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A TALE OF MARGINALIZATION: COMPARING WORKERS WITH DISABILITIES IN CANADA AND THE UNITED STATES

RAVI MALHOTRA*

RÉSUMÉ

Dans cet article, j'entreprends une analyse comparative de la loi canadienne et américaine sur les droits des personnes handicapées dans le contexte de l'emploi, afin de mieux comprendre les défis et les succès dans chacun des deux pays. Bien que la loi canadienne ait fourni beaucoup de protection pour les personnes qui deviennent handicapées alors qu'elles sont déjà sur le marché du travail, des barrières structurelles dans la communauté, spécialement dans le domaine des transports, présentent des difficultés importantes pour les personnes handicapées. Cela est plus particulièrement le cas pour les personnes handicapées dont les handicaps se manifestent avant qu'elles n'entrent sur le marché du travail. À l'inverse, bien que la loi américaine sur le travail et l'antidiscrimination fournisse des protections relativement marginales pour les personnes handicapées dans le contexte de l'emploi—vu la réalité du déclin des syndicats—il y a eu, néanmoins, de nombreuses réussites dans l'élimination de barrières dans la collectivité. Au risque de froisser les sensibilités de nombreux nationalistes canadiens, je suggère que nous avons beaucoup à apprendre de nos cousins américains en ce qui concerne les droits des personnes handicapées. J'explore quelques unes des raisons derrière cette divergence, en apparence paradoxale, en examinant de près deux exemples typiques de barrières dans chaque pays : les transports et les services auxiliaires pour les personnes handicapées. Poussés par l'activisme politique de la base syndicale sur le terrain, les américains sont très clairement des pionniers d'enlèvement de barrières dans le domaine des transports. Cependant, il reste encore beaucoup de travail à faire dans les deux pays en ce qui concerne la fourniture de services auxiliaires de qualité pour les personnes handicapées.

The tale of marginalization of people with disabilities reoccurs across industrialized countries. Whereas scholars such as Esping-Anderson have eloquently developed theories that distinguish between types of welfare states,¹ relatively little comparative legal scholarship has explored why people with disabilities remain impoverished and disenfranchised in so many different countries with a variety of

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1. See generally Gosta Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press, 1990).

political systems and legal frameworks.² In this article, I compare the socio-economic circumstances of Canadians and Americans with disabilities and discuss some of the important barriers that they face, in order to tease out some of the reasons there are both striking similarities and profound differences.

First, I provide an overview of the socio-economic status of Canadians and Americans with disabilities, including insight into the labour market status and the poverty in which many in both countries live. I caution at the outset that methodological issues relating to differences in the definition of disability mean that statistical comparisons of the performance of the two countries must be undertaken with caution.³ The data presented are intended to communicate the common marginality of many people with disabilities in both countries. Next, I provide an overview of systemic barriers in transportation and attendant care services that assist people with disabilities with activities of daily living such as bathing, dressing and toileting. These barriers play a major role in the low levels of education, unemployment and poverty that plague the disability community. Then I briefly outline the state of disability rights law as it affects workers with disabilities in the two countries and give the reader a basic understanding of the jurisprudence. In Canada, I centre my analysis on leading decisions of the Supreme Court of Canada and the relevant arbitral jurisprudence. In the United States, the focus is on the *Americans with Disabilities Act* [ADA] and the jurisprudence that has been generated under Title I of the ADA, dealing with employment discrimination. Through comparative analysis, I try to crack the puzzle of why Canada has relatively generous policies toward employees with disabilities yet has such poor environmental accessibility which inhibits labour market attachment for many people with disabilities. Finally, I summarize my conclusions.

THE SOCIO-ECONOMIC STATUS OF PEOPLE WITH DISABILITIES IN CANADA AND THE UNITED STATES

Canada

One in seven Canadians—or more than 4.4 million people—has a disability.⁴ Unfortunately, Canadians with disabilities remain marginalized in terms of all the major indicators commonly used to measure socio-economic status. Labour market participation is an especially important criterion because employment provides both

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2. An important exception is Brendon D. Pooran & Cara Wilkie, “Failing to Achieve Equality: Disability Rights in Australia, Canada and the United States” (2005) 20 J.L. & Soc. Pol’y 1.
 3. Personal communication, Aron Spector, senior researcher, Strategic Policy Research Directorate, Human Resources and Skills Development Canada (24 October 2007), observing that labour market statistics relating to disability are defined differently in Canada and the United States.
 4. Canada, *Advancing the Inclusion of Persons with Disabilities 2008* (Ottawa: Human Resources and Skills Development Canada, 2008) at 2, citing data from 2006 Participation and Activity Limitation Survey (PALS), online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/071203/dq071203a-eng.htm>>.

a path out of poverty⁵ and a sense of accomplishment and self-worth for many.⁶ As Vicki Schultz observes, “[W]ork has been fundamental to our conception of the good life. It has been constitutive of citizenship, community, and even personal identity.”⁷ Yet the new economy that has accompanied globalization presents dramatic new prospects and perils for workers with disabilities as the very meaning of what constitutes work has been profoundly altered with the decline of long-term full-time employment and the growth of part-time contingent labour⁸ trends that have been exacerbated by the current global recession.

How severe is the economic marginalization of Canadians with disabilities? Statistics released by the Survey of Labour and Income Dynamics, which uses a relatively broad definition of disability and therefore understates the marginality of people with more severe disabilities, suggest that only 46 per cent of people with disabilities were employed full-time for the full year in 2004, compared to 65 per cent of people without disabilities. While this reflects an increase from 42 per cent in 1999,⁹ the numbers nevertheless indicate the persistent marginal position that many people with disabilities occupy in the labour market.

Interestingly, even though the federal *Employment Equity Act* includes people with disabilities as a designated group,¹⁰ little progress has in fact been made in the employment rates of people with disabilities.¹¹ For the most recent available year, 2006, the representation of people with disabilities in both the federally regulated private sector and federal public sector remained significantly below market availability of

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5. Canada, *Advancing the Inclusion of Persons with Disabilities 2004* (Ottawa: Social Development Canada, 2004) at 38 (noting people with disabilities who rely primarily on employment income earn on average \$22,000 more than people with disabilities who rely primarily on income support programs).
 6. See generally Vicki Schultz, “Life’s Work” (2000) 100 *Colum. L. Rev.* 1881.
 7. *Ibid.* at 1886.
 8. For good introductions to the voluminous literature on this topic, see Joanne Conaghan, Richard M. Fischl & Karl Klare, eds., *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002); Mark P. Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montreal & Kingston: McGill-Queen’s University Press, 2009); Leah Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2006).
 9. Canada, *Advancing the Inclusion of Persons with Disabilities 2006* (Ottawa: Human Resources and Social Development Canada, 2006) at 48, online: <http://www.hrsdc.gc.ca/eng/disability_issues/reports/fdr/2006/advancinginclusion.pdf>.
 10. S.C. 1995, c. 44, s. 3.
 11. *Employment Equity Act: Annual Report 2007* (Ottawa: Human Resources Development Canada, 2008) at 17, online: <http://www.hrsdc.gc.ca/eng/labour/publications/equality/annual_reports/2007/pdf/2007_report.pdf>. The EEA applies to the federally regulated private sector and Crown corporations with 100 or more employees, the federal public service, separate employers in the federal public service with 100 or more employees (such as the Canada Revenue Agency), other public sector employers with 100 or more employees (such as the Canadian Forces), and federal contractors with 100 or more employees who bid on or receive contracts valued at more than \$200,000. *Ibid.* at 2.

employees with disabilities.¹² However, there were occasional bright spots, including representation in the more narrowly defined federal public service at above-market availability of employees with disabilities and increased representation of workers with disabilities in the banking sector.¹³

Moreover, the intersection of factors such as gender, age and Aboriginality remain important. For instance, only 40 per cent of working-age women with disabilities were employed in 2001, compared with 73 per cent of women without disabilities (the comparable numbers for men were 48 per cent and 84 per cent respectively).¹⁴ Older workers with disabilities, those with more severe disabilities and those with lower educational levels are also less likely to be employed.¹⁵ Aboriginal persons not only face much higher rates of disability (particularly Aboriginal women)¹⁶ but Aboriginal workers with disabilities also experience heightened marginalization in the labour market. Only 41 per cent of Aboriginal adults with disabilities were employed, according to 2001 census data. Aboriginal adults with disabilities were especially unlikely to be working full-time throughout the year. Only 21 per cent of Aboriginal adults with disabilities were in this category, according to the 2001 data.¹⁷

Comparing income levels also provides some insight into the marginalization of Canadians with disabilities. Just as Canadians with disabilities are more likely to be unemployed, Canadians with disabilities also experience higher poverty rates than their able-bodied counterparts. According to Statistics Canada data, people with disabilities are more than twice as likely to live below the Low-Income Cutoff.¹⁸ Given the relatively weak labour market attachment of Canadians with disabilities and the extra costs that disability often entails, this figure is hardly surprising. In addition to unemployment, another cause of poverty for people with disabilities is that they

12. *Ibid.* at 17.

13. *Ibid.*

14. *Advancing the Inclusion of Persons with Disabilities 2006*, *supra* note 9 at 56 (citing data from Statistics Canada's 2001 Participation and Activity Limitations Survey).

15. *Advancing the Inclusion of Persons with Disabilities 2004*, *supra* note 5 at 40.

16. *Advancing the Inclusion of Persons with Disabilities 2008*, *supra* note 4 at 95: "It is clear that the rates of disability—particularly associated with various health conditions such as diabetes and ear disease—are distressingly high among Aboriginal peoples. Depending on the disability and the region under consideration, estimates range from 20% to 50% greater than those found in the non-Aboriginal population ... [a 2002-2003 survey] shows that the rate of disability among First Nations adults is 28.5% (25.7% among men and 31.5% among women)".

17. *Advancing the Inclusion of Persons with Disabilities 2004*, *supra* note 5 at 45. See also the similar data reported at *Advancing the Inclusion of Persons with Disabilities 2006*, *supra* note 9 at 56: "First Nations adults with disabilities are less likely to be employed than their non-disabled counterparts (37.3% compared to 52.2%)".

18. *Advancing the Inclusion of Persons with Disabilities 2004*, *ibid.* at 54. See also Christine Dobby, "Whose Responsibility? Disabled Adult 'Children of the Marriage' under the *Divorce Act* and the Canadian Social Welfare State" (2005) 20 Windsor Rev. Legal Soc. Issues 41 at 47.

are more likely to live alone than able-bodied people.¹⁹ Unfortunately, studies have shown that concerns over loss of supplementary health coverage are an important factor in discouraging people with disabilities from entering the labour market.²⁰ People with disabilities are also twice as likely as able-bodied people to face food shortages—a statistic that of course directly affects health.²¹ Primary income earners with disabilities have also been found to have a net worth that is approximately one-third of those without disabilities.²² Thus, a wide variety of measures of income find people with disabilities repeatedly scoring poorly.

There is a well-established correlation between educational levels and success in the labour market. In fact, this may increasingly be the case as a larger proportion of newly created jobs require higher levels of training.²³ Therefore, an examination of differences among people with disabilities in educational attainment is important. The data indicate that Canadians with disabilities are less likely to have completed high school than their able-bodied counterparts. Some 37 per cent of adults with disabilities have not completed high school, compared with only 25 per cent of able-bodied adults.²⁴ Similarly, people without disabilities are nearly twice as likely to have completed a university degree as their counterparts with disabilities.²⁵

The United States

Americans with disabilities also face strikingly similar economic marginalization. According to data released in 2004 by the National Organization on Disability [NOD], only 35 per cent of working-age Americans with disabilities were in the labour market, full time or part time, compared with 78 per cent of able-bodied Americans.²⁶ Moreover, according to 2000 data from the United States Census Bureau, only

19. *Advancing the Inclusion of Persons with Disabilities 2004*, *supra* note 5 at 55.

