C.J. No.42 (QL) (102).

Jurisdiction: Ontario, Canada

Schulze, David. "Obstacles to Equity: An Analysis of the Taxation of Disability Income in Canada and Proposals for Reform" (1994) 14 Windsor Y.B. Access Just. 135.

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:

Income Tax Act, S.C. 1970-71-72, c. 63 as am.

Jurisdiction: Canada

Disability and Employment:

Malhotra, Ravi. "Martha Nussbaum's Capabilities Approach and Equality Rights for People with Disabilities: Rethinking the *Granovsky* Decision" in J. Magnet and B. Adell, (eds.), *The Canadian Charter of Rights at Twenty Five* (Toronto: LexisNexis Butterworths, 2009), 61-89 AND (2009) 45 Sup. Ct. L. Rev. 61-89.

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:

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.

Cases:

Granovsky v. Canada (Minister of Employment and Immigration), [2003] S.C.J. No. 29, [2000] 1 S.C.R. 703.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Jurisdiction: Canada

Malhotra, Ravi. "The Implications of the Social Model of Disablement for the Legal Regulation of the Modern Workplace in Canada and the United States" (2009) 33 Man. L.J. 1-40.

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:

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).
Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
Human Rights Code, R.S.B.C. 1996, c. 210.
Human Rights Code, R.S.O. 1990, c. H-19.
Wartime Labour Relations Regulations, P.C. 1003, February 17, 1944

Cases:

Adkins v. Childrens Hospital 261 U.S. 525 (1923).
Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999).
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.
Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.
Bardal v. The Globe and Mail (1960), 24 D.L.R. (2d) 140, [1960] O.W.N. 253 (H.C.J.).
Board of Trustees of Univ. of Alabama v. Garrett, (99-1240) 531 U.S. 356 (2001).
Borkowski v. Valley Central School District, 63 F.3d. 131 (2d. Cir. 1995).
British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3.
Carter v. Exxon Co. USA, 177 F3d 197 (3d Cir. 1999).
City of Cleburne v. Cleburne Living Centre, Inc., 473 U.S. 432 (1985).
Eaton v. Brant County Board of Education [1997] 1 S.C.R. 241, [1996] S.C.J. No. 98.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Flemming v. Nestor 363 U.S. 603 (1960).
Granovsky v. Canada (Minister of Employment and Immigration), [2003] S.C.J. No. 29, [2000] 1 S.C.R. 703.
Grutter v. Bollinger, 539 U.S. 306 (2003).
Holmes v. Canada (Attorney General), [1997] F.C.J. No. 577, aff'd [1999] F.C.J. No. 598.
International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20.
Lloyd's Bank v. Bundy, [1975] 1 Q.B. 326.
Lochner v. New York (1905) 198 U.S. 45.
Machtiger v. H.O.J. Industries Ltd., [1992] 1 S.C.R. 986, (1992), 91 D.L.R. (4th) 491;.
Newfoundland (Treasury Board) v. NAPE, [2004] 3 S.C.R. 381.
Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).
N.L.R.B. v. Jones and Laughlin Steel Corp. 301 U.S. 1 (1937).
Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.
Puiia v. Occupational Training Centre (1983), 43 Nfld. & P.E.I.R. 283, 127 A.P.R. 283 (P.E.I.C.A.), rev'g (1983) 43 Nfld. & P.E.I.R. 291, 127 A.P.R. 291 (P.E.I.S.C.).
Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).
Techform Products Ltd. v. Wolda [2000] O.J. No. 5676, 5 C.P.R. (4th) 25 (S.C.J.), supplementary reasons [2000] O.J. No. 5677 (S.C.J.), rev'd on other grounds [2001] O.J. No. 3822, 56 O.R. (3d) 1 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 603.

Toyota Motor Mfg., Kentucky Inc. v. Williams, 534 U.S. 184 (2002).
United Mineworkers of America v. Coronado Coal Co., 259 U.S. 344 (1922).
Vande Zande v. State of Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995).
Wallace v. Toronto-Dominion Bank, [1983] O.J. No. 2969, 41 O.R. (2d) 161 (C.A.).
Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, (1997) 152 D.L.R. (4th) 1.
Waxman v. Waxman, [2002] O.J. No. 2528, (2002) 25 B.L.R. (3d) 1 (Sup. Ct.), rev'd on other grounds [2004] O.J. No. 1765, (2004) 2 B.L.R. (4th) 1 (C.A.)

Jurisdiction: Canada, the United States

Malhotra, Ravi. "A Tale of Marginalization: Comparing Workers with Disabilities in Canada and the United States" (2009) 22 J.L. & Soc. Pol'y 79-113.

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:

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).
Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Cases:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489
Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999).
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.
Board of Trustees of Univ. of Alabama v. Garrett, (99-1240) 531 U.S. 356 (2001)
British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3
Honda Canada Inc. v. Keays, [2008] 2 S.C.R. 362.
Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), [2008] 2 S.C.R. 561.
Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).
Nova Scotia (Workers' Compensation Board) v. Martin and Laseur, [2003] 2 S.C.R. 504.
Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

Jurisdiction: Canada, the United States

Malhotra, Ravi. "The Law and Economics Tradition and Workers with Disabilities" (2008) 39.2 Ottawa L.Rev. 249

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:

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

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

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

Human Rights Code, R.S.B.C. 1996, c. 210.

Human Rights Code, R.S.O. 1990, c. H-19.

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

The Civil Rights Act of 1991, 42 U.S.C. s. 1981 et. seq. (2006)

Cases:

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

Council of Canadians with Disabilities v. Via Rail Canada Inc. 2007 SCC 15, [2007] 1 S.C.R. 650, 279 D.L.R. (4th) 1.

Mohammad v. Mariposa Stores Ltd. (1990), 14 C.H.R.R. D/215 (British Columbia Council of Human Rights).

R. v. Hutchinson, 2005 BCSC 1421, 261 D.L.R. (4th) 171, 49 B.C.L.R. (4th) 331.

U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

Jurisdiction: Canada, United States

Malhotra, Ravi. "Evaluating the Relevance of Critical Schools of Law and Economics for the Equality Rights of Workers with Disabilities in Canada and the United States" (2008) 45 Alta. L. Rev. 935

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:

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).
Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
Norris-LaGuardia Act, 29 U.S.C. ss. 101-115 (1932)
Occupational Safety and Health Act, 29 U.S.C. ss. 651-78 (1970)
Wagner Act, 29 U.S.C. ss. 151-66 (1935).

Cases:

British Columbia v. Hutchinson, 2005 BCSC 1421, 261 D.L.R. (4th) 171.
Brown v. Board of Education 347 U.S. 483 (1954).
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),
Honda Canada Inc. v. Keays, [2008] 2 S.C.R. 362.
Memorial University of Newfoundland v. Matthews (1991), 15 C.H.R.R. D.399, aff'd (1994) 22 C.H.R.R. D.354 (Nfld. S.C.T.D).

Jurisdiction: Canada, United States

Employment Equity

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

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
Canadian Human Rights Act, R.S.C. 1985, c. H-6.
Disability Discrimination Act 1992, Act No. 135 of 1992 as amended. (Australia)
Disability Discrimination Act (U.K.), 1995, c. 50.
Disabled Persons Employment Act (1986), Austria.
Employment Equity Act, S.C. 1995, c. 44.
Gesetz zur Sicherung der Eingliederung Schwerbehinderter in Arbeit, Beruf und Gesellschaft (*Schwerbehindertengesetz - SchwbG*) In der Fassung der Bekanntmachung vom 26. August 1986 (BGBl I S. 1421, 1550), zuletzt geändert durch Art. 9 des Gesetzes vom 19. Dezember 1997 BGBl I S. 3158). (*Severely Disabled Persons Act*).
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, Patty. “Collective bargaining and disabled people” (Winter 1986) 4 Just Cause No. 3, 6-7.

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, Shari. "What is employment equity?" (Winter 1986) 4 Just Cause No. 3, 7-9.

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, Richard. "Employment equity: A challenge to Act" (Winter 1986) 4 Just Cause No. 3, 9-11.

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

"Recommendations and Reality (recommendations of the Parliamentary Committee on Equality Rights concerning employment equity)" (Winter 1986) 4 Just Cause No. 3, 23-27.

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.

Jurisdiction: Canada

Chabursky, Lubomyr. "The Employment Equity Act: An Examination of its Development and Direction" (1992) 24 Ottawa I. Rev. 305.

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Employment Equity Act, R.S.C. 1985 (2d Supp.), c. 23.

Civil Rights Act of 1964 (Pub.L. 88-352, 78 Stat. 241, July 2, 1964).

Cases:

Action Travail des Femmes v. Canadian National Ry Co., [1987] 1 S.C.R. 114, 40 D.L.R. (4th) 193 (40).

Action Travail des Femmes v. Canadian National Ry Co., [1985] 1 F.C. 96, 20 D.L.R. (4th) 668 (84).

Action Travail des Femmes v. Canadian National Ry Co. (1984), 5 C.H.R.R. D/2327 (83).

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 (29).

Athabasca Tribal Council v. Amoco Canada Petroleum Co. Ltd, [1981] 1 S.C.R. 699, 6 W.W.R. 342 (68).

Central Alberta Dairy Pool v. Alberta (Human Rights Comm'n), [1990] 2 S.C.R. 489, 72 D.L.R. (4th) 417 (34).

Central Okanagan School Dist. No. 23 v. Renaud (24 September 1992), No. 21682 (SCC) (91).

Colfer v. Ottawa Bd of Comm'rs of Police and Police Chief Seguin, (12 January 1979) (Ont. Human Rights Bd of Inq.) (21).

Griggs v. Duke Power Co., 401 U.S. 424 (1971) (17).

Janzen v. Platy Enterprises Ltd, [1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352 (30).

Johnson v. Transp. Agency, Santa Clara Cty, Cal., 480 U.S.616 (1987) (137).

McKinney v. University of Guelph, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 (35).

Ontario Human Rights Comm'n v. Simpson Sears, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 (24).

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (69).

Singh v. Security and Investigation Services Ltd., (31 May 1977) (Ont. Human Rights Bd of Inq.) (19).

Jurisdiction: Canada, United States of America

The Duty to Accommodate

Malhotra, Ravi. "The Legal Genealogy of the Duty to Accommodate American and Canadian Workers with Disabilities: A Comparative Perspective." (2007) 23 Washington University Journal of Law & Policy. 1-32.

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:

Americans with Disabilities Act, 42 U.S.C. § 12101 (2000).

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

U.S. CONST. amend. I.

Workplace Religious Freedom Act, S. 677, 109th Cong. (2005).

Cases:

Alta. Human Rights Comm'n v. Cent. Alta. Dairy Pool, [1990] 2 S.C.R. 489.

Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999).

Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

B.C. Pub. Serv. Employee Relations Comm'n v. B.C.G.S.E.U. (Meiorin), [1999] 3 S.C.R. 3

Bhinder v. Canadian Nat'l Ry. Co., [1985] 2 S.C.R. 561.

B.C. Superintendent of Motor Vehicles v. B.C. Council for Human Rights, [1999] 3 S.C.R. 868.

Cent. Okanagan Sch. Dist. No. 23 v. Renaud, [1992] 2 S.C.R. 970.

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

Eckles v. Consol. Rail Corp., 94 F.3d 1041 (7th Cir. 1996).

Estate of Thornton v. Caldor, 472 U.S. 703 (1985).

Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).

Ont. Human Rights Comm'n v. Simpsons-Sears, Ltd. (O'Malley), [1985] 2 S.C.R. 536.

Que. Comm'n of the Rights of the Person & the Rights of Youth v. Montreal, [2000] 1 S.C.R. 665

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).
United States v. Bd. of Educ. for the Sch. Dist. of Phila., 911 F.2d 882 (3d Cir. 1990).

Jurisdiction: Canada, United States of America.

Malhotra, Ravi A. "Justice as Fairness in Accommodating Workers with Disabilities and Critical Theory: The Limitations of a Rawlsian Framework for Empowering People with Disabilities in Canada" in Pothier, Dianne & Devlin, Richard eds., *Critical Disability Theory: essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 70-86.

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:

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

Cases:

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

Jurisdiction: Canada

Atkins, C.G.K. "A Cripple at a Rich Man's Gate: A Comparison of Disability, Employment and Anti-discrimination Law in the United States and Canada" (2006) 21 Can. J.L. & Soc. 87.

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).
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.
Declaration of the Rights of Disabled Persons, GA Res. 3447 (XXX), 30 U.N. GAOR Supp. No. 34), U.N. Doc. A/10034 (1975).
Employment Equity Act, S.C. 1996, c. 23.
Rehabilitation Act of 1973, Pub. L. No. 93-112, §504, 87 Stat. 394.
Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Cases:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489.
Board of Trustees of Univ. of Alabama v. Garrett, (99-1240) 531 U.S. 356 (2001).
British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3.
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.
Rodriguez v. Loctite Puerto Rico, Inc., 967 F. Supp. 653 (DPR 1997).
Sutton v. United Air Lines Inc., 527 U.S. 471 (1999).
US Airways, Inc. v. Barnett, 122 S. Ct (2002).

Jurisdiction: Canada, United States of America

Bowland, Adelyn L. *Disability and Human Rights in the Workplace: A CLV Special Report* (Toronto: Thomson Canada Limited, 2004).

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, Ravi A. "The Duty to Accommodate Unionized Workers with Disabilities in Canada and the United States: A Counter-Hegemonic Approach" (2003) 2 J.L. & Equality 92.

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:

Americans with Disabilities Act (ADA), U.S. Code, Vol. 42, sec. 12101-213.

Cases:

Aka v. Washington Hospital Center 116 F.3d 876 (D.C. Cir. 1997).

Airways, Inc. v. Barnett 122 S. Ct. 1516 (2002).

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

Canadian Union of Postal Workers v. Canada Post (November 9, 1995) (Ponak). This case is unreported.

Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489.

Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970.

Eckles v. Consolidated Rail Corp. 94 F.3d 1041 (7th Cir. 1996).

Re Bayer Rubber Inc. and Communications, Energy and Paperworkers Union, Local 914 (1997), 65 L.A.C. (4th) 261 at 282 (Watters).

Re Colonial Cookies and United Food and Commercial Workers, Local 617P (1999), 82 L.A.C. (4th) 101.

Re Metropolitan Toronto (Municipality) and Canadian Union of Public Employees, Local 79, (1995), 52 L.A.C. (4th) 206 (Springate).

Re National Steel Car Ltd. and United Steelworkers of America, Local 7135, (1997), 64 L.A.C. (4th) 242 (Rose).

Re Ontario Human Rights Commission v. Simpson-Sears Ltd. (1985), 23 D.L.R. (4th) 321 (S.C.C.).