20. *Ibid.* at 56.

21. *Ibid.* at 57.

22. *Ibid.* at 57-58. Interestingly, however, people with disabilities who have a post-secondary education have a greater net worth than their counterparts without disabilities.

23. *Ibid.* at 31 (noting more than 70% of new jobs created in Canada in 2004 required a post-secondary education).

24. *Ibid.* at 32.

25. *Ibid.*

26. *2004 National Organization on Disability / Harris Survey on Americans with Disabilities* (Washington: National Organization on Disability, 2004), summary available at <http://www.nod.org/Resources/harris2004/harris2004_summ.pdf>. The latest data from the U.S. Census Bureau's monthly Current Population Survey (CPS) indicates that the January 2009 labour participation rates of working-age persons with and without disabilities remain at levels similar to those reported in the 2004 NOD/Harris Survey. The monthly CPS data can be found at <<http://www.bls.gov/cps/cpsdisability.htm>>. See also Armantine M. Smith, "Persons with Disabilities as a Social and Economic Underclass" (2002-2003) 12 Kan. J.L. & Pub. Pol'y 13 at 21 for a summary of the data in the 2000 NOD/Harris Survey and the 2000 CPS.

22 per cent of working-age men with disabilities were employed full-time.²⁷ Not surprisingly, women with disabilities and people with severe disabilities fared even worse. In 2000, 27 per cent of working-age women with disabilities participated in the labour market.²⁸ Only a shockingly low 15 per cent of women with disabilities were employed full time and only 9 per cent of those classified as severely disabled were working at all.²⁹ Again, it is important to emphasize that these statistics are intended to supply only a portrait of the marginalization of American workers with disabilities, rather than to make direct comparisons with the Canadian data, which inevitably used different definitions of disability.

While income levels of workers with disabilities, as measured by mean earnings, increased year after year in the late 1990s, income levels of people with disabilities remained low. According to the 2007 Disability Status Report, based on census data, people with disabilities were more than twice as likely as able-bodied people to have incomes classified as low.³⁰ The likelihood of having a low income was even greater among people with physical and mental disabilities.³¹ Eligibility criteria for income support programs such as disability insurance are highly restrictive, and few people with disabilities qualify because recipients are required to refrain from participation in the labour market.³² People with severe disabilities tended to have particularly low incomes, and the actual effect of this disparity is sharply magnified because people with severe disabilities frequently have very large expenses related to their disabilities, particularly in the free market health-care environment in the United States.³³ Many scholars have justifiably identified the lack of a universal health-care program as a major factor in keeping Americans with disabilities outside the labour market,³⁴ where they remain eligible for Medicaid health benefits that are provided only to the

27. Smith, *ibid.* at 22 and 48, table 8 (summarizing data from the U.S. Census Bureau, Current Population Survey, 2000).

28. *Ibid.*

29. *Ibid.* at 22, 48 (table 8) and 54 (table 14).

30. W. Erickson & C. Lee, *2007 Disability Status Report: United States* (Ithaca, NY: Cornell University Rehabilitation Research and Training Center on Disability Demographics and Statistics, 2008) at 34 [Erickson & Lee, *Disability Status*], available online at <http://www.ilr.cornell.edu/edi/disabilitystatistics/StatusReports/2007-PDF/2007-StatusReport_US.pdf?CFID=9959281&CFTOKEN=63943738&jsessionid=f03042e2d15af7ab94781b1d76433d255777>. See also *ibid.* at 22, citing the U.S. Census Bureau Survey of Income and Program Participation, table 8A (1994-1995). See also Mark C. Weber, "The Americans with Disabilities Act and Employment: A Non-Retrospective" (2000-2001) 52 Ala. L. Rev. 375 at 416, n. 301 [Weber, "Americans"], citing data showing that the poverty rate for adults with disabilities is three times that of the rest of the population.

31. Erickson & Lee, *ibid.* at 34-35. See also Smith, *supra* note 26 at 22.

32. Mark C. Weber, "Disability Rights, Disability Discrimination, and Social Insurance" (2009) 25 Ga. St. U.L. Rev. 575 at 660.

33. Smith, *supra* note 26.

34. Samuel R. Bagenstos, "The Future of Disability Law" (2004) 114 Yale L.J. 1 at 71-72 (noting universal entitlement programs are politically more stable than targeted policy interventions).

extremely poor and are consequently especially vulnerable to cutbacks. According to the 2007 Disability Status Report, the median earnings of people with disabilities were significantly less than 80 per cent of people without disabilities.³⁵ Again, like in the Canadian case, it is hardly surprising that a segment of the population with minimal labour market attachment tends to have systematically low incomes. It is also not surprising that income levels are directly correlated with educational attainment levels among Americans with disabilities.³⁶

Again on the issue of educational attainment, Americans with disabilities remain far behind their able-bodied peers. The NOD/Harris Survey data found that people with disabilities were more than twice as likely as their able-bodied counterparts to have not completed high school. More than 20 per cent of people with disabilities reported that they had not attained a high school diploma.³⁷ One interesting point to bear in mind, however, is that most people with disabilities acquire their disabilities later in life. Therefore, one has to consider not only factors such as physical barriers at university and college campuses or the increasing costs of tuition but also the possibility that disability is simply more common among those with lower levels of education and income.³⁸ Regardless of the nature of the causal relationship, the fact remains that people with disabilities in the United States have lower levels of educational attainment, with significant implications for income levels and employment rates.

BARRIERS FACED BY PEOPLE WITH DISABILITIES

Canada

The discussion above made clear that Canadians with disabilities score poorly on key indicators of socio-economic status. In this subsection, I illustrate major barriers in Canadian society that collectively cause this profound marginalization. I do the same in the subsequent subsection for the United States. This commentary is deliberately selective, as the intent is not to provide a comprehensive discussion of every barrier affecting Canadians with myriad diverse disabilities but merely to highlight particularly difficult areas.

Transportation Barriers

Clearly, one critical area is transportation because effective public transportation is essential for many people with disabilities, especially those with lower incomes, to access employment, recreation and medical services in the community. This area

35. Erickson & Lee, *supra* note 30 at 31. See also Smith, *supra* note 26 at 22 (men aged twenty-one to sixty-four years with no disabilities had a median monthly income of \$2,353, while men with severe disabilities in the same age range had a median monthly income of \$1,880; the similar numbers for women were \$1,750 and \$1,400 respectively).

36. *Ibid.* at 21.

37. *Ibid.* at 21, 58.

38. Susan Schwochau & Peter David Blanck, "The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?" (2000) 21 Berkeley J. Emp. & Lab. L. 271 at 285, n. 78.

encompasses all forms of transportation, including local and intercity buses, taxis, trains, aircraft, ferries and ships. Barriers range from physical impediments to access by people with mobility impairments, such as steps, to a failure to make information on route stops available to blind people in alternative formats and beyond.

One illustration of these extensive barriers is the inaccessible railway cars operated by VIA Rail that were the subject of an ultimately victorious battle waged by the Transportation Committee of the Council of Canadians with Disabilities [CCD], Canada's leading cross-disability rights-advocacy organization. In *Via Rail Canada Inc. v. Canada (Canadian Transportation Agency)*,³⁹ the Supreme Court of Canada, in a landmark opinion written by Justice Abella, upheld a decision of the Canadian Transportation Agency ruling that features of the newly purchased Renaissance passenger cars constituted undue obstacles to the mobility of people using wheelchairs and people who require the assistance of service animals in violation of the *Canada Transportation Act [CTA]*.⁴⁰ This issue was tremendously important because the Renaissance cars represented the first addition of new trains to an inaccessible and aging system in many years.⁴¹

The Federal Court of Appeal had overturned the decision of the Agency, finding that it had failed to analyze whether train users with disabilities could be accommodated within the general train network as a whole, regardless of the physical barriers on the Renaissance model.⁴² Moreover, the Federal Court of Appeal stated that the high cost of accommodating a small number of passengers with disabilities has to be weighed against the goal of keeping train fares affordable to the public.⁴³ The Federal Court of Appeal therefore found the Agency's decision to be patently unreasonable and sent the issue back for reconsideration in accordance with its analysis.⁴⁴ Fortunately for disability rights activists, a narrow 5-4 majority of the Supreme Court of Canada overturned the Federal Court of Appeal and restored the Agency's decision.⁴⁵

Justice Abella, writing for the majority, held that the *CTA* must be interpreted in light of human rights principles,⁴⁶ including respect for the dignity of travellers with

39. [2007] 1 S.C.R. 650 [*Via Rail Canada*].

40. S.C. 1996, c. 10.

41. David Baker & Sarah Godwin, "ALL ABOARD!: The Supreme Court of Canada Confirms That Canadians with Disabilities Have Substantive Equality Rights" (2008) 71 Sask. L. Rev. 39 at 48. It should be noted that David Baker and Sarah Godwin acted as legal counsel for the Council of Canadians with Disabilities, the key player in this litigation. I also disclose that while this case predates my involvement, I am now a member of the Human Rights Committee of the Council of Canadians with Disabilities.

42. [2005] 4 F.C.R. 473, 2005 FCA 79 (QL) [*Via Rail Canada* cited to F.C.R.].

43. *Ibid.* at 512 (noting that only 0.5% of rail passengers in 1995 had disabilities).

44. *Ibid.* at 505-06.

45. *Via Rail Canada*, *supra* note 39.

46. *Ibid.* at paras. 112-17.

disabilities. She stated that there is also a duty to prevent new barriers in the design process and therefore the law does not require one to wait until inaccessible vehicles are in operation and an individual has experienced discrimination.⁴⁷ Furthermore, given the informational disparity between a complainant and a corporate respondent that has expertise about its own finances, the respondent had a duty to demonstrate that removing the obstacle identified by the complainant would constitute undue hardship.⁴⁸ A finding would be made against a respondent that failed, as in this case, to cooperate and provide evidence to the Agency.⁴⁹ The Court also confirmed that “undue obstacle” had to be interpreted as equivalent to “undue hardship” in Canadian human rights jurisprudence, indicating that the very high standard imposed before steps required to rectify a barrier are found to be an undue hardship apply to the transportation arena as well.⁵⁰ Undueness would be reached only when all reasonable forms of accommodation were exhausted and rectifying the identified obstacle would substantially interfere with the enterprise.⁵¹ Collectively, these principles mark an important moment in Canadian jurisprudence.

The dissent, written jointly by Justice Rothstein and Justice Deschamps, placed far more emphasis on the economic implications of mandating accommodation and held that the Agency had erred in not giving sufficient weight to the degree of accessibility offered on the general train network.⁵² The minority view, had it prevailed, would have been a disturbing development in the jurisprudence that would have posed difficulties for future claimants alleging discrimination in the area of transportation that requires a remedy involving capital expenditures.

Although the disability rights community ultimately scored an important if slender victory in *Via Rail Canada*, the many years of struggle and activism that led to the decision exemplify the significant barriers faced by people with disabilities. Indeed, as David Baker and Sarah Godwin have commented, the lengthy litigation nearly bankrupted the CCD.⁵³ Moreover, during the many years that the complaint proceeded through the legal system, the inaccessible railway cars were operational, forcing people with mobility impairments to make alternative arrangements. As David Baker has poignantly commented, “The recent VIA Rail incident is convincing

47. *Ibid.* at para. 118.