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].

Re Royal Oak Mines Inc. and Canadian Auto Workers, Local 2304 (1997), 63 L.A.C. (4th) 346 (Bird).

Re Union Carbide Canada Ltd. and Energy & Chemical Workers' Union, Local 593, (1991), 21 L.A.C. (4th) 261 (Hinnegan).

Jurisdiction: Canada, United States of America.

Grant, Isabel & Mosoff, Judith. "Disability and Performance Standards Under the Ontario Human Rights Code" (2002) 1 J. L. & Equality 205.

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:

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

Human Rights Code, 1981, S.O. 1981, c. 53.

Cases:

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

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868.

Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489.

Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970.

Eaton v. Brant Board of Education, [1997] 1 S.C.R. 241.

Eldridge et al. v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Entrop v. Imperial Oil Ltd., (2000), 189 D.L.R. (4th) 14

Granovsky v. Canada (Minister of Employment and Immigration), 1 S.C.R. 703.

Jeppesen v. Ancaster, [2001] O.H.R.B.I.D. No. 1 (QL).

Law v. Canada, [1999] 1 S.C.R. 497.

Metsala v. Falconbridge, [2001] O.H.R.B.I.D. No. 3 (QL).

Re Mount Sinai Hospital and Ontario Nurses' Association (1996), 54 L.A.C. (4th) 261 (Brown).

Re Ontario Human Rights Commission v. Simpson-Sears Ltd. (1985), 23 D.L.R. (4th) 321 (S.C.C.).

Singleton v. Chrysler, [2001] B.C.H.R.T. No.10 (QL).

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

Quesnel v. London Educational Health Centre (1997), 28 C.H.R.R. D/474 (Ont. Bd. of Inquiry).

Jurisdiction: Canada

Keene, Judith. "The Ontario Human Rights Code and the Right to Accommodation in the Workplace for Employees with Disabilities" (2001) 16 J.L. & Social Pol'y 185.

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:

Human Rights Code, R.S.O. 1990, c. H.19, as amended by S.O. 1994, c.27, s. 65, eff. 17 April 1995.

Cases:

British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3.
Entrop v. Imperial Oil Ltd. (2000), 50 O.R. (3d) 18 (C.A.).

Jurisdiction: Ontario

Johnson, William. "Disability and the Duty to Accommodate - A Union Perspective" (2001-2002) 1 Lab. Arb. Y.B. 135-148.

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:

British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U. (Meiorin) (1999), 176 D.L.R. (4th) 1 (S.C.C.).

Jurisdiction: Canada

Lynk, Michael. "Disability and the Duty to Accommodate: An Arbitrator's Perspective" (2001-2002) 1 Lab. Arb. Y.B. 51-122.

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, Catherine. "Disability and the Duty to Accommodate: A Management Perspective" (2001-2002) 1 Lab. Arb. Y.B. 123-134.

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:

British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U. (Meiorin) (1999), 176 D.L.R. (4th) 1 (S.C.C.).

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) (Grismer) (1999), 181 D.L.R. (4th) 385 (S.C.C.).

Various accommodation related decisions.

Jurisdiction: Canada

Lemay, Guy, Yann Bernard & Maheu, Catherine. "The Supreme Court examines the notion of "handicap" under the Québec Charter of Human Rights and Freedoms" (Aug. 2000) 10 E.L.L.R. 45-48.

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:

Charter of Human Rights and Freedoms, R.S.Q. 1997, c. C-12.

Cases:

Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (Ville) (2000), 185 D.L.R. (4th) 385.

Québec (Commission des droits de la personne) v. Broisbriand (Ville) (1995), 25 C.H.R.R. D/412.

Québec (Commission des droits de la personne) et Hamon v. Montréal (Communauté urbaine) (1996), 26 C.H.R.R. D/466.

Jurisdiction: Québec

Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, 2000).

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:

Ontario Human Rights Code, R.S.O. 1990, c. H-19, as amended.

United Nations, *Declaration of the Rights of Disabled Persons*, proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975.

Cases:

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)*, 2000 SCC 27 (3 May 2000), online: Supreme Court of Canada <http://www.lexum.umontreal.ca/cscscc/en/index.html>.

Jurisdiction: Ontario

Lynk, Michael. "Accommodating Disabilities in the Canadian Workplace" (1999) 7 Can. Lab. & Emp. L.J. 183-247.

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, Nancy A. "Disability and the Duty to Accommodate: A Management Viewpoint" (1998) Lab. Arb. Y.B. 105-123.

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:

Human Rights Code, R.S.O. 1990, c. H.19.

Cases:

Numerous disability and accommodation arbitration cases.

Jurisdiction: Ontario, Canada

Eisenbraun, Garrett A. "Employer Response to Ill, Injured or Intoxicated Employees: Duty to Accommodate" (1998) 23:2 L. Now 14.

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

injury. 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, Gary. "Disability and the Duty to Accommodate: A Union Viewpoint" (1998) Lab. Arb. Y.B. 143-154.

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:

Ontario Human Rights Code, R.S.O. 1990, c. H-19, as amended.

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

Lynk, Michael. "A Hardy Transplant: The Duty to Accommodate and Disability Rights in Canadian Labour Law" (1998) 49 Labor Law Journal 962.

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:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489.
Calgary District Hospital Group (1995), 41 L.A.C. (4th) 319 (Ponak).
Central Okanagan School District No. 23 v. Renaud (1992), 95 D.L.R. (4th) 577.
Cie minière Québec Cartier v. Québec (1995), 125 D.L.R. (4th) 577.
Edgell v. Board of School Trustees, District No. 11 (1996), 97 C.L.L.C. 230-009 (B.C.C.H.R.).
Holmes v. Attorney-General of Canada (1997), C.L.L.C. 230-022.
K.H. v. CEP, Local 1-S and Sasktel (1997), 98 C.L.L.C. 220-020.
Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.
Re Alcan Smelters and Chemicals Ltd. (1996), 55 L.A.C. (4th) 261 (Hope).
Re Bayer Rubber Inc. (1997), 65 L.A.C. (4th) 261 (Watters).
Re Calgary Herald (1995), 52 L.A.C. (4th) 393 (Tettensor).
Re Canada Safeway Ltd. (1992), 26 L.A.C. (4th) 409 (Wakeling), *aff'd* 10 Alta. L.R. (3d) 51 (S.C.).
Re City of Oshawa (1996), 56 L.A.C. (4th) 335 (Brandt).
Re Greater Niagara General Hospital (1995), 50 L.A.C. (4th) 34 (H.D. Brown).
Re GSW Heating Products Ltd. (1996), 56 L.A.C. (4th) 249 (Barrett).
Re Interlink Freight Services (1996), 55 L.A.C. (4th) 289 (M. Picher).
Re Ministry of Health and OPSEU (Pazuk), (1994) (Need Citation)
Re Mount Sinai Hospital (1996), 54 L.A.C. (4th) 261.
Re Mount Sinai Hospital (1997), 66 L.A.C. (4th) 221 (Emrich).
Re National Steel Car Ltd. (1997), 64 L.A.C. (4th) 242 (Rose).
Re Riverdale Hospital (1993), 39 L.A.C. (4th) 63 (Stewart).
Re T.T.C. Bottling Ltd. (1993), 32 L.A.C. (4th) 73 (Christie).
Re Uniroyal Goodrich Canada Inc. (1996), 60 L.A.C. (4th) 260 (Solomatenko).
Re West Park Hospital (1996), 55 L.A.C. (4th) 78 (Emrich).
Re York County Hospital (1992) 26 L.A.C. (4th) 384 (Watters).
Toronto Star Ltd. v. CEP and Backhouse (1997) 97 C.L.L.C. 230-014.

Jurisdiction: Canada

Marvy, Leonard. "Disability and the Duty to Accommodate: A Management Viewpoint" (1998) Lab. Arb. Y.B. 125-141.

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:

Human Rights Code, R.S.O. 1990, c. H-19.

Cases:

Central Okanagan School District No. 23 v. Renaud (1992), 95 D.L.R. (4th) 577 (S.C.C.).

Various duty to accommodate and disability arbitration decisions.

Jurisdiction: Ontario, Canada

Murdock, Rebecca. "Disability and the Duty to Accommodate: A Union Viewpoint" (1998) Lab. Arb. Y.B. 155-168.

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:

Human Rights Code, R.S.O. 1990, c. H-19, as amended.

Cases:

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

Jurisdiction: Ontario, Canada

Swinton, Katherine. "Disability and the Duty to Accommodate: An Academic Perspective" (1998) Lab. Arb. Y.B. 93-103.

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 absent 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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Ontario Human Rights Code, R.S.O. 1990, c. H-19, as amended.

Cases:

Various accommodation related decisions.

Jurisdiction: Ontario, Canada

Carter, Donald D. "The Duty to Accommodate: Its Growing Impact on the Grievance Arbitration Process" (1997) 52 Industrial Relations 185-207.

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:

Better Beef (1995), 42 L.A.C. (4th) 244 (Welling).

Boise Cascade Canada (1995), 41 L.A.C. (4th) 291 (Palmer).

Calgary District Hospital Group (1995), 41 L.A.C. (4th) 319 (Ponak).

Canada Post (Milligan) (1994), 38 L.A.C. (4th) 1 (M. Picher).

Central Okanagan School District No. 23 v. Renaud (1992), 95 D.L.R. (4th) 577.

Greater Niagara General Hospital (1995), 47 L.A.C. (4th) 366 (Brant).

Hamilton Street Railway (1995), 41 L.A.C. (4th) 1 (R. Levinson).

McLeod v. Egan (1974), 46 D.L.R. (3d) 150 (S.C.C.).

Metropolitan Toronto Reference Library Board (1995), 46 L.A.C. (4th) 155 (Burkett).

Municipality of Metropolitan Toronto (1994), 35 L.A.C. (4th) 357 (Fisher).

Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.

Panabrasive (1994), 38 L.A.C. (4th) 434 (Clement).

Riverdale Hospital (1995), 41 L.A.C. (4th) 24 (Knopf).

Versa Services (1994), 39 L.A.C. (4th) 196 (R. Brown).

Jurisdiction: Canada

Griffin, Anthony D. "The Duty to Accommodate at Arbitration: A Human Rights Perspective" (1996-97) Lab. Arb. Y.B. 291-301.

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:

Ontario Human Rights Code, R.S.O. 1990, c. H-19, as amended.

Ontario Labour Relations Act, S.O. 1995, c. 1.

Cases:

Various arbitration decisions involving the duty to accommodate.

Jurisdiction: Ontario, Canada

Kort, Kees W. "The Duty to Accommodate at Arbitration: A Management Viewpoint" (1996-97) Lab. Arb. Y.B. 257-275.

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:

Human Rights Code, R.S.O. 1990, c. H. 19.

Cases:

Various Supreme Court, Human Rights Tribunal and arbitration decisions.

Jurisdiction: Ontario, Canada

McIntyre, Elizabeth. "The Duty to Accommodate at Arbitration: A Union Viewpoint" (1996-97) Lab. Arb. Y.B. 277-290.

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 for Unions 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:

Renaud v. Central Okanagan School District No. 23 (1992), 95 D.L.R. (4th) 577 (S.C.C.).

York County Hospital (1992) 26 L.A.C. (4th) 384 (Watters).

Jurisdiction: Canada

Picher, Michel G. "The Duty to Accommodate at Arbitration: An Arbitrator's Perspective" (1996-97) Lab. Arb. Y.B. 211-256.

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:

Americans with Disabilities Act 42 U.S.C.A. ss. 12101-12213 (West Supp. 1991).

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

Charter of Human Rights and Freedoms, R.S.Q. 1997, c. C-12.

Civil Rights Act 42 U.S.C. s. 2000e-2(A)1.

Ontario Human Rights Code, R.S.O. 1990, c. H-19, as amended.

Ontario Labour Relations Act, R.S.O. 1990, c. L. 2.

Rehabilitation Act 29 U.S.C. s. 794.

Cases:

Central Alberta Dairy Pool v. Alberta (Human Rights Commission) (1990), 72 D.L.R. (4th) 417 (S.C.C.).

Chambly (Commission scolaire régionale) v. Bergevin (1994), 115 D.L.R. (4th) 609 (S.C.C.).

Gilbert v. Frank, 949 F.2d 637 (2d Cir. 1991).

Transworld Airlines Inc v. Hardison 432 U.S. 63 (1977).

Weber v. Ontario Hydro (1994), 125 D.L.R. (4th) 583 (S.C.C.).

Jurisdiction: Canada, United States of America

Day, Shelagh & Brodsky, Gwen. "The Duty to Accommodate: Who Will Benefit?" (Sept. 1996) 75 Can. Bar Rev. 433-473.

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:

Alberta (Human Rights Commission) v. Central Alberta Dairy Pool, [1990] 2 S.C.R. 489.

Bhinder v. CN, [1985] 2 S.C.R. 561.

Ontario Human Rights Commission v. Simpsons-Sears, [1985] 2 S.C.R. 536.

Various BFOQ/R and duty to accommodate cases.

Jurisdiction: Canada

Jordan, Donald J. "New Vistas on the Union's Role Regarding the Duty to Accommodate" (Oct. 1996) 6 E.L.L.R. 75-77.

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:

Human Rights Code, R.S.N. 1990, c. H14.

Cases:

Corner Brook (City) v. Canadian Union of Public Employees, Local 768 et al. (1996), 138 Nfld. & P.E.I.R. 271 (Nfld. C.A.).

Jurisdiction: Newfoundland

LeFrançois, Michel. "The Scope of the Duty to Accommodate in the Large Employment Setting" (1996) 5 Can. Lab. & Emp. L.J. 1-43.

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:

Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561, 9 C.C.E.L. 135.

Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489, 33 C.C.E.L. 1.

Chambly (Commission scolaire régionale) c. Bergevin, [1994] 2 S.C.R. 525.

O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536.

Ontario (Human Rights Commission) v. Etobicoke (Borough), [1982] 1 S.C.R. 202.

Renaud v. Central Okanagan School District No. 23, [1992] 2 S.C.R. 970.

Various lower courts, tribunal and arbitration board decisions.

Jurisdiction: Canada

Gunderson, M., Hyatt D. & D. Law, "Reasonable Accommodation Requirements under Workers' Compensation in Ontario" (1995) 50 Canadian Journal of Industrial Relations/Relations Industrielles 2, 341.

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:

Human Rights Code, R.S.O. 1990, c. H.19.

Workers' Compensation Act, R.S.O. 1990, c. W. 11.

Jurisdiction: Ontario

Swinton, K. "Accommodating Equality in the Unionized Workplace" (1995) 33 Osgoode Hall L.J. 703-747.

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:

Employment Equity Act, S.O. 1993, c. 35, as rep. By S.O. 1995, c. 4, effective 14 December 1995.

Human Rights Code, R.S.O. 1990, c. H. 19.

Cases:

Action Travail des Femmes v. Canadian National Railway Co., [1987] 1 S.C.R. 1114.

Australian Iron & Steel Pty. Ltd. v. Banovic (1989), 89 A.L.R. 1 (H.C.).

Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489.

Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970.

Emrick Plastics v. Ontario (Human Rights Commission) (1992), 90 D.L.R. (4th) 476 (Ont. Div. Ct.).

O'Malley v. Simpson's-Sears Ltd., [1985] 2 S.C.R. 536.

Ontario (Human Rights Commission) v. Etobicoke (Borough of), [1982] 1 S.C.R. 202.

Re Bhinder and Canadian National Railway Co., [1985] 2 S.C.R. 561.

Jurisdiction: Ontario, Canada

Gadacz, René R. "Emancipatory Politics: Equality Rights and Reasonable Accommodation" in *Re-thinking Dis-ability: New Structures, New Relationships* (Edmonton: University of Alberta Press, 1994).

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:

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
Employment Equity Act, S.C. 1986, c. 31

Cases:

Bhinder v. Canadian National Railways, [1985] 2 S.C.R. 561.
Griggs v. Duke Power Company Ltd. 401 U.S. 424 1971.
Huck v. Canadian Odeon Theatres Ltd., [1981] 2 C.H.R.R. D/521.
O'Malley v. Simpson-Sears, [1985] 2 S.C.R. 536.
Ontario Human Rights Commission v. Borough of Etobicoke, [1982] 1 S.C.R. 202.
R. v. Big M Drug Mart, [1985] 1 S.C.R. 295.
Tymchyshyn v. Canadian Pacific Ltd. (Canadian Human Rights Commission Annual Report 1992: 86).

Jurisdiction: Canada

Blythe, Stanley J. "Disabilities and the Canadian Forces medical system" (Dec. 1994) 33 Alta. L. Rev. 1-57.

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Cases:

Alberta Human Rights Commission v. Central Alberta Dairy Pool, [1990] 2 S.C.R. 489.

Husband v. Canadian Armed Forces (1992), 15 C.H.R.R. D/197.

Levac v. Canadian Armed Forces (1992), 94 D.L.R. (4th) 266 (F.C.A.).

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

Various BFOR, assumption of risk, and accommodation related decisions.

Various "universality of service" cases.

Jurisdiction: Canada

Taylor, Catherine. "Human Rights Legislation and the Disabled" (Feb. 1993) 2 Health L. Rev. No. 1, 11-16.

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:

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

Individual Rights Protection Act, R.S.A. 1985, c. I-2.

Cases:

Alberta Human Rights Commission v. Central Alberta Dairy Pool, [1990] 2 S.C.R. 489.

Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561, 9 C.C.E.L. 135.

E.(S.T.) v. Bertelsen (1989), 10 C.H.R.R. D/6294 (Board of Inquiry- W.D. McFertige).

Robert Gillingham v. Westminster Guard & Patrol Ltd. and Naguar Meeraiya (1991), 13 C.H.R.R. D/495 (B.C. Human Rights Council, Helen Hughs).

Clarence Levac and Canadian Human Rights Commission v. Canadian Armed Forces (1992), 15 C.H.R.R. D/17 (Canadian Human Rights Tribunal).

O'Malley v. Simpson-Sears Ltd. (1986), 7 C.H.R.R. D/3102 (S.C.C.).

Ontario (Human Rights Commission) v. Etobicoke (Borough of), [1982] 1 S.C.R. 202; (1982), 3 C.H.R.R. D/781.

James Robinson and Canadian Human Rights Commission v. Canadian Armed Forces (1992), 15 C.H.R.R. D/95 (Canadian Human Rights Tribunal).

Jurisdiction: Alberta, Canada

National Association of Women and the Law. *Submission to the Legislative Committee on Bill 79 An Act to Provide for Employment Equity for Aboriginal People, People with Disabilities, Members of Racial Minorities and Women* (Ottawa: National Association of Women and the Law, 1993).

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:

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
Human Rights Code, R.S.O. 1990, c. H.19.

Jurisdiction: Ontario

Turtle, Paula. "The Right to Dismiss for Innocent Absenteeism: The Employee's Perspective" (1993) Lab. Arbit. Y.B. 237.

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:

Human Rights Code, R.S.O. 1990, c. H.19.

Cases:

Glengarry Industries/Chromalox Components (1989), 3 L.A.C. (4th) 326.
Ouimette v. Lily Cups Ltd. et al. (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.).
Cameron v. Nel-Gor Castle Nursing Home and Nelson, (1984), 5 C.H.R.R. D/2170 (Ont. Bd. Inq.).

Black v. Gaines Pet Foods and Gerber (unreported, April 28, 1992) (Ont Bd. Inq.).
Barber Ellis of Canada Ltd. (1968), 19 L.A.C. 163.
Regional Municipality of Halton (1991), 18 L.A.C. (4th) 428.
Queensway-Carleton Hospital (1990), 17 L.A.C. (4th) 23.
Gohm v. Domtar Inc. and O.P.E.I.U., Loc. 267, (1990), 12 C.H.R.R. D/161 (Ont. Bd. of Inq.), upheld (1992), 89 D.L.R. (4th) 305 (Ont. Div. Ct.).

Jurisdiction: Ontario

McKenna, Ian B. "A Proposal for Legislative Intervention in Canadian Human Rights Law" (1992) 21:2 Man. L.J. 325-339.

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).
Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489.
Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561.
Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.
Ontario Human Rights Commission et al. v. Borough of Etobicoke, [1982] 1 S.C.R. 202.
Ryan v. Chief of Police, Town of North Sydney (December 1975) [Unreported] (Nova Scotia Human Rights Commission Board of Inquiry).
Singh v. Security Systems Ltd., (31 May 1977) [Unreported] (Ontario Board of Inquiry).

Jurisdiction: Canada

Winkler, Warren K. & Thorup, Peter J. "The Duty of Accommodation and its Implications for the Employer" (1992) 1 Can. Lab. L.J. 209 – 237.

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 Code, R.S.O. 1990, c. H.19.

Human Rights Code, S.M. 1987-88 c.45.

Human Rights Act, R.S.Y. 1986, Supp., c. 11.

Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1.

Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

An Act to Secure the Handicapped in the Exercise of Their Rights, S.Q. 1978, c. 7.

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

Individual's Rights Protection Act, R.S.A. 1980, c. I-2.

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Cases:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489.

Ball Packaging Products Canada Inc. (1990), 12 L.A.C. (4th) 145 (Davis).

Belliveau v. Steel Co. of Canada (1988), 9 C.H.R.R. D/5250 (Cumming).

Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561.

Chrysler Canada (1986), 23 L.A.C. (3d) 366 (Kennedy).

Ede and Canadian Human Rights Commn. v. Canadian Armed Forces (1990), 11 C.H.R.R. D/439 (Soberman).

Gohm v. Domtar Inc. and O.P.E.I.U., Loc. 267, (1990), 12 C.H.R.R. D/161 (Ont. Bd. of Inq.), upheld (1992), 89 D.L.R. (4th) 305 (Ont. Div. Ct.).

Heincke v. Emrick Plastics (1990), 91 C.L.L.C. (Hovius).

Hickling, Horbay and Legris v. Lanark, Leeds and Grenville County Roman Catholic Separate School Bd. (1986), 7 C.H.R.R. D/3546 (Adell).

Jansenn v. Ontario (Milk Marketing Board) (1990), 13 C.H.R.R. D/397 (Backhouse).

Lancia-Bravo Foods (1990), 11 L.A.C. (4th) 59 (Burkett).

Loveday v. Baker Manufacturing Ltd. (1984), 7 C.H.R.R. D/3145 (Man. Q.B.).

Marianhill (1990), 10 L.A.C. (4th) 201 (R.M. Brown).

Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.

Ontario Human Rights Commission et al. v. Borough of Etobicoke, [1982] 1 S.C.R. 202.

Pattison v. Fort Frances (Town) Commrs. of Police (1987), 8 C.H.R.R. D/3884 (Baum).
Peterborough Civic Hospital (1981), 3 L.A.C. (3d) 21 (Ellis).
Renaud v. School District No. 23 (Central Okanagan) (1987), 8 C.H.R.R. D/4255 (B.C.H.R.C.).
Re Osborne and Inco. Ltd. (1984), 15 D.L.R. (4th) 723 (Man. C.A.).
Roosma v. Ford Motor Co. of Canada (1987), 9 C.H.R.R. D/4743 (Mercer).
Rothmans, Benson and Hedges Inc. (1990), 10 L.A.C. (4th) 18 (R.M. Brown).
Sehdev v. Bayview Glen Junior Schools (1988), 9 C.H.R.R. D/4881 (Cumming).
Stelco Wire Products (1986), 25 L.A.C. (3d) 427 (Brent).
Varta Batteries (1987), 26 L.A.C. (3d) 397 (Samuels).
Wiens v. Inco Metals Co. (1988), 9 C.H.R.R. D/4795 (Cumming).

Jurisdiction: Canada

Ginsburg, Marilyn & Bickley, Catherine. "Accommodating the Disabled: Emerging Issues Under Human Rights Legislation." (1992) 1 Can Lab. L.J. 72.

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.
Human Rights Code, R.S.O. 1990, c. H.19, s. 17(1)(2).
Workers' Compensation Act, R.S.O. 1990, c. W.11, s. 54

Cases:

Barnard v. Fort Frances (Town) (1987), 9 C.H.R.R. D/4845 (Ont. Bd. Inq.).
Belliveau v. Steel Co. of Canada (1988), 9 C.H.R.R. D/5250 (Ont. Bd. Inq.).
Black v. Gaines Pet Foods (1992), 17 C.H.R.R. D/150 (Ont. Bd. Inq.)
Boucher v. Canada (Correctional Service) (1988), 9 C.H.R.R. D/4910.
Chamberlin v. 599273 Ontario Ltd. cob Stirling Honda (1989), 11 C.H.R.R. D/110 (Ont. Bd. Inq.).
Chrysler Canada Ltd. (1986), 23 L.A.C. (3d) 366.
Cyr v. Mine Mill Union, Loc. 598, [1983] O.L.R.B. Rep. 1303.
Engell v. Mount Sinai Hospital (1989), 11 C.H.R.R. D/68 (Ont. Bd. Inq.).
General Tire Canada Ltd. (1986), 26 L.A.C. (3d) 95.
Glengarry Industries/Chromalox Components (1989), 3 L.A.C. (4th) 326.
Heincke v. Brownell and Emrick Plastics (unreported, October 15, 1990) (Ont. Bd. Inq.).

North Bay Hospital Commn. (unreported, 1990).
Pattison v. Fort Frances (Town) Commrs. of Police (1987), 8 C.H.R.R. D/3884 (Ont. Bd. Inq.).
Rodger v. Canadian National Ry. (1985), 6 C.H.R.R. D/2899.
Villeneuve v. Bell Canada (1985), 6 C.H.R.R. D/2988.
Weins v. Inco Metals Co. (1988), 9 C.H.R.R. D/4795 (Ont. Bd. Inq.).

Jurisdiction: Ontario

Gunderson, Morley. "Implications of the Duty to Accommodate for Industrial Relations Practices" (1992) 1 Can Lab. L.J. 295.

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

Joachim, Kaye. "Accommodating the Disabled Employee" (April 1992) 2 E.L.L.R. 1-2.

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:

Human Rights Code, R.S.O. 1990, c. H. 19.

Cases:

Douglas Bonner v. Ministry of Health, Insurance Systems Branch, unreported, February 3, 1992.

Jurisdiction: Ontario

Lepofsky, David M. "The Duty to Accommodate: A Purposive Approach" (1992) 1 Can. Lab. L.J. 1.

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]
Human Rights Code, R.S.O. 1990, c. H.19.

Cases:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489.

Jurisdiction: Canada

Molloy, Anne M. "Disability and the Duty to Accommodate" (1992) 1 Can Lab. L.J. 23.

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:

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.
Human Rights Code, R.S.O. 1990, c. H.19, s. 17(1)(2).
Human Rights Act, R.S.Y. 1986, Supp., c. 11, ss. 6(h), 7(1),(2), 8(b).
Human Rights Code, S.M. 1987-88, c. 45, ss. 9(1), 12.
Ontario Human Rights Code, R.S.O. 1980, c. 340, s. 4(1)(g).

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:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R.143.

Bhinder v. Canadian National Railways Co., [1985] 2 S.C.R. 561.

Brossard (Town) v. Québec (Commission des droits de la personne), [1988] 2 S.C.R. 279.

Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.

Ontario Human Rights Commission et al. v. Borough of Etobicoke, [1982] 1 S.C.R. 202. *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297.

Jurisdiction: Canada

Morellato, Maria A. "Illness and Disability in the Workplace (Part 1)" (1992) 2 E.L.L.R. 7.

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:

Atlantic Provinces Special Education Authority v. Parks (unreported, No. 02489, January 15, 1992, Nova Scotia C.A.).

Carr v. Fama Holdings Ltd. (1989), 40 B.C.L.R. (2d) 125.

Farrell v. Pattison Industries (unreported, No. C892623, December 10, 1991, Vancouver (B.C. S.C.)).

Laws v. London Chronicle, [1959] 1 W.L.R. 698.

MacLellan v. HB Contracting Ltd. et al. (1990), 32 C.C.E.L. 103.

Marshall v. Harland & Wolff Ltd., [1972] 2 All ER 715.

The Dartmouth Ferry Commission v. Jane Marks et al. (1904), 34 S.C.R. 366.

Yeager v. RJ Hastings, [1985] 1 W.W.R. 219.

Jurisdiction: Canada

Morellato, Maria A. "Illness and Disability in the Workplace (Part 2)" (1992) 2 E.L.L.R. 18.

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:

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

Cases:

Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489.

Jefferson v. Baldwin (unreported, September 1976, Victoria, British Columbia Board of Inquiry).

Morgan v. Canada (Armed Forces) (1991), 13 C.H.R.R. D/42 (Canadian Human Rights Review Tribunal).

Nielson v. Sandman Four Ltd. (1986), 7 C.H.R.R. D/3329 (B.C. Council of Human Rights).

Niles v. CNR (1981), 14 C.H.R.R. D/1327 (Canadian Human Rights Tribunal).

Ontario Human Rights Commission et al. v. Borough of Etobicoke, [1982] 1 S.C.R. 202. *Ouimette v. Lily Cups Ltd. et al.* (1990), 12 C.H.R.R. D/19 (Ont. Board of Inquiry).