48. *Ibid.* at paras. 142, 226.

49. *Ibid.* at para. 226.

50. *Ibid.* at paras. 137-39.

51. *Ibid.* at paras. 130-31.

52. *Ibid.* at para. 351. I discuss the dissent briefly in Ravi Malhotra, “The Law and Economics Tradition and Workers with Disabilities” (2007-2008) 39 *Ottawa L. Rev.* 249 at 278-79.

53. Baker & Godwin, *supra* note 41 at para. 1.

evidence that Canada has become a dumping ground for inaccessible transportation vehicles that cannot be brought into service in other developed countries.”⁵⁴

The decision in *Via Rail*, however, is by no means an isolated example. Although some attention was paid to making transportation accessible—largely an issue within federal jurisdiction—after the federal government released the *Obstacles* report in 1981 detailing systemic failures in the accommodation of people with disabilities in many areas of life,⁵⁵ transportation policy in Canada remains filled with many barriers for people with disabilities. Despite progress in the 1980s, a decision to make accessibility standards voluntary by the Liberal government in 1993 has put Canada now far behind many industrialized countries, including the United States.⁵⁶ Despite promises by private sector entities that voluntary accessibility codes would be effective, VIA Rail’s intransigence in purchasing passenger cars that have significant accessibility problems for people with mobility impairments is indicative of the barriers that people with disabilities have faced when travelling.⁵⁷

Two other recent legal developments warrant careful attention. Recently, the Canadian Transportation Agency ruled that people with disabilities who require an additional seat for an attendant or because of obesity during flights must not be charged an additional fare by the leading airlines.⁵⁸ The Agency adopted the principle known to disability rights activists as “One Person, One Fare”. The Agency accepted that the previous policy of the airlines imposed financial burdens that constituted undue obstacles for people with disabilities who required an extra seat during flights. The policy made it difficult for people with disabilities to take advantage of the employment, leisure and educational opportunities that were otherwise available to airline passengers.⁵⁹ However, the Agency granted the airlines a one-year grace period to implement a policy that complied with the ruling.⁶⁰

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54. David Baker, *Moving Backwards: Canada’s State of Transportation Accessibility in an International Context* (Winnipeg: Council of Canadians with Disabilities, 2005) at 12-13 [Baker, *Moving*], online: Council of Canadians with Disabilities <<http://www.ccdonline.ca/en/transportation/minister/movingback>>.
 55. Canada, Parliament, House of Commons, Special Committee on the Disabled and the Handicapped, *Obstacles* (Ottawa, 1981). Excerpted in Anne Crichton & Lyn Jongbloed, *Disability and Social Policy in Canada* (North York: Captus, 1998) at 274.
 56. Baker, *Moving*, *supra* note 54 at 2-3.
 57. *Ibid.* at 3. The victory at the Supreme Court of Canada cannot make up for the years of inaccessibility and barriers imposed on people with disabilities, especially poor people with disabilities who may not be able to afford more expensive modes of transportation such as airplane flights.
 58. Decision No. 6-AT-A-2008 (CTA) (available online at <<http://www.otc-cta.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=6-AT-A-2008&lang=eng>>). The airlines involved included Air Canada, Air Canada Jazz, and WestJet.
 59. *Ibid.* at paras. 22, 163, and 903.
 60. *Ibid.* at para. 919. The ruling came into effect on 10 January 2009, after an application by the airlines for leave to appeal was dismissed by the Federal Court of Appeal ([2008] F.C.J. No. 209) and by the Supreme Court of Canada ([2008] S.C.C.A. No. 322).

A second issue of concern is the growing backlash to the Ontario Human Rights Tribunal's rulings that municipal bus systems must announce the stops for blind passengers. As a result of successful complaints by prominent disability rights activists in Toronto and Ottawa against their respective municipal transportation systems,⁶¹ the Ontario Human Rights Commission advised municipalities that they must call out the stops.⁶² In an unprecedented move, municipal councillors in Sarnia denounced this directive in highly inflammatory language and compared the OHRC to Nazis.⁶³ This suggests that enforcement of the OHRC's commitment to calling out the stops across Ontario in coming years will be challenging. The OHRC announced in October 2008 that all thirty-eight of Ontario's public transit providers had committed to abiding by the stop announcement policy and that it would "continue to monitor the situation ... to ensure that this important accessibility measure is available province-wide."⁶⁴

Numerous other examples of transportation barriers are easily catalogued. If one focuses on a single city, Toronto, Canada's largest metropolis, the problems that plague the local transportation system with respect to wheelchair accessibility are manifold. They include the inaccessibility to wheelchair users and others with mobility impairments of the major portion of the subway system—the main artery of Toronto's transportation system.⁶⁵ Even stations supposedly identified as wheelchair accessible often experience broken elevators. On one random day when an accessibility audit was conducted, more than a quarter of subway elevators were out of service and none of the accessible subway stations even had accessible washrooms.⁶⁶ Only one in four buses in the conventional fixed-route bus fleet is wheelchair accessible.⁶⁷ The streetcar system is also completely inaccessible, even though accessible streetcar systems

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61. *Lepofsky v. TTC*, 2007 HRTO 23; *Green v. OC Transpo*, Decision No. 200-AT-MV-2007 (CTA) (available online at <<http://www.otc-cta.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=200-AT-MV-2007&lang=eng>>). The complaint against Ottawa's OC Transpo system, which regularly crosses into Quebec, was heard by the Canadian Transportation Agency. Both Lepofsky and Green are members of the Ontario Bar and disability rights advocates.
 62. See Commissioner Barbara Hall to transit providers, October 2007, online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/resources/news/transitletter>>. See also Ontario Human Rights Commission, "Next Stop, Accessibility": *Report on Public Transit Stop Announcements in Ontario* (April 2008), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/discussion_consultation/transitreport/pdf>.
 63. See AODA Alliance, "Our Campaign for Strong, Effective Implementation of the AODA", online: <<http://www.aodaalliance.org/strong-effective-aoda/03252008.asp>>.
 64. News Release, "RE: Transit Stop Announcements" (16 October 2008), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/resources/news/transitthank>>.
 65. Baker, *Moving, supra* note 54 at 35.
 66. *Ibid.* at 42.
 67. *Ibid.* at 40. In fairness, it should be noted that the Canadian disability rights community was less active on the issue of making regular buses accessible because of concerns, now seen to be largely unfounded, that heavy snowfall in most Canadian cities would prevent the use of such lifts.

are in operation in European cities.⁶⁸ Moreover, as a result of a 1998 decision by the Conservative provincial government to download funding responsibilities for public transit to municipalities, the paratransit service in Toronto that provides door-to-door transportation, Wheel-Trans, has become increasingly costly and overwhelmed by users, leading to a decline in the quality of the service and pressure by the service provider to exclude those with mobility impairments that are deemed minor.⁶⁹ Lengthy waiting times, limited hours of service, advance booking requirements, prioritization of trips for medical purposes only, cancellation fees and higher fares are all growing problems with paratransit systems in Ontario.⁷⁰ Collectively, these barriers make employment for people with many disabilities very difficult.

Attendant Care Services

A second area that imposes considerable barriers for many people with disabilities is the profound shortage of attendant care services, sometimes known as home support services. Attendant service providers assist, under the direction of the disabled person, with activities of daily living such as bathing, dressing and toileting and are essential for people with disabilities to fully participate in employment, education and life of the community in general. They allow people with disabilities to exercise full autonomy in deciding to undertake particular tasks, such as putting on a blue shirt or blouse on Monday, but leave the physical execution of the task to attendants to perform.⁷¹ Unfortunately, demand for attendant care services in Canada greatly exceeds the supply, particularly in remote and rural communities, and the waiting lists are often lengthy. Where such services are unavailable, people with disabilities are expected to rely on demeaning institutional settings or family members or friends—an untenable situation that undermines the independence of people with disabilities and leads to friction or even abuse within families.⁷² Some people with disabilities are forced to use acute health care services, a system already under extreme stress and under-funded, because they have no alternative.⁷³

68. *Ibid.* at 41.

69. *Ibid.* at 37-38; Ena Chadha, "Running on Empty: The 'Not So Special Status' of Paratransit Services in Ontario" (2005) 20 Windsor Rev. Legal & Soc. Issues 1 at 9-10. Indeed, Wheel-Trans actually implements what amounts to a medical exam for new Wheel-Trans applicants to ensure that they are sufficiently disabled. Chadha, *ibid.* at 10. The policy was unsuccessfully challenged as a violation of the Charter equality rights of the mentally disabled: see *Canella v. T.T.C.*, (1999) 123 O.A.C. 123 (Ont. S.C.J.).

70. Chadha, *ibid.* at 1.

71. See the discussion of the difference between "decisional" and "executorial" autonomy in Samuel R. Bagenstos, "The Americans with Disabilities Act as Welfare Reform" (2003) 44 Wm. & Mary L. Rev. 921 at 992-93 [Bagenstos, "Americans"].

72. See Andrew I. Batavia, "A Right to Personal Assistance Services: 'Most Integrated Setting Appropriate' Requirements and the Independent Living Model of Long-Term Care" (2001) 27 Am. J.L. & Med. 17 at 18 [Batavia, "Right"] (discussing implications of lack of attendant services in American context).

73. Roeher Institute, *Nothing Personal: The Need for Personal Supports in Canada* (North York: Roeher Institute, 1993) at 64-65 [Roeher Institute, *Nothing Personal*].

Moreover, these services are arbitrarily classified as extended health care under the *Canada Health Act* and therefore provinces are free to impose user fees for them, even though they are in fact essential for people with disabilities to thrive in the community.⁷⁴ Indeed, many provinces have imposed user fees, forcing many people with disabilities on limited incomes to make drastic choices, such as bathing less frequently—decisions that can have very negative health effects, physically and psychologically.⁷⁵ The same problems arise in provision of assistive devices such as customized wheelchairs. There is also an extremely complex and highly bureaucratic patchwork of services to navigate in order to obtain what is required, which varies significantly from province to province and even within provinces.⁷⁶ There are also concerns that the shift toward a decentralized federalism with greater powers for the provinces, symbolized by the end of the Canada Assistance Plan, may mean greater inter-provincial and intra-provincial disparities in the availability of attendant services and assistive devices, as well as greater variation in eligibility requirements and the degree of coverage.⁷⁷ This is particularly true as people with disabilities are expected to rely increasingly on dispersed and local voluntary community organizations to supply services such as attendant services and assistive devices as the federal and provincial governments cede more and more authority to the community support sector. There are also deep concerns that, despite federal government verbal commitments to empowering Canadians, these voluntary organizations are far more oriented towards satisfying their funders than the disabled clients who seek accountability for the services they obtain.⁷⁸

In many cases, there are also arbitrary disparities based on the medical diagnosis of the disabled person, even though the individual may have needs identical to someone with a diagnosis for whom the program is intended.⁷⁹ People who are born with disabilities may find they do not meet the eligibility criteria of services designed for people who are injured later in life and who have established a record of employment.⁸⁰

74. *Ibid.* at 65.

75. Kari Krogh et al., *A National Snapshot of Home Support from the Consumer Perspective: Enabling People with Disabilities to Participate in Policy Analysis and Community Development* (Winnipeg: Council of Canadians with Disabilities, 2005) at 60, online: Council of Canadians with Disabilities <<http://www.ccdonline.ca/en/socialpolicy/disabilitysupports/homesupports/national-snapshot2005>>.