Ram v. McDonalds Restaurants of Canada (unreported, No.200, December 18, 1991, Victoria, British Columbia Council of Human Rights).

Re Canadian Pacific Ltd. and Canadian Human Rights Commission et al. (1987), 40 D.L.R. (4th) 586 (Fed. C.A.).

Trans World Airlines Inc. Hardison 432 US 63 [1977] (U.S. S.C.).

Jurisdiction: British Columbia

Morellato, Maria A. "Illness and Disability in the Workplace (Part 3)" (1992) 2 E.L.L.R. 25.

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:

Canadian Human Rights Act, R.S.C. 1985, c. H-6.
Human Rights Act, S.B.C. 1984, c. 22.

Cases:

Atlantic Provinces Special Education Authority v. Parks (unreported, No. 02489, January 15, 1992, Nova Scotia C.A.).
Elliot v. City of Parksville (1990), 66 D.L.R. (4th) 107 (B.C. C.A.).
Horton v. Regional Municipality of Niagara (1988), 9 C.H.R.R. D/466.

Jurisdiction: British Columbia

Adell, Bernard. "The Rights of Disabled Workers at Arbitration and Under Human Rights Legislation" (1991) 1 Lab. Arb. Y.B. 167-186.

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:

Ontario Human Rights Code, 1981 S.O. 1981, c. 53 as amended.
Labour Relations Act, R.S.O. 1980. C. 228, as amended 1986, c. 64.

Cases:

McLeod v. Egan, [1975] 1 S.C.R. 517.

Jurisdiction: Ontario, Canada

Adell, Bernard. "The Rights of Disabled Workers Revisited" (1991) 2 Lab. Arb. Y.B. 181-189.

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:

Ontario Human Rights Code, 1981 S.O. 1981, c. 53 as amended.

Cases:

Dennis v. Family & Children's Services of London and Middlesex (1990), 12 C.H.R.R. D/285 (Backhouse).

Hamilton Spectator (Div. Of Southam Inc) (1989), 8 L.A.C. (4th) 415 (Springate).

Marianhill (1990), 10 L.A.C. (4th) 201, at 211 (R.M. Brown).

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:

Ontario Human Rights Code, R.S.O. 1990, c. H.19.

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

Cases:

Ontario (Human Rights Commission) v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536.

Jurisdiction: Ontario

Barrett, Tammy D. "Employing Disabled Persons: Bona Fide Occupational Requirement or Qualification, Reasonable Accommodation and the Tolerance of Safety Risk" (1989) 9 Windsor Y.B. Access Justice 154.

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:

Canadian Human Rights Act, S.C. 1976-7, c. 33 (as amended 1980-81-82-83, c. 143).

Ontario Human Rights Code, S.O. 1981, c. 53; 1984, c. 58, c. 39 as amended by S.O. 1986, c. 64, s. 18.

Cases:

Bhinder v. Canadian National Railways Co., [1985] 2 S.C.R. 561.

DeJager v. Department of National Defence (1986), 7 C.H.R.R. D/3508.

Mahon v. Canadian Pacific Ltd. (1985), 7 C.H.R.R. D/3278 (Fed. C.A.).

Nowell v. Canadian National Railways Ltd., (1986) 8 C.H.R.R. D/3727.

Ontario Human Rights Commission et al. v. Borough of Etobicoke, [1982] 1 S.C.R. 202.

Re Air Canada and Carson, et al. (1985), 18 D.L.R. (4th) 72 (Fed. C.A.).

Wiens v. Inco Metals Company, Ontario Division (unreported, February, 1988).

Jurisdiction: Canada, United States of America

Pentney, William. "Equality: 'Dreaming of what might be'" (Winter 1987) 5 Just Cause 13-16.

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:

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

Cases:

Bhinder v. CN, [1985] 2 S.C.R. 561.

Ontario (Human Rights Commission) v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536.

Jurisdiction: Canada

Loney, Grace. "Principle not reflected in policy (Recommendations of CLAIR to the Human Rights Commission" (Winter 1986) 4 Just Cause No. 3, 15-18.

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

Newman, Elaine. "A is for Access: Ontario Treasurer Calls for Commitment to Reasonable Accommodation in the Workplace" (1984) 4:3 ARCHtype 10.

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:

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.

Jurisdiction: Ontario

Csurgo, Lilla. "Safety and risk in employment" (Winter 1986) 4 Just Cause No. 3, 18-20.

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:

Bhinder v. Canadian National Railway (1985), [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481, 63 N.R. 185, 17 Admin. L.R. 111, 9 C.C.E.L. 135, 86 C.L.L.C. 17,003.

7 C.H.R.R. D/3093, [1986] D.L.Q. 88, 1985 CarswellNat 144, 1985 CarswellNat 670 (S.C.C.).

Forseille v. United Grain Growers Ltd., 1985 CarswellNat 934, 6 C.H.R.R. D/3051, 85 C.L.L.C. 17,024.

Lela Swanson v. Steveshirl Restaurant Ltd. (April 1985) B.C. Human Rights Council under the Human Rights Code of B.C. (Could not find citation).

Mahon v. Canadian Pacific Ltd. ((1985)), 85 C.L.L.C. 17,025, 7 C.H.R.R. D/3278.

Manitoba (Human Rights Commission) v. Baker Manufacturing Ltd. [1984] 5 W.W.R. 704, 84 C.L.L.C. 17,026, 12 D.L.R. (4th) 618, (sub nom. *Loveday v. Baker Manufacturing Ltd.*) 30 Man. R. (2d) 116, 7 C.H.R.R. D/3145.

Rodger v. Canadian National Railways (1985), 85 C.L.L.C. 17,019, 6 C.H.R.R. D/2899 (Cdn. Human Rights Comm.).

Jurisdiction: Canada

The Canadian Charter of Rights and Freedoms

Claridge, Thomas. "Ont.'s Employment Standards Act provision violates Charter" (July 2005) 25 Lawyers Wkly. No. 10, 12.

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:

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.
Employment Standards Act, 2000, S.O. 2000, c. 41

Cases:

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

Jurisdiction: Ontario

Carpenter, Rodney C. "Employment of Disabled Persons and the Canadian Charter" (1988) 5:4 Just Cause 20.

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:

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.

Jurisdiction: Canada

Newman, Elaine. "The Charter: A Challenge to Sheltered Workshops" (1986) 4:3 Just Cause 21.

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:

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.

Employment Standards Act, S.O.1968, c. 35.

U.S. Const. am. 13.

Cases:

Kaszuba v. Salvation Army Sheltered Workshop et al. (1983), 41 O.R. (2d) 316.

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:

Human Rights Code, R.S.B.C. 1996, c. 210.

Cases:

Moore v. British Columbia (Ministry of Education) 54 C.H.R.R. D/245, 2005 BCHRT 580, 2005 Carswell BC 3573 (B.C. Human Rights Trib.).

Jurisdiction: British Columbia

Smith, William J. "Data-Based Advocacy: Determining Reasonable Accommodation of Special Needs in the Age of Accountability" (Mar 2007) 16 Educ. & L.J. 269-306.

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:

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

Jurisdiction: Canada

**Luhtanen, Melissa. "Accommodating Children of all Abilities" (2006)
30:5 L. Now 13.**

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:

Alberta Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14.

Cases:

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

Central Okanagan School District No. 23 v. Renaud (1992), 95 D.L.R. (4th) 577.

Howard v. University of British Columbia (1993), 18 C.H.R.R. D/353 (B.C.H.R.C.).

Robb v. St. Margaret's School (2003), 45 C.H.R.R. D/276 (B.C.H.R.T.).

Jurisdiction: Alberta

Ontario Human Rights Commission, *Education and Disability: Human Rights Issues in Ontario's Education System* (Toronto: Ontario Human Rights Commission, 2006).

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:

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

Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990.

Human Rights Code, R.S.O. 1990, c. H.19.

Cases:

Adler v. Ontario, [1996] 3 S.C.R. 609.

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Howard v. University of British Columbia, (1993) 18 C.H.R.R. D/37.

Jurisdiction: Ontario

Pothier, Dianne. "Eaton v. Brant (County) Board of Education", (2006) 18 Can. J. Women & L. 121-142.

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:

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

Cases:

Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954).

Eaton v. Brant (County) Board of Education (1997), 142 D.L.R. (4th) 385 (S.C.C.).

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

Hibbs, Terri & Pothier, Dianne. "Post-Secondary Education and Disabled Students: Mining a Level Playing Field or Playing in a Minefield?" in Pothier, Dianne & Devlin, Richard eds., *Critical Disability Theory: essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 197-219.

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:

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

Cases:

Martin v. Nova Scotia (Workers' Compensation Board), [2003] 2 S.C.R. 504 (QL).

Jurisdiction: British Columbia

Williams, Monica & Macmillan, Robert B. "Litigation in Special Education between 1996-1998: The Quest for Equality" (2003) 12 Educ. & L.J. 293-317.

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:

Concerned Parents for Children with Learning Difficulties Inc. v. Saskatchewan (Minister of Education) [1998] S.J. No. 566 (Q.B.).

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Grimm v. Wetaskiwin Regional Division No. 11 (1998), 1998 CarswellAlta 644 (Alta. Q.B.).

Maureen Daigle (1998), 168 D.L.R. (4th) 191 (N.S.S.C.).

Pokonzie v. Sudbury District Roman Catholic Separate School Board (1997), CarswellOnt 4346 (Ont. Div. Ct.).

The Halifax Regional School Board v. The Attorney General of Nova Scotia and Fernand and

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.

Jurisdiction: Canada

MacKay, A. Wayne & Burt-Gerrans, Janet. "Inclusion and Diversity in Education: Legal Accomplishments and Prospects for the Future" (2003) 13 Educ. & L.J. 77-103.

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:

British Columbia (Ministry of Education) v. Moore, [2001] B.C.J. No. 488 (QL).

British Columbia (Public Service Employee Relations Commission) v.

B.C.G.S.E.U., [1999] 3 S.C.R. 3.

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868.

Concerned Parents for Children with Learning Difficulties Inc. v. Saskatchewan (Minister of Education) [1998] S.J. No. 566 (Q.B.).

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Pokonzie v. Sudbury District Roman Catholic Separate School Board (1997), CarswellOnt 4346 (Ont. Div. Ct.).

Cudmore (look-up)

Jurisdiction: Canada

Roher, Eric M. & Brown, Anthony F. “Special Education and Student Discipline” (2004) 14 Educ. & L.J. 51-69.

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:

Education Act, R.S.O. 1990, c. E.2.

Human Rights Code, R.S.O. 1990, c. H-19.

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

Cases:

Bonnah (Litigation Guardian of) v. Ottawa-Carleton District School Board (2002), 2002 CarswellOnt 1212, 44 Admin. L.R. (3d) 25 (Ont. S.C.J.), affirmed (2003), 2003 CarswellOnt 1210, 64 O.R. (3d) 454, 170 O.A.C. 248 (Ont. C.A.).

Jurisdiction: Ontario

Wright, David A. "Court Permits Board to Use 'Safe School Provisions' to Transfer Exceptional Pupil", Case Comment, (2002) 12 Educ. & L.J. 251-255.

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:

Bonnah (Litigation Guardian of) v. Ottawa-Carleton District School Board (2002), 2002 CarswellOnt 1212, 44 Admin. L.R. (3d) 25 (Ont. S.C.J.).

Legislation:

Education Act, R.S.O. 1990, c. E.2.

Jurisdiction: Ontario

Stack, Robert. "Progress and Uncertainty: The Educational Rights of Special Needs Children in British Columbia" (2001) 7 Appeal 42-65.

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:

Bales, Bales and Bales v. School District 23 (Central Okanagan) Board of School Trustees (1984), 54 B.C.L.R. 203 (B.C S.C.).
Concerned Parents for Children with Learning Difficulties Inc. v. Saskatchewan (Minister of Education) [1998] S.J. No. 566 (Q.B.).
Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Régionale Chauveau (Commission Scolaire) c. Québec (Commission des droits de la Personne) (1994), 21 C.H.R.R. D/189.

Legislation:

British Columbia School Act, R.S.B.C. 1996, c. 412.
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.
Human Rights Code, R.S.B.C. 1996, c. 210.

Jurisdiction: British Columbia, Canada

Williams, Monica A. & Macmillan, Robert B. "Litigation in Special Education (1978-1995) Part I: From Access to Inclusion" (2000) 10 E.L.J. 349-369.

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:

Bales, Bales and Bales v. School District 23 (Central Okanagan) Board of School Trustees (1984), 54 B.C.L.R. 203 (B.C S.C.).
Carriere v. County of Lamont No. 30, August 15, 1978, Unreported Decision of Supreme Court of Alberta, Trial Division [15 August, 1984].
Elwood v. Halifax County-Bedford District School Board (1987) settlement approved by court order, N.S.S.C.T.D., June 1, 1987.
Quebec (Commission des droits de la personne) c. Chauveau (Commission scolaire regionale), [1993] R.J.Q. 929, 18 C.H.R.R. D/433 (Human Rights Trib.), rev'd (20 May 1994), C.A. Quebec 200-09-000160-934 (C.A.).
Quebec (Commission des droits de la personne) c. Saint-Jean-sur-Richelieu (Commission scolaire), [1991] R.J.Q. 3003 (Human Rights Trib.), rev'd in part re execution of judgment pending appeal (1992), 94 D.L.R. (4th) 622, 44 Q.A.C. 130 (Que. C.A.), aff'd (20 May 1994), Montreal 500-09-001750-918 (Que. C.A.).
Razaqpur v. Carleton Roman Catholic Separate School Board (need citation)
Trofimenkoff v. Saskatchewan (Minister of Education), [1991] 6 W.W.R. 97 (Sask. C.A.).

Jurisdiction: Canada

MacKay, Wayne & Kazmierski, Vincent C. "And on the Eighth Day, God Gave Us. . . Equality in Education: *Eaton v. Brant (County) Board of Education and Inclusive Education*" (Aug. 1996) 7 N.J.C.L. 1-42.

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:

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

Charter of Human Rights and Freedoms, R.S.Q. 1997, c. C-12.

Education Act, R.S.O. 1990, c. E. 2.

Cases:

Bales v. Central Okanagan School District 23 (1984), 54 B.C.L.R. 203 (S.C.).

Eaton v. Brant (County) Board of Education (1995), 22 O.R. (3d) 1 (C.A.).

Hickling v. Lanark, Leeds & Grenville Roman Catholic Separate School Board (1986), 7 C.H.R.R. D/3546 (Ont. Bd. Of Inquiry).

Québec (Commission des droits de la personne) c. Chauveau (Commission scolaire) (1994), 64 Q.A.C. 31.

Robichaud c. Nouveau-Brunswick (Commission scolaire no. 39) (1989), 99 N.B.R. (2d) 341 (C.A.).

Yarmoloy v. Banff School District No. 102 (1985), 16 Admin. L.R. 147 (Alta. Q.B.).

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

Jurisdiction: Ontario, Québec, Canada

Peacock, Mark G. "Recent Developments in Education Law Affecting the Linguistic Minority and Handicapped Students in Québec: Public Education that is "Separate but Equal"?" in *Développements récents en droit de l'éducation* (1996) (Cowansville, Qué.: Éditions Yvon Blais, 1996), p. 25-70.

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:

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

Charter of Human Rights and Freedoms, R.S.Q. 1997, c. C-12.

Cases:

Commission scolaire régionale Chauveau v. Commission des droits de la personne du Québec, [1994] R.J.Q. 1196.

Commission scolaire régionale St-Jean-sur-Richelieu v. Commission des droits de la personne du Québec, [1994] R.J.Q. 1227.

Eaton v. The Brant County Board of Education et al., [1994] 22 O.R. (3d) 1 (C.A.).

Jurisdiction: Québec, Canada

Greenstein, Bertha. "Exceptional Child's Right to Education" (Nov. 1995) 7 Educ. & L.J. 77-80.

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:

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

Education Act, R.S.O. 1990, c. E.2.

Cases:

Eaton v. Brant (County) Board of Education, (1995), 22 O.R. (3d) 1 (C.A.).

Jurisdiction: Ontario

Smith, William J. "Affirmative Action for Students with Disabilities? Not Yet Says the Court of Appeal", Case Comment, (1994) 6 Educ. & L.J. 89.

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:

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

Québec (Commission des droits de la personne) c. Chauveau (Commission scolaire régionale), [1993] R.J.Q. 929, 18 C.H.R.R. D/433 (Human Rights Trib.), rev'd (20 May 1994), C.A. Québec 200-09-000160-934 (C.A.).

Québec (Commission des droits de la personne) c. Saint-Jean-sur-Richelieu (Commission scolaire), [1991] R.J.Q. 3003 (Human Rights Trib.), rev'd in part re execution of judgment pending appeal (1992), 94 D.L.R. (4th) 622, 44 Q.A.C. 130 (Que. C.A.), aff'd (20 May 1994), Montreal 500-09-001750-918 (Que. C.A.).

Jurisdiction: Québec

Dickinson, Greg M. "Of Rights, Mental Disability and Discretion in the Academy. Case Comment: *Berg v. University of British Columbia*" (May 1994) 5 Educ. & L.J. 353-360.

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:

Berg v. University of British Columbia, [1993] 2 S.C.R. 353, 152 N.R. 99.

Jurisdiction: British Columbia, Canada

Chipeur, Gerald D. & Treacy, Heather L. "A Very Public Relationship: *Berg v. University of British Columbia*, Case Comment, (1993) 3 N.J.C.L. 276.

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:

Beattie v. Acadia University (1976), 72 D.L.R. (3d) 718.

Chambers v. Saskatchewan (Department of Social Services), [1988] 5 W.W.R. 446, 72 Sask. R. 115 (C.A.).

Gay Alliance Toward Equality v. Vancouver Sun, [1979] 2 S.C.R. 435.

Insurance Corp. of British Columbia v. Heerspink, [1982] 2 S.C.R. 145.

Rawala and Souza v. DeVry (1982), 3 C.H.R.R. D/1057 (Ontario Human Rights Board of Inquiry).

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

Singh v. Royal Canadian Legion, Jasper Place (Alberta), Branch No. 255 (1990), 11 C.H.R.R. D/357 (Alta. Bd. of Inquiry).

University of British Columbia v. Berg, [1993] 2 S.C.R. 353.

Jurisdiction: Canada

Crane, M.C. "The University and Its Students—a "Very Public Relationship": A Comment on the Decision of the Supreme Court of Canada in *University of British Columbia v. Berg*", Case Comment, (1993) 27 U. Brit. Colum. L. Rev. 339.

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:

Beattie v. Acadia University (1976), 72 D.L.R. (3d) 718.
Gay Alliance Toward Equality v. Vancouver Sun, [1979] 2 S.C.R. 435.
University of British Columbia v. Berg, [1993] 2 S.C.R. 353.

Jurisdiction: Canada

Cohen, Tracey M. & Cruickshank, David A. "The Human Rights Arguments for a Child's Right to Education" in *Making the Most of the Law: Education and the Child with Disabilities* (Learning Disabilities Association of Canada, 1993) 81.

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:

Alberta (Department of Education) v. Alberta (Human Rights Commission) (1988), 9:2 C.H.R.R. D/4979.
Bales, Bales and Bales v. School District 23 (Central Okanagan) Board of School Trustees (1984), 54 B.C.L.R. 203 (B.C. S.C.).
Berg v. University of British Columbia (1991), 56 B.C.L.R. (2nd) 296 (leave to appeal to S.C.C. granted Feb. 6, 1992).
Bloedel v. University of Calgary (1980), 1 C.H.R.R. D/25.
Canadian Odeon Theatres v. Saskatchewan Human Rights Commission and Huck (1985), 3 W.W.R., 744.
Elwood v. Halifax County-Bedford District School Board (1987) settlement approved by court order, N.S.S.C.T.D., June 1, 1987.
Lanark, Leeds and Grenville County Roman Catholic Separate School Board v. Ontario (Ont. Human Rights Commission) (1987), 8 C.H.R.R. D/4235.
New Brunswick School district No. 15 v. New Brunswick (Human Rights Board of Inquiry) (1989), 10:2 C.H.R.R. D/6426.
Peel Board of Education v. Ontario Human Rights Commission (1990), 72 O.R. (2d) 593.
Re Alberta Human Rights Commission & The Queen (1986), 27 D.L.R. (4th) 735.
Re Schmidt & Calgary Board of Education (1976), 57 D.L.R. (3d) 746 (Alta. S.C., Trial Div.).
Re Winnipeg School Division No. 1 & Craton (1986), 21 D.L.R. (4th) 1 (S.C.C.).
Re Winnipeg School Division No. 1 & MacArthur (1982), 133 D.L.R. (3d) 305 (Man. Q.B.).
Tegstrom v. The Queen, [1971] 1 W.W.R. 147.

Jurisdiction: Canada

Wilson, Jeffery. "Common Law and Equitable Arguments: Private Law Remedies" in *Making the Most of the Law: Education and the Child with Disabilities* (Learning Disabilities Association of Canada, 1993) 68.

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:

Hicks v. Etobicoke (City) Board of Education, [1988] O.J. No. 1900 (Ontario District Court).

Jurisdiction: Canada

Royal, Paul & Walsh, Elizabeth Cusack. "Learning Disabilities and the Right to an Appropriate Education Under the Charter" in *Making the Most of the Law: Education and the Child with Disabilities* (Learning Disabilities Association of Canada, 1993) 101.

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:

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.

Cases:

Bales, Bales and Bales v. School District 23 (Central Okanagan) Board of School Trustees (1984), 54 B.C.L.R. 203 (B.C S.C.).

Board of Education of Hendrick School District v. Rowley 458 U.S. 176 (Sup. Ct. U.S. 1982).

Brooks, Allen v. Dixon and Canada Safeway, [1989] 4 W.W.R. 193.

Brown v. Board of Education of Topeka, 347, U.S. 483.

Carriere v. County of Lamont No. 30, August 15, 1978, Unreported, (Alberta QB).

Dolmage v. Muskoka Board of Education (1985), 49 O.R. 546 (Ont. S.C.).
Elwood v. Halifax County-Bedford District School Board (1987) settlement approved by court order, N.S.S.C.T.D., June 1, 1987.
Frederick L. v. Thomas, 408 F.Supp. 832 (E.D. Pa. 1976).
Hickling, Horbay and Legris v. Lanark Leeds and Grenville County Roman Catholic School, August 14, 1986 (Ontario Human Rights Commission).
Jones v. The Queen (1987), 31 D.L.R. (4th) 569 (SCC).
Law San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).
Rowett v. York (Region) Board of Education (Unreported, 1986).

Jurisdiction: Canada

Smith, William. "Inclusive Education for Students with Disabilities", Case Comment, (1993) 5 Educ. & L.J. 167-178.

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:

Québec (Commission des droits de la personne) c. Saint-Jean-sur-Richelieu, Commission scolaire, [1991] R.J.Q. 3003 (T.D.P.Q.).

Legislation:

Education Act, R.S.Q. c. I-13.3.

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Jurisdiction: Canada

"Special Education Since Eaton: The Fight for Integrated and Segregated Placements" (1998) 10:2 Education Law Reporter 13.

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:

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.
Pokonzie v. Sudbury District Roman Catholic Separate School Board (1997), CarswellOnt 4346 (Ont. Div. Ct.).

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.

Jurisdiction: Canada

Smith, William J. & Foster, William F. "Educational Opportunity for Students with Disabilities in Canada: How Far Have We Progressed?" (Sept. 1997) 8 Educ. & L.J. 183-226.

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)

Manley-Casimir, Michael E. "Equality in the Education of Special Needs Students: A Canadian Perspective" (1997) 9 Educ. & L.J. 275-290.

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:

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.

Cases:

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

Jurisdiction: Canada

Smith, William J. & Foster, William. *Equal Educational Opportunity for Students with Disabilities: A Source Book for Parents, Advocates and Professionals* (Montréal: Office of Research on Educational Policy, McGill University, 1996).

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:

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

Education Act, R.S.O., 1990, c. E.2.

Education Act, R.S.Q., c. I-13.3.

Education Act, R.S.S. 1978, c. E-0.1.

Education Act, S.N.S. 1995-96, c. 1.

Education Act, S.N.W.T. 1995, c. 28.

Education Act, S.Y. 1989-90, c. 25. As am. By S.Y. 1994, c. 12.

Fair Practices Act, R.S.N.W.T. 1988, c. F-2.

Human Rights, Citizenship and Multiculturalism Protection Act, R.S.A. 1980, c. H-11.7.

Human Rights Act, R.S.N.B. 1973, c. H-11.

Human Rights Act, R.S.P.E.I. 1988, c. H-12.

Human Rights Act, R.S.Y. 1986 (Supp.), c. 11.

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

Human Rights Code, R.S.N. 1990, c. H-14.

Human Rights Code, R.S.N.S. 1989, c. 214.

Human Rights Code, R.S.O. 1990, c. H-19.

Human Rights Code, S.M. 1987-88, c. 45.

Handicapped Persons' Education Act, R.S.N.S. 1989, c. 194.

Public Schools act, R.S.M. 1987, c. P-250.

Saskatchewan Human Rights Code, R.S.S. 1978, c. S-24.1.

Schools Act, R.S.N. 1990, c. S-12.

School Act, R.S.P.E.I. 1988, c. S-2.1.

School Act, S.A. 1988, c. S-3.1.

School Act, S.B.C. 1989, c. 61.

Schools Act, S.N.B. 1990, c. S-5.1.

School Attendance Act, R.S.N. 1990, c. S-9.

School Boards Act, S.N.S. 1991, c. 6.

Cases:

Eaton v. Brant (County) Board of Education (1995), 22 O.R. (3d) 1 (C.A.) rev'd (1996), 142 D.L.R. (4th) 385 (S.C.C.)

Jurisdiction: Canada (Provincial and Territorial)

Mackay, A. Wayne. "Human Rights and Education: Problems and Prospects" (1996) 8 Educ. & L.J. 69.

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:

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.

[Various provincial human rights/education statutes]

Cases:

Attis v. New Brunswick District No.15 Board of Education, [1996] 1 S.C.R. 825.
Bales, Bales and Bales v. School District 23 (Central Okanagan) Board of School Trustees (1984), 54 B.C.L.R. 203 (B.C S.C.).

Brown v. Board of Education of Topeka, 347, U.S. 483.

Eaton v. Brant (County) Board of Education (1995), 22 O.R. (3d) 1 (C.A.).

San Antonio Independent School District v. Rodriguez, 41 U.S. 1 (1973).

Jurisdiction: Canada; U.S.A.

Smith, William J. "Equal Educational Opportunity for Students with Disabilities: Legislative Action in Canada" (Montreal: OREP, 1994)

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:

Charter of Human Rights and Freedoms, R.S.Q. c. C-12.

Fair Practices Act, R.S.N.W.T. 1988, c. F-2.

Human Rights Act, R.S.N.B. 1973, c. H-11.

Human Rights Act, R.S.P.E.I. 1988, c.H-12.

Human Rights Act, R.S.Y. 1986, (Supp.), c. 11.

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

Human Rights Code, R.S.N. 1990, c. H-14.

Human Rights Code, R.S.N.S. 1989, c. 214.

Human Rights Code, R.S.O. 1990, c. H.19.

Human Rights Code, S.M. 1987-88, c. 45.

Individual's Rights Protection Act, R.S.A. 1980, c. I-2.

Saskatchewan Human Rights Code, R.S.S. 1978, c. S-24.1.

Legislation:

Provincial/Territorial Education Acts:

Education Act, R.S.N.S. 1989, c. 136.

Education Act, R.S.N.W.T. 1988, c. E-1.

Education Act, R.S.O. 1990, c. E.2.

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.A. 1988, c. S-3.1.

School Act, S.B.C. 1989, c. 61.

Schools Act, S.N.B. 1990, c. S-5.1.

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

Smith, William J. & Foster, William F. "Educational Opportunity for Students with Disabilities in Canada: Beyond the Schoolhouse Door" (1994) 5 Educ. & L.J. 305.

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.N.W.T. 1988, c. E-1.

Education Act, R.S.O. 1990, c. E.2.

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.A. 1988, c. S-3.1.

School Act, S.B.C. 1989, c. 61.

Schools Act, S.N.B. 1990, c. S-5.1.

School Act, S.P.E.I. 1993, c. 35.

Jurisdiction: Canada

Henteleff, Yude M. "Comparative Analysis of the Public Schools Acts and Regulations of the Provinces and Territories" in *Making the Most of the Law: Education and the Child with Disabilities* (Learning Disabilities Association of Canada, 1993) 1.

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

Smith, William J. & Foster, William F. "Educational Opportunity for Students with Disabilities in Canada: A Platform of Rights to Build on" (1993) 5 Educ. & L.J. 193. *

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:

Charter of Human Rights and Freedoms, R.S.Q. c. C-12.

Fair Practices Act, R.S.N.W.T. 1988, c. F-2.

Human Rights Act, R.S.N.B. 1973, c. H-11.

Human Rights Act, R.S.P.E.I. 1988, c.H-12.