76. Roeher Institute, *Nothing Personal*, *supra* note 73 at 70-71.

77. Roy Hanes & Allan Moscovitch, "Disability Supports and Services in the Social Union" in Alan Puttee, ed., *Federalism, Democracy and Disability Policy* (Montreal & Kingston: McGill-Queen's University Press, 2002) 121 at 131-32.

78. Michael Bach, "Governance Regimes in Disability-Related Policy and Programs: A Focus on Community Support Systems" in *ibid.*, 153 at 160-61; Marcia H. Rioux & Michael J. Prince, "The Canadian Political Landscape of Disability: Policy Perspectives, Social Status, Interest Groups and the Rights Movement" in *ibid.*, 11 at 24-25.

79. Roeher Institute, *Nothing Personal*, *supra* note 73 at 78-79 (describing Saskatchewan program that funded wheelchairs only for people with paralysis).

80. *Ibid.* at 80.

People with disabilities whose functioning is too great may ironically be at risk of losing essential services. As the Roehrer Institute has noted, "In short, a person has to be careful about trying too hard for inclusion in the activities of everyday living for fear of losing the supports that, for many, are essential to daily functioning."⁸¹

Even when people with disabilities qualify for attendant services, there are real problems of rigidity that risk profound marginalization. For instance, services may not be available on weekends, drastically affecting a disabled person's quality of life.⁸² Programs may have strict regulations stipulating only home-based delivery of attendant services, regardless of the fact that they are required in the workplace or at a university, forcing the disabled person to apply separately to another program, if it even exists, for the necessary services.⁸³ Even worse, many people with disabilities may lose their services should they move, even within the same community, because their attendant services are tied to a particular building.⁸⁴ This situation obviously has a direct effect on their labour market opportunities, including their ability to take employment that requires travel.

Moreover, regulations may prohibit attendants from performing very simple care routines—such as the insertion of tubes, which are easily learned by anyone—because they have been classified by legislation as funded only when performed by a medical specialist.⁸⁵ Many consumers fear that the recent unionization of many attendants may lead to restrictions that institutionalize their homes and dangerously reduce flexibility, while destroying relationships between attendants and users.⁸⁶ Although some programs offer people with disabilities the opportunity to hire and fire their own attendants under a direct funding model, these are available only on a limited basis in many parts of Canada.⁸⁷ Worst of all, funding cutbacks to home support services in recent years have led to serious barriers that prevent people with disabilities from achieving their full potential, including having to withdraw from the labour market.⁸⁸

81. *Ibid.* at 81.

82. *Ibid.* at 86.

83. *Ibid.* at 87.

84. *Ibid.*; Krogh *et al.*, *supra* note 75 at 59.

85. Roehrer Institute, *Nothing Personal*, *supra* note 73 at 88-89.

86. Krogh *et al.*, *supra* note 75 at 79. See also Cynthia J. Cranford, "From Precarious Workers to Unionized Employees and Back Again? The Challenges of Organizing Personal-Care Workers in Ontario" in Cynthia J. Cranford *et al.*, *Self-Employed Workers Organize: Law, Policy and Unions* (Montreal & Kingston: McGill-Queen's University Press, 2005) 96 at 122-23 (describing tensions raised by lack of flexibility and disputes over whether attendants should do basic housekeeping). I address this in Ravi Malhotra, "Empowering People with Disabilities" (2006) 41 *New Politics*, online: William Patterson University <<http://www.wpunj.edu/newpol/issue41/Malhotra41.htm>>.

87. Krogh *et al.*, *ibid.* at 75.

88. See generally Kari Krogh & Jon Johnson, "A Life without Living: Challenging Medical and Economic Reductionism in Home Support Policy for People with Disabilities" in Dianne Pothier & Richard Dev-

The United States

Transportation Barriers

It should be acknowledged at the outset that, despite myriad barriers for Americans with disabilities, transportation accessibility has been a relative success story in the United States. It remains clear, however, that all the same barriers that largely continue in Canadian transportation systems posed, in the past, the same difficulties for Americans with disabilities and therefore warrant examination. Canadian disability-rights advocates can learn much from the American history, and it is only by closely parsing the interplay between legal doctrine and grassroots movements that one can decipher what occurred to transform American society so radically in favour of Americans with disabilities in the transportation sector.

For instance, as far back as 1976, when the disability rights movement was in its relative infancy and more than a decade before the *ADA*, in *Disabled in Action, Inc. v. Coleman*⁸⁹ a coalition of disability rights activists sought to compel federal transportation authorities to require manufacturers to produce a low-floor wide-door bus with ramps that would be suitable for wheelchair users in order to meet accessibility requirements in public transportation.⁹⁰ Disability rights activists prioritized bus accessibility as a low-cost form of transportation for the many people with disabilities with minimal incomes.⁹¹ Although this litigation was deemed to be moot by the time a decision was rendered,⁹² the new Carter Administration, under pressure from disability rights activists, reacted to the litigation by decreeing in 1977 that all buses purchased with federal funds after 30 September 1979 must be wheelchair accessible.⁹³ Unfortunately, Congress, under intense pressure from lobbyists of the American Public Transit Association [APTA], voted in 1978 to re-evaluate this mandate, leading to delays of many years before Americans with disabilities would enjoy full access to bus transportation.⁹⁴

This was by no means the only legal setback in these early days of American transportation activism. In a telling ruling that would anticipate later dubious judicial analyses of the *ADA*, a majority of the New York State Supreme Court (Appellate Division) held that the New York City transit authorities did not discriminate against people with physical disabilities under the state's human rights laws, because bus

lin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: University of British Columbia Press, 2006) 151 at 151-76.

89. 448 F. Supp. 109, 1978 U.S. Dist. LEXIS 18976 (E.D. Pa.1978) [*Disabled* cited to Lexis]. Although the decision was released in 1978, the plaintiffs had filed the case in 1976.

90. Doris Zames Fleischer & Frieda Zames, *The Disability Rights Movement: From Charity to Confrontation* (Philadelphia: Temple University Press, 2001) at 56.

91. *Ibid.* at 85.

92. *Disabled*, *supra* note 89 at 5.

93. Fleischer & Zames, *supra* note 90 at 56.

94. *Ibid.*

lifts that enabled wheelchair access were affirmative action and not mandated under the law.⁹⁵ Even when disability rights activists convinced authorities to introduce some accessible buses, poor training for bus drivers meant that many did not know how to use the wheelchair lifts or were hostile to people with mobility impairments using the new buses, leading to confrontations between bus drivers and disability rights activists.⁹⁶ Poor maintenance of wheelchair lifts caused further difficulties.⁹⁷ One early grassroots organization, Disabled in Action, organized a sit-in at the offices of the Metropolitan Transportation Authority in Manhattan in 1980 to protest continued delays in the introduction of wheelchair-accessible buses.⁹⁸ In part, this reflects the fact that a generation of radicalized veterans, newly disabled as a result of combat in Vietnam, played a pivotal role in mobilizing Americans with disabilities in transportation and other forms of activism.⁹⁹ Tragically, this kind of grassroots mobilization has been essentially absent from the Canadian scene.

Sometimes industry lobbyists initiated litigation in an effort to roll back or delay the advent of disability rights. For instance, the APTA successfully launched litigation to challenge 1979 Department of Transportation [DOT] regulations that required accessible buses. APTA was able to convince the D.C. Circuit that accommodation of people with disabilities wrongly constituted unwarranted affirmative action and therefore the Court overturned a lower court's ruling upholding the DOT regulations.¹⁰⁰ The New York City government under Mayor Koch was particularly hostile to accessible transportation, citing the cost implications at a time of fiscal constraints for municipal governments. Nevertheless, a 1984 agreement between transit authorities and disability rights activists generated an eight-year plan to make key subway stations and a large majority of buses wheelchair accessible. Eventually, transit authorities agreed to make all buses wheelchair accessible.¹⁰¹ Organizations such as American Disabled for Accessible Public Transportation [ADAPT] battled on with an array of lawsuits in the courts and political demonstrations in the streets throughout the 1980s. This action culminated eventually in attainment of nationwide transportation accessibility and the passage of the ADA. The history of this struggle provides important lessons from which Canadian disability rights activists can learn.¹⁰²

95. *Eastern Paralyzed Veterans Association v. Metropolitan Transportation Authority*, 433 N.Y.S. 2d 461 (App. Div. 1980).

96. Fleischer & Zames, *supra* note 90 at 60-61.

97. *Ibid.* at 61.

98. *Ibid.* at 59.

99. See Ravi Malhotra, "The Politics of the Disability Rights Movement" (2001) 31 *New Politics*, online: William Patterson University <<http://www.wpunj.edu/newpol/issue31/malhot31.htm>>.

100. *American Public Transit Association v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981).

101. Fleischer & Zames, *supra* note 90 at 62.

102. *Ibid.* at 68.

What are the specific lessons for Canadian disability rights activists? First and foremost, one should not be choosing between political-consciousness-raising and the assertion of disability rights as a political issue in every realm of the public sphere, on the one hand, and a litigation strategy on the other. Rather, the two should be complementary and go hand in hand.¹⁰³ This suggests that a disability rights movement led primarily by professionals needs to liaise more aggressively with marginalized segments of the community who have both the time and passion to contribute in a way that many professionals with disabilities do not. While the Vietnam war was a unique episode in American history, activism can be replicated, provided that advocacy organizations conduct the proper outreach. The vast majority of people with disabilities still do not self-identify with the movement in Canada. A second question that remains ambiguous is the role that injured soldiers returning from service in Afghanistan might play in a future disability rights movement. Very little is known about such disabled soldiers, and while one cannot equate their experiences with the explosive political tensions raised by American intervention in Vietnam, it is entirely possible that newly disabled soldiers will become politicized in a way that has been sorely lacking among many people with disabilities.

Attendant Services

The historic lack of attendant services has also been an enormous barrier for more than ten million Americans with disabilities, and success has remained more elusive than in the field of transportation. A major political issue in the United States has been the continued warehousing of people with disabilities in nursing homes, despite the very real potential they have to live independently and contribute to society if appropriate attendant services were made available and despite the fact that attendant services are actually more cost effective.¹⁰⁴ Neglect and abuse in American nursing homes are legendary and the settings are particularly inappropriate for younger people with disabilities.¹⁰⁵ Some people with disabilities have even committed suicide rather than be confined to the bleak regimentation of a nursing home.¹⁰⁶

While the Independent Living movement has highlighted this issue and in some cases has even become a provider of attendant services to disabled people through disabled-run Independent Living Centres, most Americans with disabilities continue to obtain attendant services through home health agencies with many of the

103. This dovetails with the findings of Sarah Armstrong's insightful work on the impact of litigation strategies on disability rights movements. See generally Sarah Armstrong, "Disability Advocacy in the Charter Era" (2003) 2 J.L. & Equality 33.

104. Fleischer & Zames, *supra* note 90 at 84.

105. See generally Nina A. Kohn, "Second Childhood: What Child Protection Systems Can Teach Elder Protection Systems" (2003) 14 Stan. L. & Pol'y Rev 175; Margo Schlanger, "Beyond the Hero Judge: Institutional Reform Litigation as Litigation" (1999) 97 Mich. L. Rev. 1994 at 2035, n. 184 (discussing litigation against nursing homes).