Human Rights Act, R.S.Y. 1986, (Supp.), c. 11.

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

Human Rights Code, R.S.N. 1990, c. H-14.

Human Rights Code, R.S.N.S. 1989, c. 214.

Human Rights Code, R.S.O. 1990, c. H.19.

Human Rights Code, S.M. 1987-88, c. 45.

Individual's Rights Protection Act, R.S.A. 1980, c. I-2.

Saskatchewan Human Rights Code, R.S.S. 1978, c. S-24.1.

Provincial/Territorial Education Acts:

Education Act, R.S.N.S. 1989, c. 136.

Education Act, R.S.N.W.T. 1988, c. E-1.

Education Act, R.S.O. 1990, c. E.2.

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, R.S.P.E.I. 1988, c. S-2.

School Act, S.A. 1988, c. S-3.1.

School Act, S.B.C. 1989, c. 61.

Schools Act, S.N.B. 1990, c. S-5.1.

Jurisdiction: Canada

Crane, M.C. "Human Rights in the University: A Case Comment on *Berg v. University of British Columbia*", Case Comment, (1992) 26 U. Brit. Colum. L. Rev. 293.

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:

Alberta (Department of Education) v. Deyell (1984), 8 C.H.R.R. D/3668 (Alta. Q.B.).

Beattie v. Acadia University (1976), 72 D.L.R. (3d) 718.

Berg v. University of British Columbia (1991), 56 B.C.L.R. (2d) 296, 81 D.L.R. (4th) 497 (C.A.).

Ontario (Human Rights Commission) and O'Malley v. Simpsons Sears, [1985] 2 S.C.R. 536.

Rawala and Souza v. DeVry (1982), 3 C.H.R.R. D/1057 (Ontario Human Rights Board of Inquiry).

Sonnenberg v. Centre universitaire St. Louis-Maillet (1987) 8 C.H.R.R. D/5100 (N.B. Board of Inquiry).

Jurisdiction: British Columbia, Canada

Mackay, A. Wayne. "The Elwood case: Vindicating educational rights" (Spring 1988) 5 Just Cause 6-10.

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:

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

Jurisdiction: Nova Scotia, Canada

Sussel, Terri & Manley-Casimir, Michael. "Special education and the Charter: the right to equal benefit of the law" (Spring, 1988) 5 Just Cause 23-28.

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:

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

Cases:

Board of Education v. Rowley, 458 U.S. 176 (1982).

Jurisdiction: Canada, United States of America

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

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:

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.

Cases:

Elwood v. Halifax County-Bedford District School Board (1987) settlement approved by court order, N.S.S.C.T.D., June 1, 1987.

Jurisdiction: Canada

Sussel, Terri & Manley-Casimir, Michael. "Special Education and the Charter: The Right to Equal Benefit of the Law" (1987) 2 Can. J.L. & Soc. 45.

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:

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.

Education for all Handicapped Children Act 20 U.S.C.A. SS 1401-61 (1976 Supp. IV 1980).

Various provincial human rights/ educational statutes

Cases:

Bales, Bales and Bales v. School District 23 (Central Okanagan) Board of School Trustees (1984), 54 B.C.L.R. 203 (B.C S.C.).

Canadian Odeon Theatres v. Saskatchewan Human Rights Commission and Huck (1985), 3 W.W.R., 744.

Carriere v. County of Lamont No. 30, August 15, 1978, Unreported, (Alberta QB).

Elwood v. Halifax County-Bedford District School Board (1987) settlement approved by court order, N.S.S.C.T.D., June 1, 1987.

Hendrick Hudson District Board of Education v. Rowley 358 U.S. 176 (1982).

Hickling, Horbay and Legris v. Lanark Leeds and Grenville County Roman Catholic School, August 14, 1986 (Ontario Human Rights Commission).

Mills v. Board of Education of the District of Columbia 348 F. Supp. 866 (D.D.C. 1972).

Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania 343, F. Supp. 1257 (E.D.Pa. 1972).

Jurisdiction: Canada, United States of America

Sussel, T.A. & Manley-Casimir, M.E. "The Supreme Court of Canada as a 'National School Board': The Charter and Educational Change" (1986) 11:3 Canadian Journal of Education 313-337.

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:

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.

Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

Cases:

Brown v. Board of Education of Topeka, 347, U.S. 483 (1954).

Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357.

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

Tinker v. Des Moines Ind. Comm. School Dist., 393 U.S. 503 (1969).

Reference re Education Act of Ontario and Minority Language Education Rights (1984), 10 D.L.R. (4th) 491 (Ont. C.A.).

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

MackKay, A. Wayne. “Bales v. Bd. of Sch. Trustees: Parents, School Boards and Reasonable Special Education”, Case Comment, (1985) 8 Admin. L.R. 225-230.

MackKay 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, MackKay considers the arguments advanced by the parents, and notes the judge’s dismissal of these arguments. MackKay 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:

Bales, Bales and Bales v. School District 23 (Central Okanagan) Board of School Trustees (1984), 54 B.C.L.R. 203 (B.C. S.C.).

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.

Jurisdiction: Canada

MacKay, A. W. "The Canadian Charter of Rights and Freedoms: A Springboard to Students' Rights" (1984) 4 Windsor Y.B. Access Justice 174-228.

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:

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

US Const. Amend. XVI.

Cases:

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

Jurisdiction: Canada, United States of America

MacKay, A. Wayne. "Public Education in Nova Scotia: Legal Rights, Fleeting Privileges or Political Rhetoric?" (1984), 8 Dal. L.J. 137.

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:

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

Education Act, R.S.N.S. 1967, c. 81, as amended.

Freedom of Information Act, S.N.S. 1977, c. 10.

Human Rights Act, S.N.S. 1969, c. 11.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Universal Declaration of Human Rights, G.A. res. 217A (III), UN GAOR, 3rd Sess., Supp. No. 13, U.N. Doc A/811 (1948).

Various other education or truancy related statutes.

Cases:

Carrière v. County of Lamont unreported.

Crawford v. Ottawa Board of Education, [1971] 2 O.R. 179 (C.A.).

Donald v. Hamilton Board of Education, [1945] 3 D.L.R. 424 (Ont. C.A.).

Goss v. Lopez (1975), 419 U.S. 565.

Hoffman v. Board of Education of New York (1978, 410 N.Y.S. (2d) 99 (App. Div.); reversed on further appeal in (1979) 424 N.Y.S. (2d) 376 (App. Div.).

Lambton County Board of Education v. Beauchamp (1979), 10 R.F.L. (2d) 354 (Ont. Prov. Ct.).

McLeod v. Salmon Arm School Trustees, [1952] 2 D.L.R. 562 (B.C.C.A.).

Mills v. Board of Education (1972), F. Supp. 866 (D.D.C.).

Patrick v. Yorkton (1914), 6 W.W.R. 1107 (Sask. S.C.).

The Queen v. Larry Jones (1983), an unreported decision, March 16, 1983 (Alta. Prov. Ct.).

Re Clark and Clark an unreported decision, November 25, 1982, per Matheson Co. Ct. J. (Ont. Co. Ct.).

Re Superintendent of Family and Child Service and Dawson et al., an unreported decision, March 14, 1983 (B.C. Prov. Ct.).

Regina v. Wiebe, [1978] 3 W.W.R. 36 (Alta. Prov. Ct.).

Ruman v. Lethbridge School Board, [1943] 3 W.W.R. 340 (Alta. S.C.).

Wilkinson v. Thomas, [1928] 2 W.W.R. 700 (Sask. K.B.).

Winnipeg School Division v. McArthur, [1982] 3 W.W.R. 342 (Man. Q.B.).

Jurisdiction: Nova Scotia

Robitaille-Rousseau, Monique. "At School Together" (1984) 2:3 Just Cause 7.

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

Ruff, Kathleen. "The Fight for Integration" (1984) 2:3 Just Cause 12.

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.

Jurisdiction: Ontario, Canada

Carver, Roger. "Integrated Education: A Paradox for the Deaf" (1984) 2:3 Just Cause 9-11.

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

Kelly, Claire. "What Rights for Indian Children?" (1984) 2:3 Just Cause 18-19.

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

O'Reilly, Robert R. "Educational Rights for Disabled Children" (1984) 2:3 Just Cause 4-6.

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:

Street Health, *Failing the Homeless: Barriers in the Ontario Disability Support Program for People with Disabilities* (Toronto: Street Health, 2006).

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:

Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25.

Jurisdiction: Ontario

Porter, Bruce. "Homelessness, Human Rights, Litigation and Law Reform: A View from Canada" (2004) 10 *Australian Journal of Human Rights* 133.

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.

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.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

[Provincial human rights statutes, generally]

[Various provincial tenancy statutes]

Cases:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R. (4th) 224.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Fernandes v. Director of Social Services (Winnipeg Central) (1992), 93 D.L.R. (4th) 402 (Man. C.A.).

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

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20.

Jurisdiction: Canada, International

Frankel, Ted. "Exodus: 40 Years of Deinstitutionalization and the Failed Promise of Community-Based Care" (2003) 12 Dal. J. Leg. Studies 1-32.

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:

Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12101 (1990).

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

Various Nova Scotia health related legislation.

Cases:

Fernandes v. Manitoba (Director of Social Services) (1992), 78 Man. R. (2d) 172.

Olmstead v. L.C., 119 S. Ct. 2180 (1990).

Jurisdiction: Nova Scotia, Canada, United States of America

Farha, Leilani. "Is there a Woman in the House? Re/conceiving the Human Right to Housing" (2002) 14 Can. J. Women & L. 118.

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:

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

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:

Bill C-31, *An Act to Amend the Indian Act*, S.C. 1985, c. 27, reprinted in R.S.C. 1985, 1st Supp., c. 32.

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, Lynn. "Raising the Roof on Community Housing for People with Disabilities: Class Actions in Canada" (2000) 6 Appeal 22-27.

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, Meghan. "Little House of Horrors: Discrimination against Boarding Home Tenants- Human Rights Legislation and the Charter" (1998) 13 J.L. & Soc. Pol'y 224.

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:

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.

Human Rights Code, 1981, S.O. 1981, c. 53.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R.143.

Egan v. A.G. Canada, [1995] 2 S.C.R. 513.

Garbett v. Fisher (1996), 25 C.H.R.R. D/379 (Ont. Bd. of Inq.).

Munsch v. York Condominium Corporation No. 60 (1992), 18 CHRR D/339 (Ont. Bd. Inq.).

Rodriguez v. British Columbia (Attorney General) (1993), 158 N.R. 1 (S.C.C.).

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.A. 1980, c. I-4.

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

Drassinower, Martha & Levine, Sarah A. "More sinned against than sinning: housing, mental illness and disability" (Dec. 1995) 6 Windsor Rev. Legal & Social Issues 91-156.

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:

Advocacy Act, S.O. 1990, c. 26. (repealed)

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:

Canadian Mental Health Association v. Winnipeg, 71(1990), 69 D.L.R. (4th) 697.
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).

Ouimette v. Lily Cups (1994), 12 C.H.R.R. D/19, 90 C.L.L.C. 17,019 (Board of Inquiry).

Roberts v. Ontario (Ministry of Health) (1994), 19 O.R. 3d 387, 117 D.L.R. (4th) 297 (C.A.).

Jurisdiction: Ontario

Hulchanski, David J. *Discrimination in Ontario's Rental Housing Market: The Role of Minimum Income Criteria* (Toronto: Ontario Human Rights Commission, 1994).

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 "renters" 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:

Human Rights Code, 1981, S.O. 1981, c. 53.

Jurisdiction: Ontario

Spotton, Noelle. "Minimum Income Requirements in Rental Applications: Are They Discriminatory?" (Fall 1993) 9 J.L. & Social Pol'y, 93-115.

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:

Human Rights Code, R.S.O. 1990, c. H.19.

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 analagous ground under the *Charter*, he criticizes Palmetter 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:

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

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

Cases:

Action Travail des Femmes v. Canadian National Railway Co. (1987), 40 D.L.R. (4th) 193 (S.C.C.).

Bernard v. Dartmouth Housing Authority (1988), 88 N.S.R. (2d) 190.

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

Re Ontario Human Rights Commission v. Simpson-Sears Ltd. (1985), 23 D.L.R. (4th) 321 (S.C.C.).

Jurisdiction: Nova Scotia, Canada

Parkdale Community Legal Services "Homelessness and the Right to Shelter: A View from Parkdale" (1988) 4 J.L. & Soc. Pol'y 33.

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:

Canada Assistance Plan Act, S.C., 1966-67, c. 45.

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. 7, 12 & 15.

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

Human Rights Code, R.S.O. 1981 c. 53.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Landlord and Tenant Act, R.S.O. 1980, c. 232.

Rental Housing Protection Act, R.S.O. 1986, c. 164.

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. 13, UN Doc. A/810 (1948).

Cases:

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

Finlay v. Canada, [1986] 2 S.C.R. 607.

Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441.

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

R. v. Morgentaler, [1988] 1 S.C.R. 30.

Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177.

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

"Service Equity at Heart of Homeless Women Case" (1988) 4:3 Canadian Human Rights Advocate 7.

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

Shea, Donald. "Housing—Freedom to choose" (1986) 4 Just Cause, No. 1, 5-6.

The author asserts the right to choose adequate housing for people with and without disabilities, which would ideally offers 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, Pat. "Legal issues in psychiatric boarding homes" (1986) 4 Just Cause No. 1, 18-20.

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, Paul. "Zoning: a discrimination tool" (1986) 4 Just Cause, No. 1, 3-5.

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, Linda. "The Charter and Publically Assisted Housing" (1985) 1 J.L. Soc. Pol. 17-20.

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:

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
Human Rights Code, 1981, S.O. 1981, c. 53.
International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.
National Housing Act, R.S.C. 1985, c. N-11
Universal Declaration of Human Rights, G.A. res. 217A (III), UN GAOR, 3rd Sess., Supp. No. 13, U.N. Doc A/811 (1948).

Cases:

Ontario Film and Video Appreciation Society (1985), 41 O.R. (2d) 583 (Div. Ct.), Affirmed, 24 A.C.W.S. (2d) 285 (C.A.).

Jurisdiction: Ontario, Canada

MacKay, A. Wayne & Holgate, Margaret. "Fairness in the Allocation of Housing: Legal and Economic Perspectives" (1983) 7 Dalhousie L.J. 383-446.

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:

Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.
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.
National Housing Act R.S.C., 1970, c. N-10.

Cases:

Re Webb and Ontario Housing Corporation (1978), 22 O.R. (2d) 257 (C.A.).