106. Fleischer & Zames, *supra* note 90 at 34-35.

same problems and restrictions that I discussed above in the Canadian context.¹⁰⁷ Consequently, there are real needs that still have to be addressed and a powerful \$90 billion nursing home industry stands much to lose.¹⁰⁸ It is telling and indicative of a fundamental problem that the American activist organization ADAPT eventually changed the meaning of its acronym to American Disabled for Attendant Programs Today in 1990 to reflect its continuing struggle for attendant services long after it had won its battles for accessible public transportation.¹⁰⁹

The first significant reform was enactment by Congress of section 1915(c) of the *Social Security Act* in 1981. This established an optional service entitled the Home and Community-Based Care Waiver Program that authorized the provision of services in the community.¹¹⁰ Participating states could apply for a certain number of waiver slots, provided that the cost of offering services in the community would be less expensive. Individuals who met the financial eligibility criteria could then choose whether they obtained community based services, but only until the slots were filled.¹¹¹ States retained considerable autonomy to decide whether to offer such services state-wide, how many slots to request and whether to offer them to people with specific types of disabilities.¹¹² While the amount spent has risen markedly since the late 1980s, it still pales in comparison to the tens of billions allocated for institutional care and primarily serves younger people with physical or intellectual disabilities.¹¹³

Disability rights activists have continued to mobilize on the issue. ADAPT played a major role in creating awareness of the issue using the same highly creative and effective methods that it had used to challenge the inaccessibility of the intercity bus industry. For instance, it has surrounded government buildings as well as offices of lobbying organizations for the nursing home industry in various cities and then proclaimed the building to be a nursing home. People were then allowed to enter or leave the occupied buildings only with ADAPT's permission.¹¹⁴ Such aggressive tactics likely contributed to public awareness and influenced the outcome of litigation

107. Bob Kafka, "Empowering Service Delivery" (1998) *Ragged Edge*, online: <<http://www.raggededge-magazine.com/0998/b998ft6.htm>>. For a discussion of the Independent Living movement, see Marc A. Rodwin, "Patient Accountability and Quality of Care: Lessons from Medical Consumerism and the Patients' Rights, Women's Health and Disability Rights Movements" (1994) 20 *Am. J.L. & Med.* 147 at 164-66.

108. Fleischer & Zames, *supra* note 90 at 83-84.

109. *Ibid.* at 82, 104-05.

110. Batavia, "Right", *supra* note 72 at 24.

111. *Ibid.*

112. *Ibid.*

113. *Ibid.* at 25.

114. Fleischer & Zames, *supra* note 90 at 84.

in this area.¹¹⁵ For example, in *Olmstead v. L.C.*,¹¹⁶ a majority of the Supreme Court ruled that the unnecessary institutionalization of people with mental health and intellectual disabilities in Georgia could in some circumstances violate the *ADA* where reasonable accommodations were not made that permitted such individuals to live in the most integrated possible setting.¹¹⁷ The majority found that unjustified isolation may be regarded as discrimination under the *ADA*. Therefore, the Court held that, when evaluating such claims by people with disabilities, and arguments by states that accommodations would constitute a fundamental alteration of the program, courts must consider both the cost of providing community care by the plaintiffs in question and the range of services that the state provides to people with mental disabilities and the need to offer all services equitably.¹¹⁸ In many ways, the Supreme Court's decision in *Olmstead* marked a turning point in favour of the Independent Living model and consumer-directed care where the disabled person selects, manages and fires his or her attendants.¹¹⁹

Studies in the United States that have compared disabled people's satisfaction in using an Independent Living [IL] model with the traditional agencies model have shown significant advantages with the IL model.¹²⁰ People with disabilities under the IL model are generally much more satisfied with their attendants and also rate their overall quality of life as higher.¹²¹ Moreover, evidence supports a positive correlation between the IL model and the health of people with disabilities. Studies have demonstrated a lower hospitalization rate when disabled people use the IL model.¹²² Disabled people using the IL model also have been able to achieve greater productivity, making it easier for them to participate in the labour market.¹²³ Unfortunately, attendant services programs that follow the IL model remain limited, undermining the capacities of many potential workers with disabilities in the United States.

DISABILITY RIGHTS LAWS IN CANADA AND THE UNITED STATES

Canada

In this subsection, I provide a brief overview of leading Supreme Court of Canada cases and arbitral decisions that affect workers with disabilities before discussing

115. *Ibid.* at 104-05.

116. 527 U.S. 581 (1999).

117. *Ibid.*

118. *Ibid.* at 597.

119. Andrew I. Batavia, "The Growing Prominence of Independent Living and Consumer Direction as Principles in Long-term Care: A Content Analysis and Implications for Elderly People with Disabilities" (2002) 10 *Elder L.J.* 263 at 270-71 [Batavia, "Growing"].

120. *Ibid.* at 267.

121. *Ibid.*

122. *Ibid.* at 268.

123. *Ibid.* at 269.

American jurisprudence in the next subsection. In Canada, the duty to accommodate workers with disabilities has its origins in the duty to accommodate workers with religious beliefs and the development of jurisprudence under the *Canadian Charter of Rights and Freedoms*, which prohibits discrimination on the basis of disability and was adopted as part of the 1982 patriation of the Canadian Constitution.¹²⁴ In *Ontario Human Rights Commission and O'Malley v. Simpson-Sears*, the Supreme Court of Canada held that a neutral workplace rule requiring a retail clerk to work on her Sabbath violated the Ontario Human Rights Code's prohibition of discrimination on the basis of creed.¹²⁵ The Supreme Court, overruling lower courts, held that intent was not required to make a claim of discrimination, as the difficulties in demonstrating intent would make it unlikely that a complainant could prove an intent to discriminate on the part of employers in many cases.¹²⁶

Moreover, human rights legislation seeks to remove discrimination to assist victims rather than punish the party that is discriminating.¹²⁷ The Court also endorsed the idea, later developed in *Andrews v. Law Society of British Columbia*¹²⁸, that equal treatment did not necessarily require identical treatment. Furthermore, the Court developed the point that human rights legislation is quasi-constitutional and almost always takes priority over conflicting statutes. Human rights legislation clearly also takes precedence over collective agreements and private contracts and must be interpreted in a broad and liberal fashion.¹²⁹

The Court therefore developed the concept of adverse effect discrimination, which arises where a neutral rule is not discriminatory on its face but nevertheless has a disproportionate effect on a group protected by human rights legislation.¹³⁰ In this case, the neutral rule of performing work on a standard schedule had an adverse effect on particular religious minorities who could not work on their Sabbath. Once a complainant had demonstrated *prima facie* evidence of adverse effect discrimination, the employer had the onus of showing that the workplace rule constituted a *bona fide*

124. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, c. 11 (U.K.) [*Charter of Rights*]. However, disability rights activists had to mobilize to convince the federal government to amend the original version of the *Charter of Rights*, which did not bar disability discrimination. For a discussion of this, see e.g. M. David Lepofsky, "The *Charter's* Guarantee of Equality to People with Disabilities: How Well Is It Working?" (1998) 16 Windsor Y.B. Access Just. 155 at 161-64. Section 15 of the *Charter of Rights* did not take effect until 1985, to allow legislatures and others to adjust.

125. [1985] 2 S.C.R. 536, [1985] S.C.J. No. 74 (QL) [*O'Malley* cited to S.C.R.].

126. *Ibid.* at 549.

127. *Ibid.* at 547.

128. *Andrews v. The Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 164, [1989] S.C.J. No. 6 (QL) [*Andrews* cited to S.C.R.].

129. *Zurich Insurance Co. v. Ontario Human Rights Commission* [1992] 2 S.C.R. 321 at 339, (1992) 93 D.L.R. (4th) 346 (QL); Michael MacNeil, Michael Lynk & Peter Engelmenn, *Trade Union Law in Canada*, looseleaf (Aurora: Canada Law Book, 2002) ¶11.210.

130. *O'Malley*, *supra* note 125 at 551-52.

occupational requirement [BFOR] that the employer could not alter or accommodate without experiencing undue hardship.¹³¹ As the employer in this case did not present any evidence, the Court held that the employer had failed to demonstrate undue hardship and found that its failure to accommodate violated the Ontario *Human Rights Code*.¹³² The development of the concept of adverse effect discrimination allowed for a more comprehensive understanding of the need to accommodate workers with disabilities where many barriers relate to neutral rules of general application that negatively affect workers with disabilities. By the late 1990s, disability discrimination complaints were the most common ground of discrimination alleged before both the Ontario and Canadian Human Rights Commissions.¹³³

In *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*,¹³⁴ the Supreme Court of Canada clarified the nature of the duty to accommodate in another case concerning the accommodation of a worker's religious beliefs that conflicted with workplace rules. The complainant worked at a milk processing plant and was denied time off to celebrate a religious holiday that fell on a Monday, the busiest day at the plant, and subsequently terminated after refusing to work on his Holy Day.¹³⁵ Although a human rights Board of Inquiry upheld his discrimination complaint, this decision was overturned on appeal on the grounds that the work schedule constituted a BFOR.¹³⁶ The Supreme Court, in a judgment by Justice Wilson, restored the Commission's decision and held that the employer had violated the complainant's human rights by failing to accommodate his request for time off to commemorate his Holy Day up to the point of undue hardship.¹³⁷ There was a duty to accommodate even where the employer argued that the workplace rule constitutes a BFOR.¹³⁸ Until this decision, the case law remained very confused, often making arbitrary distinctions based on the wording of particular human rights statutes, on the question of whether the duty to accommodate arises only in cases of adverse effect discrimination or whether it applied also to situations of direct discrimination.¹³⁹

131. *Ibid.* at 552, 555. This is sometimes known as the *bona fide* occupational qualification. In unionized workplaces, the union also has a duty to accommodate.

132. *Ibid.* at 559-60.

133. Michael Lynk, "Disability and the Duty to Accommodate: An Arbitrator's Perspective" [2001-02] Lab. Arb. Y.B. 51 at 56.

134. [1990] 2 S.C.R. 489, [1990] S.C.J. No. 80 (QL) [*Dairy Pool* cited to S.C.R.].

135. *Ibid.* at 494-96.

136. *Ibid.* at 500.

137. *Ibid.* at 517.

138. *Ibid.* See also Ravi A. Malhotra, "The Legal Genealogy of the Duty to Accommodate American and Canadian Workers with Disabilities: A Comparative Perspective" (2007) 23 Wash. U. J.L. & Pol'y 1 at 14 [Malhotra, "Legal Genealogy"].

139. Lepofsky, *supra* note 124 at 178. See also *Bhinder v. CN*, [1985] 2 S.C.R. 561, [1985] S.C.J. No. 75 (QL) (holding workplace rule requiring worker to wear hard hat was a BFOR).

The ruling also clarified what the criteria are in determining the contours of when an accommodation will be classified as undue hardship. The Court indicated that while not an exhaustive list, six factors identified by the Board of Inquiry ought to be adopted: (1) financial cost of the accommodation, (2) disruption of a collective agreement, (3) problems of morale of other employees, (4) interchangeability of the workforce and facilities, (5) size of the employer's operations and (6) safety.¹⁴⁰ The exact weight accorded to each factor varies with the facts of a particular case but employee morale is generally accorded little weight.¹⁴¹ These principles have been applied in a number of disability discrimination cases relevant to the workplace in many different situations.

In *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U. (Meiorin)*,¹⁴² a case involving a female firefighter's challenge to aerobic standards as adverse effect discrimination that disproportionately affected female firefighters, the Supreme Court of Canada restored the arbitrator's decision ruling that the grievor had experienced discrimination.¹⁴³ This landmark decision also established a new test that transcended the obscure differences between adverse effect and direct discrimination and confusion over when the relevant tests for the two categories applied.¹⁴⁴ Under the new test, a decision maker has to ask three questions: (1) Did the employer adopt the challenged standard for a purpose rationally connected to the performance of the job? (2) Has the employer chosen the standard in an honest and good faith belief that it is required to fulfil the work-related purpose? (3) Is the standard reasonably necessary so that it would be impossible to accommodate an individual employee without imposing undue hardship upon the employer?¹⁴⁵ In order to demonstrate undue hardship, the employer must pass all three branches of the test.¹⁴⁶ As Lynk observes, the decision requires employers to reflect on a number of factors when considering a possible accommodation. These factors include whether alternative approaches, such as individualized testing, have been attempted or implemented, whether a common standard for all employees is truly necessary, whether the employer's business objectives may be met in a way that is not discriminatory, whether the standard may be designed without placing a burden on those to whom the standard applies and whether the union and the disabled employee have fully participated in the process.¹⁴⁷

140. *Dairy Pool*, *supra* note 134 at 520-21.

141. Lynk, *supra* note 133 at 64-65.

142. [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 (QL) [*Meiorin* cited to S.C.R.].

143. *Ibid.*

144. See Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*", Case Comment, (2001) 46 McGill L.J. 533 at 538-39.

145. *Meiorin*, *supra* note 142 at 32-33.

146. *Ibid.*

147. Lynk, *supra* note 133 at 60.

Another important case meriting close attention is the Supreme Court of Canada's decision in *Nova Scotia (Workers' Compensation Board) v. Martin*.¹⁴⁸ In *Martin*, the Court considered a section 15 *Charter* challenge to the exclusion of chronic pain from the regular workers' compensation system in Nova Scotia. Unlike others with disabilities who were eligible for workers' compensation, workers diagnosed with chronic pain were eligible for only a four-week Functional Restoration Program.¹⁴⁹ The Court unanimously held that the exclusion of workers with chronic pain from the regular workers' compensation system did in fact violate their equality rights under the *Charter* and could not be saved by section 1.¹⁵⁰ The Court noted that the exclusion did not allow for the individual testing of workers who were asserting that they had chronic pain.¹⁵¹ It determined that the appropriate comparator group—an important prerequisite for successful section 15 *Charter* litigation—was all workers eligible for employment-related injuries who do not have chronic pain.¹⁵² The Court skilfully acknowledged that the widespread perception among many policy-makers and physicians that chronic fatigue syndrome was at least partly psychosomatic simply increased the stigma of people with the condition and enhanced, rather than diminished, their legal argument.¹⁵³ By explicitly stating that the legislation and associated regulations harmed the dignity of Nova Scotians with chronic pain and provided them with no services specifically geared toward chronic pain, the Court contributed to a nuanced understanding of disability discrimination.¹⁵⁴

This is not to suggest that there is not considerable room for improvement. Most certainly there has been greater progress made in the unionized sector covered by labour law than among the majority of non-unionized workers with disabilities, who must rely solely on provincial employment standards legislation and the contract of

148. [2003] 2 S.C.R. 504, 2003 SCC 54 [*Martin* cited to S.C.R.]

149. *Ibid.* at para. 2.

150. *Ibid.* at paras. 5-6. Much of the ruling deals with the extent to which administrative tribunals may consider constitutional issues. That issue is beyond the scope of this paper.

151. *Ibid.* at para. 71.

152. *Ibid.*

153. *Ibid.* at para. 90.

154. *Ibid.* at para. 101. This contrasts sharply with the Court's reasoning in *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28 (upholding dropout provision in Canada Pension Plan eligibility requirement that prevented people with temporary disabilities from obtaining CPP benefits). I write about this elsewhere: see Ravi Malhotra, "Martha Nussbaum's Capabilities Approach and Equality Rights for People with Disabilities: Rethinking the *Granovsky* Decision" in Joseph Magnet & Bernard Adell, eds., *The Canadian Charter of Rights and Freedoms at Twenty-Five* (Markham: LexisNexis, 2009) 61 at 61-89.

employment.¹⁵⁵ Hence, in the recent decision of *Honda Canada Inc. v. Keays*,¹⁵⁶ the majority of the Supreme Court of Canada, speaking through Justice Bastarache, held that aggravated and punitive damages ought not to have been awarded to a man with chronic fatigue syndrome [CFS] who had worked for his employer for some fourteen years and who was now seeking damages for wrongful dismissal.¹⁵⁷ The trial judge had increased the notice period of fifteen months to twenty-four months in light of what he concluded was discrimination and harassment on the part of Honda Canada. Additionally, punitive damages of \$500,000 were awarded.¹⁵⁸ The majority of the Ontario Court of Appeal reduced punitive damages to \$100,000 because it concluded that the trial judge had relied on findings of fact that were not supported by evidence and because the damages were not proportional to the alleged wrong.¹⁵⁹ The majority of the Supreme Court of Canada concluded that the trial judge erred in many of his factual findings and that there had not been discriminatory conduct in the manner of Mr. Keays' dismissal. Consequently, they ruled that there was no justification for either extending the notice period beyond fifteen months¹⁶⁰ or for any punitive damages whatsoever.¹⁶¹

On the one hand, it seems evident that the Supreme Court majority may not have a sufficiently nuanced understanding of the complexities of an invisible disability such as CFS, which is widely misunderstood by many policy-makers, including physicians. It represents a departure from the reasoning in *Martin*. However, it should also be acknowledged that a number of factors likely coalesced to produce this outcome. First, the trial judge's inflammatory language about a Honda Canada conspiracy against Mr. Keays likely undermined his reasons and indeed led to very little deference to his findings of fact.¹⁶² In that sense, the decision can likely be distinguished from future litigation of this sort. However, a more troubling aspect is the fact that the majority seemed unwilling to systematically apply human rights principles in adjudicating the conduct of the employer.¹⁶³ By insisting that there was simply no basis to found a human rights complaint and that it was unnecessary to

155. See, e.g. Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada" in The Honourable Randall S. Echlin & Chris G. Paliare, eds., *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2007) 189 at 193-94, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1068403>.

156. *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, 2008 SCC 39 [*Keays*]. I disclose that I am a member of the Human Rights Committee of the Council of Canadians with Disabilities that had intervener status in this litigation.

157. *Ibid.*

158. *Ibid.* at paras. 8-11.

159. *Ibid.* at para. 18.

160. *Ibid.* at paras. 33-61.

161. *Ibid.* at paras. 62-78.

162. *Ibid.* at paras. 36-48. Justice Bastarache concluded, as did the Court of Appeal, that "there simply was no conspiracy to terminate Keays". *Ibid.* at para. 45.

163. *Ibid.* at para. 67.

consider whether discrimination constituted an independent actionable wrong, the Supreme Court missed a golden opportunity to weave human rights principles into wrongful dismissal jurisprudence.

Overall, the Canadian jurisprudence on disability has had a number of advantages. First, it has accepted a very broad definition of disability. Whereas the American ADA jurisprudence is fraught with difficulties, Canadian human rights tribunals and labour arbitration boards have accepted the fact that disability includes not just the stereotypical person using a wheelchair or who is blind or deaf but a wide range of mental health disabilities such as depression, invisible disabilities such as HIV and colour blindness, addictions such as alcoholism or drug dependency, and much more.¹⁶⁴ A disability may be temporary, long-term or permanent. A person who is perceived by employers as having a disability also qualifies as a person with a disability. All these conditions must be accommodated up to the point of undue hardship.¹⁶⁵ A second advantage is that labour arbitrators have gained the authority to apply human rights codes in arbitration, including of course the duty to accommodate.¹⁶⁶ This means that unionized workers are able to win remedies on a far more expedited basis than would be possible by filing complaints with the backlogged and painfully slow human rights commissions.¹⁶⁷

The scope of the duty to accommodate disabilities in Canadian arbitral and human rights jurisprudence is broad and may require the employer to act creatively and flexibly to implement the principles enshrined in the *Charter of Rights and Freedoms* and in human rights legislation in highly specific and individual circumstances that must be evaluated on their own merits. It includes the idea that existing positions may have to be rebundled or modified, to the point of undue hardship, if a particular worker cannot perform the duties in any existing job.¹⁶⁸ An employer may also be required to offer training, provided that the cost does not amount to undue hardship, for a disabled employee.¹⁶⁹ Employers operating larger workplaces may have a concomitantly broader duty to workers requesting accommodations such as, for instance, other shifts.¹⁷⁰ However, this duty to accommodate disabilities is not unlimited. An employer retains the right to operate a productive workplace, and an employee must be able to perform the essential duties of an existing, modified or newly assigned position. The duty to accommodate does not generally require the creation of an

164. Lynk, *supra* note 133 at 61-63.

165. *Ibid.*

166. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42 (QL).

167. See e.g. Brian Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000) 26 *Queen's L.J.* 43.

168. *Calgary District Hospital Group and U.N.A., Local 121-R* (1994), 41 L.A.C. (4th) 319 at 326 (Ponak) (suggesting nursing jobs may have to be rebundled to accommodate disabled grievor).

169. Lynk, *supra* note 133 at 72-73.

170. *Ibid.* at 72.

entirely new position.¹⁷¹ It consists largely of after-the-fact modification to existing structures that systematically discriminate against people with disabilities.

Nevertheless, the Canadian approach provides for significant modifications of the workplace to meet the individualized accommodation issues of specific disabled people and its system of regulations to allow for disabled people to be reasonably accommodated. In this respect, it contrasts favourably with the American experience that I will analyze below. For instance, automatic termination clauses in a collective agreement or in an employment contract have typically been found by arbitrators and courts to violate human rights statutes. These provisions state that a worker automatically loses her or his job following a prescribed period of absence, regardless of the reason. Decision makers have generally concluded that since disabilities are the cause for the absence, termination essentially for having a disability amounts to discrimination if the employee may be accommodated in another position or is likely to return to work in the foreseeable future.¹⁷² Arbitrators have also held that an employer is still required to accommodate a worker whose disability is discovered or identified only after she or he is terminated.¹⁷³

This is not to suggest that the duty to accommodate is unlimited. There will always be cases that are extremely difficult to accommodate and where the employer cannot be expected to do more. For instance, in *Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*¹⁷⁴ the Supreme Court of Canada unanimously held that an arbitrator's ruling, dismissing the employee's grievance with respect to her termination, that the employer had met its duty to accommodate ought to be restored.¹⁷⁵ The grievor in this case had numerous and diverse disabilities including episodes of depression and personality disorder, physical impairments such as tendonitis, epicondylitis and bursitis and also had undergone various surgeries.¹⁷⁶ She had missed 960 days of work in fewer than eight years and the prognosis was clear that her psychiatric disabilities would continue indefinitely.¹⁷⁷

The Supreme Court of Canada held that the idea, developed in *Meiorin*, that a workplace rule will be upheld only when it is impossible to accommodate an employee without undue hardship, did not mean that the employer had to tolerate an employee

171. *Ibid.* at 76-77.

172. *Ibid.* at 81-83. But see *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, 2007 SCC 4 [McGill] (ruling automatic termination clauses do not necessarily violate an employer's human rights responsibilities to accommodate employees with disabilities *per se* where employee had been absent for a period of years).

173. Lynk, *supra* note 133 at 89.

174. [2008] 2 S.C.R. 561, 2008 SCC 43 [*Hydro-Quebec*].

175. *Ibid.*

176. *Ibid.* at para. 2.