Jurisdiction: Canada (United States, United Kingdom)

Health:

Disability and Access to Health Care

Chisholm, Raquel. "Not a leg to stand on: the Unconstitutionality of New Brunswick Regulation 84-20, Section 2(d)" (2006) 24 Windsor Y.B. Access Just. 77.

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:

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

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

Medical Services Payment Act, S.N.B. 1968, c. 85.

Cases:

Auton v. British Columbia (2002), 6 B.C.L.R. (4th) 201 (C.A.), aff'g (2000), 78 B.C.L.R. (3d) 55 (S.C.), leave to appeal to S.C.C. granted, [2002] S.C.C.A No. 510 (QL).

Cameron v. Nova Scotia (1999), 177 D.L.R. (4th) 611 (N.S.C.A.) aff'g (1999), 172 N.S.R. (2d) 227, leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 531 (QL).

Chaoulli v. Québec (Attorney General), [2005] 1 S.C.R. 791.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Granovsky v. Canada (Minister of Employment and Immigration) [2000] 1 S.C.R. 793, 186 D.L.R. (4th) 1, 2000 SCC 28.

Jurisdiction: New Brunswick

Finley, Margot. "Limiting Section 15(1) in the Health Care Context: The Impact of *Auton v. British Columbia*" (2005) 63 U. Toronto Fac L. Rev. 213-244.

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:

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

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

Medicare Protection Act, R.S.B.C. 1996, c. 286.

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Auton (Guardian ad litem of) v. British Columbia (Attorney General), 2004 SCC 78, [2004] 3 S.C.R. 657.

Eaton v. Brant Board of Education, [1997] 1 S.C.R. 241, 142 D.L.R. (4th) 385.

Eldridge v. British Columbia, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577.

Granovsky v. Canada (Minister of Employment and Immigration) [2000] 1 S.C.R. 793, 186 D.L.R. (4th) 1, 2000 SCC 28.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, 170 D.L.R. (4th).

Newfoundland Treasury Board v. N.A.P.E., 2004 SCC 66, [2004] 3 S.C.R. 384.

Jurisdiction: British Columbia, Canada

Ries, Nola M. "The Uncertain State of the Law Regarding Health Care and Section 15 of the Charter" (2003) 11 Health L. J. 217-240.

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:

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

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

Cases:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.
Auton v. British Columbia (2002), 6 B.C.L.R. (4th) 201 (C.A.), aff'g (2000), 78 B.C.L.R. (3d) 55 (S.C.), leave to appeal to S.C.C. granted, [2002] S.C.C.A No. 510 (QL).
Cameron v. Nova Scotia (1999), 177 D.L.R. (4th) 611 (N.S.C.A.) aff'g (1999), 172 N.S.R. (2d) 227, leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 531 (QL).
Law v. Canada, [1999] 1 S.C.R. 497.

Jurisdiction: British Columbia, Nova Scotia, Canada.

Jones, Craig "Fixing to Sue: Is There a Legal Duty to Establish Safe Injection Facilities in British Columbia?" (2002) 35 U. Brit. Colum. L. Rev. 393-454.

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.
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.
Health Act, R.S.B.C. 1996, c. 179.
International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.
Medicare Protection Act, R.S.B.C. 1996, c.286.

Cases:

Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3.
Auton (Guardian ad litem of) v. British Columbia (Attorney General) (2000), 78 B.C.L.R. (3d) 55 (S.C.).
Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 S.C.R. 307.
Brown v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420.
City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2.
Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703.
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.)

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.
Robb v. Canadian Red Cross Society, [2000] O.J. No. 2396.
Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519.
R. v. Gladue, [1999] 1 S.C.R. 688.
R. v. Morgentaler, [1988] 1 S.C.R. 30.
Walker Estate v. York Finch General Hospital, [2001] 1 S.C.R. 647.

Jurisdiction: British Columbia, Canada

Carver, Peter. "Disability and the Allocation of Health Care Resources: The Case of Connor Auton" (2001) 12 Health Ethics Today 1.

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:

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2000] B.C.J. No. 1547 (B.C.S.C.).

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.

Jurisdiction: Canada

Leggat, Sandra G. & Tardif, Gaétan S. "The Impact of the Purchaser Provider Funding Model in the United Kingdom on the Independence of Persons with Disabilities: Implications for the Canadian Health Care System" (1997) 20 Dalhousie L. J. 532.

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:

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. 7 & 15.
Disability Discrimination Act (U.K.), 1995, c. 50.
National Health Service and Community Care Act 1990 (U.K.), 1990, c. 19.

Cases:

Battlefords District Co-operative Ltd. v. Gibbs, [1996] 3 S.C.R. 566.
Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

Jurisdiction: Canada, United Kingdom

Peat, Malcolm. "Attitudes and Access: Advancing the Rights of People with Disabilities" (1997) 156 Can. Med. Assoc. J. 657-659.

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:

United Nations General Assembly. *Standard rules on the equalization of opportunities for persons with disabilities* [resolutions adopted by the United Nations, 48th session, agenda item 109]. New York: United Nations; 1993.

Jurisdiction: Canada

Blanchet, Andre. "The Rights of Children with Disabilities to Medical Treatment: The Canadian Scene" in *L'Institut Roehrer Institute, As if Children Matter: Perspectives on Children, Rights and Disability* (North York: Roehrer Institute, 1995) 71-76.

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:

Re Eve, [1986] 2 S.C.R. 388.

Re S.D., [1983] 3 W.W.R. 597 (B.C. Prov. Ct.); [1983] 3 W.W.R. 618 (B.C. Sup. Ct.).

Jurisdiction: Canada

Right to Health Care and the Constitution

Llewellyn, Jennifer. "A Healthy Conception of Rights: Thinking Relationally about Rights in a Health Care Context" in Downie, Jocelyn ed., *Health Law at the Supreme Court of Canada* (Toronto: Irwin Law, 2007).

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:

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

Cases:

Auton v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.

Chaoulli v. Québec (Attorney General), [2005] 1 S.C.R. 791.

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Law v. Canada, [1999] 1 S.C.R. 497.

Jurisdiction: Canada

Jackman, Martha. "Misdiagnosis or Cure? Charter Review of the Health Care System" in C.M. Flood, ed., *Just Medicare: What's In, What's Out, How We Decide* (Toronto: University of Toronto Press, 2006) 58.

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:

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.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No.46.

Cases:

Chaoulli c. Québec (Procureure generale), [2000] J.Q. no. 479 (Cour superieure du Québec- Chambre civil), aff'd [2002] J.Q. No.759 (Cour d'appel du Québec).

Jurisdiction: Canada

Jackman, Martha. "The Last Line of Defence for [Which?] Citizens": Accountability, Equality, and the Right to Health in *Chaoulli*" (2006) 44 Osgoode Hall L.J. 349 – 375.

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:

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

Charter of Human Rights and Freedoms, R.S.Q. 1997, c. C-12.

Cases:

Chaoulli c. Québec (Procureur général), [2005] 1 S.C.R. 791.

Jurisdiction: Alberta, Québec, Canada

Manfredi, Christopher P. & Maioni, Antonia. "The Last Line of Defense for Citizens': Litigating Private Health Insurance in *Chaoulli v. Quebec*" (2006) 44 Osgoode Hall L.J. 249-272.

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:

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.

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

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

Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

Chaoulli v. Quebec (Attorney General), 2005 SCC 35

Jurisdiction: Canada

Porter, Bruce. "A Right to Healthcare in Canada: Only if You Can Pay for it" (2005) 6 ESR Review 4.

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:

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

Charter of Human Rights and Freedoms, R.S.Q. 1997, c. C-12.

Cases:

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

Jurisdiction: Québec, Canada

Bakht, Natasha. "Furthering an Economic/Social Right to Healthcare: The Failure of Auton v. British Columbia" (2005) 4 J.L & Equality 241-260.

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:

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 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Cases:

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Mahe v. Alberta, [1990] 1 S.C.R. 342.

Jurisdiction: British Columbia, Canada.

Sossin, Lorne. "Towards a Two-Tier Constitution? The Poverty of Health Rights" in Colleen M. Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).

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:

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
Québec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Cases:

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.
Chaoulli v. Québec (Attorney General), [2005] 1 S.C.R. 791.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429.

Irwin Toy v. Attorney General of Québec, [1989] 1 S.C.R. 927.

Jurisdiction: Québec, Canada

Jackman, Martha. "Section 7 of the Charter and Health-Care Spending" in Gregory P. Marchildon, Tom McIntosh & Pierre-Gerlier Forest eds, *The Romanow Papers Volume I: The Fiscal Sustainability of Health Care in Canada* (Toronto: University of Toronto Press, 2004) 110-136.

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:

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

Cases:

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

Chaoulli c. Québec (Procureur général), [2002] J.Q. no. 759.

Chaoulli c. Québec (Procureure générale), [2000] J.Q. no. 479.

Jurisdiction: Canada

Greschner, D. "How Will the Charter of Rights and Freedoms and Evolving Jurisprudence Affect Health Care Costs?" in McIntosh, T. et al. eds., *The Governance of Health Care in Canada* (Toronto: University of Toronto Press, 2004). 83-124.

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:

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

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 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Cases:

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

Cameron v. Nova Scotia (Attorney General), [1999] N.S.J. No. 297 (NS CA).

Chaoulli c. Quebec (Procureur general), [2002] J.Q. n° 759 (Cour d'appel du Quebec).

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

R. v. Morgentaler, [1988] 1 S.C.R. 30.

R. v. Oakes, [1986] 1 S.C.R. 103.

R. v. Parker, [2000] O.J. No. 2787 (Ont. CA).

Jurisdiction: Canada

Ries, Nola M. "Section 7 of the Charter: A Constitutional Right to Health Care? Don't Hold Your Breath" (2003) 12 Health L. Rev. No. 1, 29-35.

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:

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

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

Cases:

Auton v. British Columbia (2002), 6 B.C.L.R. (4th) 201 (C.A.), aff'g (2000), 78 B.C.L.R. (3d) 55 (S.C.), leave to appeal to S.C.C. granted, [2002] S.C.C.A No. 510.

Cameron v. Nova Scotia (1999), 177 D.L.R. (4th) 611 (N.S.C.A.) aff'g (1999), 172 N.S.R. (2d) 227, leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 531.

Gosselin v. Québec (Attorney General) (2002) 221 D.L.R. (4th) 257, aff'g [1999] R.J.Q. 1033 (C.A.), [1992] R.J.Q. 1647 (S.C.).

Other s. 7 health related cases are mentioned.

Jurisdiction: Canada

Samuels II, H. Raymond, ed., *Constitutionalizing Universal Public Healthcare in Canada: Integrating Quality-of-Life Considerations With the Charter of Rights and Freedoms* (Ottawa: The Agora Cosmopolitan, 2003).

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:

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

Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33.

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

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:

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

Cases:

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

Chaoulli c. Québec (Procureur général), [2002] J.Q. no. 759.

Chaoulli c. Québec (Procureure générale), [2000] J.Q. no. 479.

Jurisdiction: Canada

Friesen, Tamara. "The Right to Health Care" (2001) 9 Health L. J. 204-222.

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:

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

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

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Various other international instruments are referenced.

Cases:

Auton v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.

Cameron v. Nova Scotia (1999), 177 D.L.R. (4th) 611 (N.S.C.A.).

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

Jurisdiction: Canada

Disability and Personal Supports

Christopher, Michelle C. "Children, Families, and the Law" (2005) 29:5 L. Now 45.

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:

Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12.

Family Support for Children with Disabilities Act, S.A. 2003, c. F-5.3.

Jurisdiction: Alberta

Torjman, Sherri. *Nothing Personal: The Need for Personal Supports in Canada* (York: L'Institut Roeher Institute, 1993).

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:

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

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

Federal-Provincial Fiscal Arrangements Act, R.S.C. 1985, c. F-8.

Vocational Rehabilitation of Disabled Persons Act, R.S.C. 1985, c. V-3.

Jurisdiction: Canada

Carpenter, Sandra. "The independent living movement: from concept to action!" (Fall-Winter 1987) 5 Just Cause 12-14.

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)

Anderson, Gavin W. "Filling the Charter Gap: Human Rights Codes in the Private Sector" (1995) 33 Osgoode Hall L.J. 749-784.

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:

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

Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.

Human Rights Act, R.S.C. 1985, c. H-6.

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

Human Rights Code, R.S.O. 1990, c. H. 19.

Individual Rights Protection Act, R.S.A. 1985, c. I-2.

Pay Equity Act, S.O. 1993, c. 4 as am. By Savings and restructuring Act, 1996, S.O. 1996, c. 1, Schedule J.

Cases:

Action Travail des Femmes v. Canadian National Railway Co. (1987), 40 D.L.R. (4th) 193 (S.C.C.).

Dickason v. University of Alberta, [1992] 2 S.C.R. 1103.

Gay Alliance Toward Equality v. Vancouver Sun, [1979] 2 S.C.R. 435.

Gosselin v. Québec (1989), 23 Q.A.C. 329 (C.A.), aff'd [1992] R.J.Q. 1647 (Sup. Ct.).

McKinney v. Board of Governors of the University of Guelph, [1990] 3 S.C.R. 229.

University of British Columbia v. Berg, [1993] 2 S.C.R. 353.

Wiebe v. Ontario, Ontario Human Rights Commission Complaint No. 20-106S (30 June 1989) [pending].

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

Chadha, Ena & Holder, Bill. "Turnbull, et al. v. Famous Players", Case Comment, (2002) 17 J. L. & Soc. Pol'y 145.

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:

Human Rights Code, R.S.O. 1990, c. H.19.

Ontarians with Disabilities Act, 2001, S.O. 2001, c. 32.

Cases:

Turnbull, et al. v. Famous Players (2001), 40 C.H.R.R. D/333 (Ont. Bd. Inq.).

Jurisdiction: Ontario

**Ruff, Kathleen. “Disabled Persons Win Right to Accessibility” (1985) 1:5
Can. Human Rights Advocate 1.**

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:

Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1.

Cases:

Canadian Odeon Theatres Ltd. v. Huck (1985), 6 C.H.R.R. D/2682 (Sask. C.A.).

Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Jurisdiction: Saskatchewan, Canada

Disability and Child Care:

Dobby, Christine. "Whose Responsibility?: Disabled Adult "Children of the Marriage" Under the *Divorce Act* and the Canadian Social Welfare State" (November, 2005) 20 W.R.L.S.I 41.

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.

Ontario Disability Support Program Act, S.O. 1997, c.25.

Cases:

A.E.L. v. J.D.L., [2002] A.J. No. 441 (Alta. Q.B.).

Andersen v. Andersen, [1997] B.C.J. No. 2496 (B.C.S.C.).

Buckley v. Holden, [1991] B.C.J. No. 174 (B.C.S.C.).