177. *Ibid.* at paras. 3-5.

who was hampering the efficient operation of the business. Rather, dismissal would be seen as appropriate where the employer had made significant efforts to accommodate the employee.¹⁷⁸ In this case, the employer had undertaken significant efforts to accommodate the grievor, including modification of her work station, part time work and reassignment to a new position.¹⁷⁹ The Court also held that one must consider the accommodations provided over the entire time of employment, not simply at the time of dismissal.¹⁸⁰ While some may see this as a retreat in the application of disability rights law, the fact situation raised here is extreme and it is hardly surprising that arbitrators and courts would regard any further accommodation as constituting undue hardship.¹⁸¹

With respect to last chance agreements, where employers and unions typically agree that a further serious violation of work rules—usually significant absenteeism caused by alcoholism or drug addiction—will result in automatic termination as an alternative to immediate discharge, the duty to accommodate disabilities contained in human rights law may sometimes override the last chance agreement. Neither employers nor unions are entitled to contract out of the human rights code.¹⁸² Arbitrators and courts have typically insisted that employers demonstrate that they cannot accommodate the disabled worker, notwithstanding the breach of the last chance agreement, without undue hardship.¹⁸³ An employer may, for instance, be expected to allow a worker with an addiction problem to take a leave of absence in order to enter drug rehabilitation.¹⁸⁴ However, a worker may be dismissed if reasonable accommodation has been made and there is no reasonable likelihood that the worker will achieve regular attendance in the future.¹⁸⁵

Yet there is one telling contradiction that comparative scholarship reveals. Although Canadian workplaces, particularly those that are unionized, must comply with a significant duty to accommodate workers with disabilities up to the point of undue hardship, this does little to address those environmental barriers, such as those existing in the transportation system. It also does not address barriers in education faced by the many people with disabilities who acquire disabilities at birth or prior to entry into the labour market. Similarly, the broad definition of disability is undoubtedly extremely beneficial for those who acquire disabilities either in the workplace or off-duty while they are employed. However, the broad definition of disability does

178. *Ibid.* at paras. 12-18. This seems to resolve ambiguity about what precisely the Supreme Court meant by “impossible” in *Meiorin*, *supra* notes 142-145 and accompanying text.

179. *Ibid.* at para. 17.

180. *Ibid.* at paras. 21-22.

181. In that sense, it is similar to the fact situation raised in *McGill*, *supra* note 172.

182. *Lynk*, *supra* note 133 at 98.

183. *Ibid.* at 94.

184. *Ibid.* at 95.

185. *Ibid.* at 98.

not assist people with disabilities in battling bus systems and subway networks that are not friendly for wheelchair users or those who require guide dogs and announced stops.¹⁸⁶ The fact that American society has featured more vibrant and successful disability rights activism has meant that more significant gains have been made in areas such as transportation access. Ranging from academic groups such as the Society for Disability Studies to more activist oriented organizations such as ADAPT that flaunt their in-your-face tactics, these dedicated advocates for disability rights activism have altered the discursive policy environment to make it much more difficult for policy-makers to ignore disability activism.¹⁸⁷ Indeed, recent American scholarship has even focused on strategies for cultivating future generations of disability leaders and identifying ways of obtaining representation of particularly marginalized subgroups of people with disabilities, such as those with intellectual disabilities.¹⁸⁸ Canadians can learn much from these initiatives where their cognate equivalents remain comparatively timid and where fewer Canadians with disabilities are willing to publicly devote their time for disability rights causes.

Would such an approach dismiss the tried and true strategies of legal change for the utopian pastures of political transformation? Not at all. As Orly Lobel has recently observed, there is a risk of cooptation in *both* legal and non-legal strategies.¹⁸⁹ Legal strategies may flatten more creative and rich methods of addressing a multifaceted problem of discrimination. They may serve to legitimate struggling for legal reforms in a system that is inherently unequal or they may crowd out other potentially more liberating solutions.¹⁹⁰ A purely political strategy runs the risk of itself being co-opted by the popular discourses of the day such as privatization, deregulation and the transfer of government functions to other non-state actors.¹⁹¹ A dialectically interconnected legal and political strategy is necessary so that the day-to-day political activism of disability rights activists feeds into the legal strategies of disability rights lawyers and vice versa. Other social movements such as the feminist movement have

186. The recently enacted *Accessibility for Ontarians with Disabilities Act*, S.O. 2005, c. 11, after about a decade of tireless lobbying by disability rights activists, mandates improved access in the long term. It is far too early to tell whether the AODA process will generate improvements in accessibility. This topic will have to be assessed by future scholarship.

187. See Society for Disability Studies <<http://www.disstudies.org>> for an overview of the Society for Disability Studies' history and activities.

188. Pennie Foster-Fishman *et al.*, "Building the Next Generation of Leaders in the Disabilities Movement" (2007) 22 *Disability & Soc.* 341 at 347.

189. See generally Orly Lobel, "The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics" (2007) 120 *Harv. L. Rev.* 937.

190. *Ibid.* at 949-58. The seminal example in the field of labour law is Karl E. Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1977) 62 *Minn. L. Rev.* 265 (discussing how the passage of labour law legislation in the United States stunted the rank-and-file consciousness of union activists). This is a brief summation of a very complex topic.

191. *Ibid.* at 942, 975.

demonstrated a capacity for seeking political change and legal reforms. Both are valuable and necessary.

In Canada, the duty to accommodate has been confined largely to the workplace in terms of practical realization, as illustrated by the tenacious fight of the railway industry to block basic accessibility to mobility impaired Canadians that was achieved long ago in the United States.¹⁹² Yet without substantive changes in areas such as transportation and attendant services, people with disabilities will remain outside the labour market. The relatively high union density rate in Canada, particularly in the comparatively large and highly regulated public sector,¹⁹³ facilitates provision of accommodations at labour arbitration. However, it is completely irrelevant to those Canadians with disabilities who have either given up the quest for labour market entry and the dignity of working for a living or never entered the labour market in the first place. It will require *both* political strategizing and dramatic legal victories to achieve the changes that Canadians with disabilities so badly need. I turn in the next subsection to an overview of American jurisprudence under Title I of the *ADA*.

The United States

In 1990, the *ADA* was enacted by Congress with overwhelming support, with a two-year phase-in period similar to the one granted for section 15 of the *Canadian Charter of Rights and Freedoms*, after a protracted social movement raised awareness about the systemic marginalization faced by people with disabilities in the United States. It followed the earliest attempts to prohibit disability discrimination in employment through the enactment—with no lobbying from the disability rights community and apparently entirely as an afterthought—of section 504 of the *Rehabilitation Act of 1973*.¹⁹⁴ Section 504 prohibits discrimination on the basis of what it termed “handicap”¹⁹⁵ by entities in receipt of federal funds, including federal agencies and federal contractors.¹⁹⁶ The campaign to have regulations pursuant to the *Rehabilitation Act of 1973* released by the appropriate federal authorities spawned many of the first disability civil rights struggles and culminated in lengthy and dramatic sit-ins by disability rights activists in many American cities in 1977.¹⁹⁷ Disability rights activists also emphasized the importance of maintaining independ-

192. See generally Baker & Godwin, *supra* note 41.

193. See e.g. Eric Tucker, “‘Great Expectations Defeated?’ The Trajectory of Collective Bargaining Regimes in Canada and the United States Post-NAFTA” (2004) 26 *Comp. Lab. L. & Pol’y J.* 97 at 109.

194. 29 U.S.C. § 794 (2000).

195. For a discussion of the distinctions between impairment, disability, and handicap, see generally Jerome E. Bickenbach *et al.*, “Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps” (1999) 48 *Soc. Sci. & Med.* 1173.

196. Linda H. Krieger, “Afterword: Socio-Legal Backlash” (2000) 21 *Berkeley J. Emp. & Lab. L.* 476 at 489; Laura L. Rovner, “Disability, Equality and Identity” (2004) 55 *Ala. L. Rev.* 1043 at 1050.

197. Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (New York: Random House, 1993) at 64-69.

ence for people with disabilities to counteract attempts by the Reagan Administration to roll back progressive regulations drafted to implement section 504.¹⁹⁸

The pressing need to expand civil rights for people with disabilities to the private sector gradually led disability rights advocacy groups to go a step further and lobby Congress in the 1980s to enact the *ADA*.¹⁹⁹ This measure was, however, an ordinary piece of legislation, unlike Canada's 1982 adoption of the *Charter of Rights and Freedoms* and the accordance of quasi-constitutional status to federal and provincial human rights statutes.²⁰⁰ American case law is clear that legislative classifications made on the basis of disability do not receive heightened scrutiny but merely have to be defended rationally.²⁰¹

Title I of the *ADA* prohibits employers with fifteen or more employees from discriminating against qualified people with disabilities.²⁰² The definition of disability adopted in the *ADA* is identical to the definition that was used in section 504.²⁰³ Specifically, a person is classified as having a disability if he or she has (1) a physical or mental impairment that substantially limits one or more of that individual's major life activities, (2) has a record of such an impairment or (3) is regarded as having such an impairment.²⁰⁴ A person who meets the definition contained in any one of the three prongs is entitled to reasonable accommodations, tailored to that individual's particular circumstances, which do not amount to undue hardship.²⁰⁵

198. Bagenstos, "Americans", *supra* note 71 at 964-65.

199. Chai R. Feldblum, "Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?" (2000) 21 Berkeley J. Emp. & Lab. L. 91 at 126-27. As the duty to accommodate workers religious with religious beliefs was held to be *de minimis* in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), there was never any cross-fertilization, unlike in Canadian jurisprudence, between the duty to accommodate workers with religious beliefs and workers with disabilities in the United States. See generally Malhotra, "Legal Genealogy", *supra* note 138.

200. See *supra* note 129, and accompanying text.

201. *City of Cleburne v. Cleburne Living Centre, Inc.*, 473 U.S. 432 (1985).

202. Linda H. Krieger, "Foreword—Backlash against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies" (2000) 21 Berkeley J. Emp. & Lab. L. 1 at 6. Title I contained a two-year phase-in period, ending in 1994, where only employers with twenty-five or more employees were subject to the ADA.

203. Bonnie Poitras Tucker, "The Supreme Court's Definition of Disability under the ADA: A Return to the Dark Ages" (2000) 52 Ala. L. Rev. 321 at 323 [Tucker, "The Supreme Court's"].

204. 29 C.F.R. § 1630.2(g)(1) (2004).

205. *Vande Zande v. State of Wisconsin Department of Administration*, 44 F.3d 538 at 542 (7th Cir.1995). For a brief outline of how an ADA employment discrimination case proceeds, see Ruth Colker & Bonnie Poitras Tucker, *The Law of Disability Discrimination*, 3rd ed. (Cincinnati: Anderson Publishing, 2000) at 233-34. See also Robert A. Dubault, Note, "The ADA and the NLRA: Balancing Individual and Collective Rights" (1995) 70 Ind. L.J. 1271 at 1273; Steven L. Willborn, "The Nonevolution of Enforcement under the ADA: Discharge Cases and the Hiring Problem" in Peter D. Blanck, ed., *Employment, Disability and the Americans with Disabilities Act: Issues in Law, Public Policy and Research* (Evanston: Northwestern University Press, 2000) 103 at 104 (noting that ADA enforcement parallels the procedure under Title VII).

Unfortunately, whereas Canadian jurisprudence on disability discrimination in employment has moved in a direction that takes more seriously the systemic discrimination faced by people with disabilities, the ADA Title I jurisprudence has been plagued by a series of setbacks. Indeed, employers win the vast majority of lawsuits filed under Title I.²⁰⁶ First, in a series of cases known as the *Sutton* trilogy,²⁰⁷ the United States Supreme Court has narrowed the definition of disability. In *Sutton v. United Air Lines*, a majority of the Supreme Court held that the plaintiffs, who sought to work as airline pilots and whose uncorrected vision fell far below the standard required by the employer, could be evaluated only regarding whether they were substantially limited in a major life activity after one had taken into account any mitigating measures.²⁰⁸ These include appliances, pharmaceutical products and even the body's own compensating mechanisms.²⁰⁹ The majority also rejected the argument that the plaintiffs were substantially limited in the major life activity of working because the limitation affected only a narrow class of jobs. The regulations issued by the Equal Employment Opportunity Commission [EEOC] are clear that a disability must affect a person's ability to perform a class of jobs or a broad range of jobs in various classes.²¹⁰ Therefore, the plaintiffs were held to not be people with disabilities as defined in the ADA even though, paradoxically, their impairments were the very reason that the defendant airline refused to hire them.²¹¹ Moreover, the EEOC regulations suggesting a much broader definition of disability were ignored.²¹²

In *Murphy v. United Parcel Service*,²¹³ the United States Supreme Court held that a mechanic who was fired because his high blood pressure exceeded regulatory standards for commercial drivers was not a person with a disability under the ADA because the evaluation had to take into account the mitigating effects of medication.²¹⁴ When the plaintiff was medicated, he had virtually no activity limitations with major life activities and therefore he was not a person with a disability for the purposes of

206. See e.g. Ruth Colker, "The Americans with Disabilities Act: A Windfall for Defendants" (1999) 34 Harv. C.R.-C.L. L. Rev. 99 at 99-100.

207. *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999) (truck driver's visual impairment did not constitute a substantial limitation so as to qualify under the ADA) [*Albertsons*]; *Murphy v. United Parcel Service*, 119 S. Ct. 2133 (1999) (petitioner commercial driver with hypertension did not constitute a substantial limitation so as to qualify under the ADA) [*Murphy*]; *Sutton v. United Air Lines*, 119 S. Ct. 2139 (1999) (petitioner airline pilots with severe myopia correctable through use of glasses did not have substantial limitations so as to qualify under the ADA) [*Sutton*].

208. *Sutton*, *ibid.* at 2146-47.

209. Weber, "The Americans", *supra* note 30 at 378.

210. *Sutton*, *supra* note 207 at 2151.

211. Tucker, "The Supreme Court's", *supra* note 203 at 331.

212. *Sutton*, *supra* note 207 at 2146.

213. *Murphy*, *supra* note 207.

214. *Ibid.* at 2137.

the ADA.²¹⁵ The Supreme Court also ruled that the fact that the plaintiff could not meet regulatory certification standards for commercial driving did not constitute a substantial limitation in the major life activity of working because the limitation affected only a narrow class of jobs.²¹⁶ The combined effect of the two rules means that many impairments that affect workers but may be imperfectly mitigated or who work in unusual industries may not be considered disabilities at all under the ADA yet may be significant enough to warrant dismissal by their employer.²¹⁷ Even the factual reasoning in this decision seems dubious. In concluding that *Murphy* was wrongly decided, disability scholar Samuel Bagenstos has observed that the plaintiff's high blood pressure excluded him from literally millions of jobs.²¹⁸

Finally, in the third case in the trilogy, *Albertsons, Inc. v. Kirkingburg*,²¹⁹ the United States Supreme Court held that a visually impaired truck driver's disability status had to be evaluated by considering the effect of his body's compensatory system in adjusting to his visual impairment, just as the Court's dictates require plaintiffs to mitigate using other more conventional measures.²²⁰ The majority found that, despite the fact there was a significant difference in the way the plaintiff observed the world, this did not amount to a substantial limitation for the purposes of the ADA.²²¹ Yet again the plaintiff's disability was sufficient to warrant dismissal by the employer but was not sufficient to be covered by the ADA.²²² A more recent decision, *Toyota Motor Mfg., Kentucky, Inc. v. Williams*,²²³ reached the conclusion that the Court of Appeals for the Sixth Circuit had applied the wrong test in evaluating a disability discrimination claim by a woman with carpal tunnel syndrome who was unable to perform requirements of her job on an automobile assembly line because the lower court had wrongly focused on the effects of the claimant's disability in her specific workplace rather than on a variety of activities central to most people's lives in and out of the workplace.²²⁴ Collectively, these cases represent an ominous narrowing of the definition of disability for the purposes of the ADA. Insulin-dependent diabetics, for instance, who can mostly but not perfectly con-

215. *Ibid.* This was the conclusion drawn by the Court of Appeals but the Petitioner did not seek certiorari on whether this conclusion was correct.

216. *Ibid.* at 2138-39.

217. Tucker, "The Supreme Court's", *supra* note 203 at 333.

218. Samuel R. Bagenstos, "Subordination, Stigma and 'Disability'" (2000) 86 Va. L. Rev. 397 at 402 [Bagenstos, "Subordination"].

219. *Albertsons*, *supra* note 207.

220. *Ibid.* at 2168-69.

221. *Ibid.* at 2168.

222. Tucker, "The Supreme Court's", *supra* note 203 at 334.

223. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (decision on whether woman with carpal tunnel syndrome working in auto plant is disabled remanded back to lower courts).

224. *Ibid.* at 200-01. This particular restriction is especially bizarre when evaluating employment discrimination and contrasts fundamentally with the Canadian approach of closely evaluating the accommodation needs in the workplace in question.

trol their disabilities through medication may no longer be classified as disabled for the purposes of the *ADA* and, without reasonable accommodations, may be unable to work.²²⁵ An extensive analysis of the statutory interpretation of the *ADA* is far beyond the scope of this article.²²⁶ However, these rulings have prevented many people with genuine disabilities from asserting their rights.

A second major problem is the constitutionality of major parts of the *ADA* have been called into question as a result of the United States Supreme Court's New Federalism jurisprudence, which more aggressively enforces the power of the states under the Eleventh Amendment of the United States Constitution *vis-à-vis* the federal government than has been true in past years. The Eleventh Amendment protects states' sovereign immunity by prohibiting citizens of another state or of foreign states from suing a state of the United States in federal courts. However, it has been consistently interpreted as also prohibiting a state's own citizens from suing the state in federal court for damage remedies.²²⁷ Under some circumstances, Congress may be empowered under section 5 of the Fourteenth Amendment to pass civil rights laws, such as the *ADA*, that abrogate state sovereignty.²²⁸ The precise nature and scope of those circumstances was defined in the Supreme Court decision *City of Boerne v. Flores* as requiring the law to demonstrate congruence and proportionality between the injury and the means sought to remedy it.²²⁹

In *Board of Trustees of the University of Alabama v. Garrett*, the United States Supreme Court held in a narrow 5–4 decision by Chief Justice Rehnquist, as he then was, that lawsuits for money damages under Title I of the *ADA* were barred because it failed to meet the test of congruence and proportionality that the Court had established in *City of Boerne* for constitutionally permissible abrogation of a state's sovereign immunity.²³⁰ Therefore, in one dramatic stroke, a major class of employers—state governments and their agencies—was eliminated from coverage of the *ADA* because insufficient evidence of a pattern of discrimination against workers with disabilities had been demonstrated to justify the abrogation of a state's sovereign immunity through the Fourteenth Amendment to the United States Constitution. It remains unclear to what extent other parts of the *ADA* may similarly fall victim to the New Federalism.²³¹

225. Tucker, "The Supreme Court's," *supra* note 203 at 346-48.

226. But see generally Bagenstos, "Subordination," *supra* note 218 (arguing that stigma ought to be used as organizing principle for determining what impairments ought to be classified as disabilities for *ADA* purposes).

227. Michael E. Waterstone, "Lane, Fundamental Rights and Voting" (2005) 56 *Ala. L. Rev.* 793 at 798, n. 20.

228. *Ibid.* at 798.

229. 521 U.S. 507 at 520 (1997) [*City of Boerne*].

230. 531 U.S. 356 (2001) [*Garrett*].

231. See e.g. *Tennessee v. Lane et al.*, 541 U.S. 509 (2004) (ruling 5-4 that Congress properly abrogated state sovereign immunity through the 14th Amendment in requiring wheelchair access to state courts). For

This brief overview underscores another dimension of the insights that may be gleaned through comparative scholarship. Whereas the duty to accommodate workers with disabilities is interpreted broadly in Canada and leaves employers to make their arguments on the grounds of undue hardship, a variety of legal rules are invoked to restrict the definition of disability in the employment context in the United States. This is of course compounded by the fact that fewer than one in ten private sector workers is now unionized as the American union movement continues its terminal decline.²³² Environmental access features do not have the appropriate outcomes, at least in part because efficacy under the ADA is thwarted by the draconian interpretation given to it by the courts.

Yet political activism again remains central. On 25 September 2008, President Bush signed the *Americans with Disabilities Act Amendments Act of 2008* after years of lobbying by disability rights advocacy groups.²³³ The law addresses the concerns of disability activists by clarifying that the definition of disability encompasses a very broad spectrum. Therefore, the formalist rulings in the *Sutton* trilogy and in *Toyota* are effectively overruled by statute including the requirement that a person's disability be evaluated after taking into account the effect of mitigating measures.²³⁴ However, the legislation does not address the vexing federalism questions that are likely to continue to plague jurisprudence in this area. Activists will have to remain vigilant to ensure that future disability discrimination claims are not thwarted by the vagaries of the federalism jurisprudence.

CONCLUSIONS

In this article, I have provided a synopsis of the socio-economic conditions facing people with disabilities in Canada and the United States. As well, I have shown how barriers in two particular areas—transportation and attendant care services—have significant negative effects for workers with disabilities. Finally, I provided a brief overview of disability rights law as it affects workers in the two countries and why there are key differences between them. What stands out is the profound marginalization of people with disabilities in both countries. While the United States has relatively enlightened accessible transportation policies and Canada has relatively generous labour market policies for those people with disabilities who are already in the labour market, poverty and unemployment remain the fate for far too many

an analysis, see Anita Silvers & Leslie Pickering Francis, "A New Start on the Road Not Taken: Driving with Lane to Head Off Disability-Based Denial of Rights" (2007) 23 Wash. U. J.L. & Pol'y 33.

232. Mark Barenberg, "Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production" (1994) 94 Colum. L. Rev. 753 at 758.

233. Alex B. Long, "Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008", available online: Social Science Research Network <<http://ssrn.com/abstract=1273922>>.

234. *Ibid.* at 4. A partial exception is made for eyeglasses and contact lenses.

people with disabilities. This fact suggests each country can learn from the experiences of the other. Canadian disability rights activists have much they can learn from the experiences of grassroots organizations like ADAPT. The state-centric nature of lobbying in Canada has undermined the potential for advocates to find their own voices through creative struggles from below. Without such activism, the relatively strong union density in Canada will not benefit people with disabilities, particularly blind and mobility impaired Canadians. On the other hand, American disability rights activists have accomplished a great deal in making transportation accessible but have been thwarted by the courts because of the narrow jurisprudence under the ADA. In 2008, legislation to remedy these rulings was finally enacted into law after years of pressure by disability rights advocates. Both countries need to develop better attendant services programs. Policy-makers in both countries will have to carefully consider a multi-pronged approach to address the systemic discrimination facing Canadians and Americans with disabilities.

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