Buzon v. Buzon, [1999] A.J. No. 371 (Alta. Q.B.).

Gardiner v. Gardiner, [2001] N.S.J. 228 (N.S.S.C.).

Graham v. Graham, [1998] B.C.J. No. 2436 (B.C.S.C.).

Harrington v. Harrington (1981), 123 D.L.R. (3d) 689

King v. Sutherland, [2004] O.J. No. 3569 (Ont. Sup. Ct. Jus.).

Krangle (Guardian ad litem of) v. Brisco, [2002] 1 S.C.R. 205.

Law v. Law (1986), 2 R.F.L. (3d) 458 (Ont. S.C.).

Lisevich v. Lisevich, [1998] A.J. No. 777 (Alta. Q.B.).

Moge v. Moge, [1992] 3 S.C.R. 813.

Ross v. Ross, [2004] B.C.J. No. 446 (B.C. C.A.).

R.W.G. v. S.I.G., [2002] S.J. No. 231 (Sask. Q.B.).

Welsh v. Welsh, [1998] O.J. No. 4450 (Ont. Gen. Div.).

Jurisdiction: Canada.

Roeher Institute. *Finding a Way In: Parents on Social Assistance Caring for Children with Disabilities* (North York, Ont.: L'Institut Roeher Institute, 2000).

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:

British Columbia Benefits (Child Care) Act, R.S.B.C. 1996, c. 26.

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

Day Nurseries Act, R.S.O. 1990, c. D.2.

Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14.

Human Rights Code, R.S.B.C. 1996, c. 210.

Human Rights Code, R.S.O. 1990, c. H.19.

Cases:

Andrews v. The Law Society of British Columbia, [1989] 1 S.C.R. 143.

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

Eldridge et al. v British Columbia (Attorney General), [1997] 3 SCR 624.

Irwin, Sharon Hope. "Inclusive Child Care in Canada: Advances at Risk" in *L'Institut Roehrer Institute, As if Children Matter: Perspectives on Children, Rights and Disability (North York: Roehrer 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:

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

Individuals with Disabilities Education Act (IDEA), Code of Federal Regulations, Vol. 34, 1992.

Jurisdiction: Canada, United States of America

Disability and Transportation:

Baker, David & Godwin, Sarah. "All Aboard!: The Supreme Court of Canada Confirms that Canadians with Disabilities Have Substantive Equality Rights" (2008) 71 Sask. L. Rev. 39.

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:

VIA Rail Canada Inc. v. Canadian Transportation Agency, 2007 SCC 15, [2007] 1 S.C.R. 650.

Jurisdiction: Canada

Lepofsky, David M. "Federal Court of Appeal De-Rails Equality Rights for Persons with Disabilities—VIA Rail v. Canadian Transportation Agency and the Important Duty Not to Create New Barriers to Accessibility" (2006) 18 N.J.C.L. 169.

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

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.

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Cases:

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.
Via Rail Canada Inc. v. Canadian Transportation Agency, 2005 FCA 79, 251 D.L.R. (4th) 418.

Jurisdiction: Canada

Manderscheid, Don J. "Municipal Paratransit Systems: Public Service or Human Right?" (Sept. 2005) 2 Digest M. & P.L. (2d) 1 (4).

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:

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 stat. 327 (codified as amended at 42 U.S.C. § 12101).
Ontarians with Disabilities Act, 2001, S.O. 2001 c. 32.

Cases:

Cannella et al. v. Toronto Transit Commission (1999), 123 O.A.C. 123, 1999 CarswellOnt 1911 (S.C.J.).
Jordan v. Canada (Human Rights Commission) (1994), 82 F.T.R. 280, 24 C.H.R.R. D/160, 1994 CarswellNat 689 (T.D.).

Jurisdiction: Canada, United States of America

Chadha, Ena. "Running on Empty: The Not So Special Status of Paratransit Services in Ontario" (2005) 20 Windsor Rev. Legal & Soc. Issues. 1-40.

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.
Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
Human Rights Code, 1981, S.O. 1981, c. 53.

Cases:

Cannella v. Toronto Transit Commission (1999), 123 O.A.C. 123 (Ont. Sup. Ct. Jus.).
Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.
Lovelace v. Ontario, [2000] 1 S.C.R. 950.
Odell et al. v. Toronto Transit Commission (No. 1) (2001), 39 C.H.R.R. D/200 (Ont.Bd.Inq.).
Ontario Human Rights Commission v. Ontario (Ministry of Health) (1994), 19 O.R. (3d) 387 (Ont. C.A.).
Ontario Women's Hockey Association et al. v. Blainey (1987) 8 C.H.R.R. D/4180 (Ont.H.C.J.).

Jurisdiction: Ontario

Baker, David. "Moving Backwards: Canada's State of Transportation Accessibility in an International Context: Final Report to the Council of Canadians with Disabilities" (February, 2005) Online: Council of Canadians with Disabilities, <www.ccdonline.ca/publications/movingback/movingback.htm>.

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.
Air Carrier Access Act of 1988, 49 U.S.C. § 1374 (1988).
Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).
Canada Transportation Act, S.C. 1996, c. 10.
Disability Discrimination Act of Australia (1992).
Disability Discrimination Act of 1995 (U.K.), 1995, c. 50.
Federal-Aid Highway Act of 1973, 23 U.S.C. § 142.
Ontarians with Disabilities Act, 2001, S.O. 2001, c. 32.
Rehabilitation Act of 1973, 29 U.S.C. § 794.
Surface Transportation Act of 1982, 49 U.S.C. §§1601, 1612.
Urban Mass Transportation Act of 1964, 49 U.S.C. § 1612.
[A number of regulations from each jurisdiction]

Cases:

Buchholz v. Air Canada NTA Decision No. 1993-A-252.

Clariss Kelly v. Via Rail (1980) CTC Order No. R-30742.

VIA Rail Canada Inc. v. Canada (Canadian Transportation Agency) 2005 FCA 79, [2005] 4 F.C.R. 473.

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

Ontario Human Rights Commission, Human Rights and Public Transit Services in Ontario: Consultation Report. March 27, 2002.

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:

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

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

Ontarians with Disabilities Act, 2001, S.O. 2001, c. 32.

Jurisdiction: Ontario

Access to Justice

Seaman, Brian. "Legal Equality, Poverty, and Access to Justice" (2006) 30:6 L. Now 20.

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:

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.

Cases:

B.C.G.E.U. v. B.C. (A.G.), [1988] 2 S.C.R. 214.

Canadian Bar Assn v. British Columbia, [2008] BCCA 92, 76 B.C.L.R. (4th) 48.

Polewsky v. Home Hardware Stores Ltd. [2003] 66 O.R. (3d) 600.

R. v. G.L., [2002] 99 C.C.R. (2d) 91.

Jurisdiction: Canada

Buckley, Melina. "Litigating Section 15: The Path to Substantive Equality in Charter Litigation", (November 2005), online: 20 Years <http://www.20years.ca/index_en.html>

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:

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

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

Addario, Lisa. *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice* (Ottawa: Status of Women Canada, 1998).

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:

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.

Jurisdiction: Canada

Lepofsky, M. David. "Equal Access to Canada's Judicial System for Persons with Disabilities- A Time for Reform" (1995) 5 N.J.C.L. 183.

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:

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.
Provincial/ territorial human rights legislation, generally

Various provincial Jury Acts

Jurisdiction: Canada

Doe, Tanis. "Access to Justice and Children with Disabilities" in L'Institut Roeher Institute, *As if Children Matter: Perspectives on Children, Rights and Disability* (North York: Roeher Institute, 1995) 50-55.

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

Lepofsky, David M. "Disabled Persons and Canadian Law Schools: The Right to the Equal Benefit of the Law School" (1991) 36 McGill L.J. 636.

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, Mary Jane. "The Charter and Legal Aid" (1985) 1 J.L. & Social Pol'y 21-41.

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.

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 Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171 Can. T.S. 1976 No. 47.

Cases:

Howard v. Stony Mountain Institution (1984), 4 C.R.D. 300-02, (Fed. Ct. T. D.).

Re Ewing and Kearney v. The Queen (1974), 49 D.L.R. (3d) 619, (B.C.C.A.).

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

R. v. Powell and Powell (1984), 4 C.R.D. 800-01.

Airey Case, Judgment of October 9, 1979, Eur. Ct. Human Rights.

Argersinger v. Hamilton 407 U.S. 25 (1972).

Lassiter v. Department of Social Services 101 S.Ct. 22153 (1981).

Powell v. Alabama 287 U.S. 45 (1932).

Jurisdiction: Canada, Ireland, United States, International

Immigrants/Refugees with disabilities:

MacIntosh, Constance. "Wealth Meets Health: Disabled Immigrants and Calculations of "Excessive Demand"" in Downie, Jocelyn ed., *Health Law at the Supreme Court of Canada* (Toronto: Irwin Law, 2007).

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 Act, 1976, S.C. 1976– 77, c. 52.

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

"Immigration Act Medical Inadmissibility Provision Survives Constitutional Challenge" *Canadian HIV/AIDS Policy & Law Review* (Vol. 8, No. 2, August 2003).

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:

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

Immigration Act, R.S.C. 1985, c I-2.

Immigration and Refugee Protection Act, S.C. 2001, c 27.

Cases:

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

Jurisdiction: Canada

Fitz-James, Michael. "Citizen's disabled spouse loses Charter challenge" (Nov. 2002) 13 L. Times No. 39, 12.

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, Lisa. "Refugees with Disabilities: A Human Rights Perspective" (Jan. 2001) 19 Refuge No. 2, 23-30.

Anani discusses the immigration of refugees 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

Voyvodic, Rose. "Into the Wasteland: Applying Equality Principles to Medical Inadmissibility in Canadian Immigration Law" (2001) 16 J.L. & Soc. Pol'y 115.

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:

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.

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Immigration Act, R.S.C. 1985, c. I-2.

Cases:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

Canada (A.G.) v. Anvari (1993), 19 Imm.L.R. (2d) 192 (Fed. C.A.) reversing (1991), 14 C.H.R.R. D/292 (Cdn. Human Rights Review Trib.).

Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177.

Jurisdiction: Canada

Mosoff, Judith. "Excessive Demand on the Canadian Conscience: Disability, Family, and Immigration" (1999) 26 Man. L.J. 149.

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:

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.

Immigration Act, S.C. 1976, c. 52.

Jurisdiction: Canada

Relevant Government Reports

Government of Canada. *Advancing the Inclusion of Persons with Disabilities: A Government of Canada Report* (Ottawa: Government of Canada, 2002).

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

Parliament, Standing Committee on Human Resources, Development and the Status of Persons with Disabilities, *Getting it Right for Canadians: The Disability Tax Credit* (Ottawa: The Committee, 2002).

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; reformatting 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. *In Unison 2000: Persons with Disabilities in Canada*, (Ottawa: Federal/Provincial/Territorial Ministers Responsible for Social Services, 2000), online: Union Sociale <http://www.union sociale.gc.ca/In_Unison2000/iu00100e.html>

This report builds on the 1998 *In Unison* framework, and relates statistical data and personal stories to indicate how Canadians with disabilities are fairing 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. *In Unison: a Canadian Approach to Disability Issues: a Vision Paper* (Hull, Québec: Human Resources Development Canada, 1998), online: Social Union <http://socialunion.gc.ca/pwd/unison/unison_e.html>

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

Federal Task Force on Disability Issues, *Equal Citizenship for Canadians with Disabilities: The Will to Act* (Ottawa: Public Works and Government Services Canada, 1996).

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:

Canada Evidence Act, R.S.C. 1985, c. C-5.

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.

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Criminal Code, R.S.C. 1985, c. C-46.

Employment Insurance Act, S.C. 1996, c. 23.

Immigration Act, R.S.C. 1985, c. I-2.

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

Jurisdiction: Canada

Premier's Council on the Status of Persons with Disabilities. *A New Context: New Threats, New Opportunities: An Analysis of Alberta's Changing Political and Social Climates and their Impact on People with Disabilities* (Edmonton: Premier's Council on the Status of Persons with Disabilities, 1995).

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

Parliament, Standing Committee on Human Rights and the Status of Disabled Persons, *The Grand Design: Achieving the 'Open House' Vision* (Ottawa: The Committee, 1995).

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:

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

Federal-Provincial Fiscal Arrangements Act, R.S.C. 1985, c. F-8.

Jurisdiction: Canada

Parliament, Standing Committee on Human Rights and the Status of Disabled Persons, "As True As Taxes: Disability and the Income Tax System: Report of the Standing Committee on Human Rights and the Status of Disabled Persons" in *House of Commons No. 29 (March 1993)*.

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

Parliament, Standing Committee on Human Rights and the Status of Disabled Persons, "Completing the Circle: A Report on Aboriginal People with Disabilities" in *House of Commons, No. 33 (24 March, 1993)*.

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

disabled persons: second report of the Standing Committee on Human Rights and the Status of Disabled Persons" in *House of Commons*, No. 30 (5 and 12 June, 1990).

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

Parliament, Standing Committee on Human rights and the Status of Disabled Persons, "Unanswered questions: the government's response to A Consensus for action: fourth report of the Standing Committee on Human Rights and the Status of Disabled Persons", in *House of Commons*, (6 December 1990).

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

Parliament, Standing Committee on Human rights and the Status of Disabled Persons, "Paying too dearly: [report of the Standing Committee on Human Rights and the Status of Disabled Persons]", in *House of Commons*, (11 June 1992).

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

Minister of Supply and Services Canada, *International Covenant on Economic, Social and Cultural Rights: Second Report of Canada Articles 10-15* (Ottawa: Human Rights Directorate Multiculturalism and Citizenship Canada, 1992).

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:

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Cases:

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

Jurisdiction: Canada, International

Ministry of the Attorney General of Ontario, *The Protection of Social and Economic Rights: A Comparative Study* (Toronto: Ministry of the Attorney General, Constitutional Law and Policy Division, 1991).

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:

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46.

Jurisdiction: Canada, International

“Court Challenges Program: First Report of the Standing Committee on Human Rights and the Status of Disabled Persons” in House of Commons (Issue No. 15) (December, 1989)

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:

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.
Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

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:

Canadian Charter of Rights and Freedoms, *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.
Canada Elections Act, R.S.C. 1970, c. 14.
Unemployment Insurance Act, R.S.C. 1970, c. U-2.

Jurisdiction: Canada

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

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:

Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.
Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Jurisdiction: Canada

Parliament, Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, "Access by the Physically Disabled" in *Equality for All*, House of Commons, No. 29 (October, 1985).

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:

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

Cases:

Huck v. Canadian Odeon Theatres (1985), 6 C.H.R.R. D/2682 (Sask. C.A.)

Jurisdiction: Canada