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Has the Charter Made a Difference for People with Disabilities? Reflections and Strategies for the 21st Century

Ravi Malhotra[*]

I. INTRODUCTION

Canada was one of the very first countries in the world to incorporate equality provisions for people with physical and mental disabilities directly in its Constitution.[1] Influenced by both the International Year of Disabled Persons declared by the United Nations in 1981 and grassroots mobilization by disability rights advocates, section 15 of the *Canadian Charter of Rights and Freedoms* held out the promise that people with disabilities were to be regarded as equal to other citizens.[2] How can we evaluate the fulfillment of this promise three decades later? Are those whom some have labelled Charter skeptics correct in regarding legal strategies as a diversion from more important grassroots political struggles?[3] Or is a more nuanced conclusion warranted?

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[1] Pauline Rosenbaum & Ena Chadha, "Reconstructing Disability: Integrating Disability Theory into Section 15" (2006) 33 S.C.L.R. (2d) 343, at 343 [hereinafter "Rosenbaum & Chadha"]. Section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"], states: "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ... mental or physical disability."

[2] Note that the original draft of s. 15 did not include people with disabilities as many policy-makers were concerned that the costs of disability accommodation would be exorbitant. See Yvonne Peters, "The Constitution and the Disabled" (1993) 2 Health L. Rev. 1, at para. 25.

[3] See, *e.g.*, Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1989); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997). For an important earlier consideration of the efficacy of legal strategies for achieving social transformation for people with

In this short paper, I use the lens of critical disability theory to argue that while the convoluted evolution of the section 15 jurisprudence in recent years certainly leaves much to be desired and marks a retreat from the early promise of substantive equality, the Supreme Court of Canada has repeatedly if not consistently embraced the core vision articulated by disability rights advocates. By this I mean that the Court has come some distance to embracing a social model understanding of disablement even though barriers continue to be widespread in public settings such as restaurants, schools and stores. The social model stands for the proposition that it is largely structural barriers that unnecessarily impede the lives of people with disabilities, and that the focus of public policy should be on a societal commitment to eliminating barriers and providing accommodation rather than altering the person with a disability. Staircases prevent wheelchair users from entering restaurants, clubs and homes, and print materials preclude blind and visually impaired people from timely access to information. In contrast, the medical model has devoted its energies primarily to rehabilitation, charity, cure and prevention of disability. Its focus is on ameliorating impairment in the disabled person's body and regarding the situation as tragic when this cannot be achieved.[4] Moreover, this articulation of the social model is true even in cases where disability rights advocates have ultimately lost on the merits. Although there is no doubt that the evolution of section 15 jurisprudence in the Supreme Court of Canada has been troubling, with an increasing

disabilities, see Sarah Armstong, "Disability Advocacy in the *Charter* Era" (2003) 2 J. L. & Equality 33 (rejecting both the conservative and radical critiques of the Charter in the context of disability rights).

[4] The disability studies literature is vast and there are numerous variants of the social model. The canonical reference is Michael Oliver, *The Politics of Disablement* (London: Macmillan, 1990). Very recently, Michael Oliver and Colin Barnes released an updated version. See Michael Oliver & Colin Barnes, *The New Politics of Disablement* (London: Macmillan, 2012). See also Gary L. Albrecht, Katherine D. Seelman & Michael Bury, eds., *Handbook of Disability Studies* (Thousand Oaks, California: Sage, 2001) and Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (New York: Times Books, 1993) (discussing the American disability rights movement). For an important analysis of Canadian jurisprudence using critical disability theory, see Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: University of British Columbia Press, 2006). I do not consider the universalist model whereby impairments are regarded as a spectrum on which each and every individual is simply on a different point. While it has some superficial appeal, I do not think it is helpful to legal analysis and regard it as disorienting. But see Rosenbaum & Chadha, *supra*, note 1, at 350; Jonathan Penney, "A Constitution for the Disabled or a Disabled Constitution? — Toward a New Approach to Disability for the Purposes of Section 15(1)" (2002) 1 J.L. & Equality 83, at para. 35.

tendency by the Court to dismiss section 15 claims in more recent years,[5] two recent developments, Canada's ratification of the United Nations *Convention on the Rights of Persons with Disabilities*[6] and the promulgation of regulations pursuant to the *Accessibility for Ontarians with Disabilities Act, 2005*[7] after many long and hard years of lobbying[8] are particularly promising and deserve closer attention by constitutional law scholars. Advocates of critical disability theory nevertheless need to remain vigilant and push courts and tribunals to exemplify reasoning consistent with the principles of substantive equality.

At the outset, three aspects of disability politics in general and people with disabilities as an identity community in particular are worth noting for contextual background. First, people with disabilities remain among the most marginalized Canadians and this fact needs to be kept in mind in all contexts in which constitutional jurisprudence is considered. Even the most cursory foray into sociology bears out this assertion. People with disabilities remain disproportionately impoverished, are far less likely to have secured full-time employment, and attain lower education levels when compared with their able-bodied peers.[9] Like many other minority groups, people with disabilities are also underrepresented in corporate boardrooms and legislative assemblies across the country.[10] Second, people with disabilities are extremely diverse. The category encompasses a wide range of conditions, including people with sensory conditions, mobility impairments, learning disabilities, psychiat-

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[5] Bruce Ryder & Taufiq Hashmani, "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010" in J. Cameron & B. Ryder, eds. (2010) 51 S.C.L.R. (2d) 505, at 506 [hereinafter "Ryder & Hashmani"] (noting a drop of nearly 50 per cent in established s. 15 claims in Supreme Court rulings between 2004 and 2009 compared to previous years).

[6] G.A. Res. 61/106 (2007) [hereinafter "CRPD"].

[7] S.O. 2005, c. 11 [hereinafter "AODA"].

[8] Essential reading for understanding the social movement that eventually led to the AODA is M. David Lepofsky, "The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the *Ontarians with Disabilities Act* — The First Chapter" (2004) 15 N.J.C.L. 125 [hereinafter "Lepofsky, 'Long'"] (outlining the political mobilization for disability rights legislation in Ontario between 1994 and 2003).

[9] Gwen Brodsky, Shelagh Day & Yvonne Peters, *Accommodation in the 21st Century* (2012), at 2, online: Canadian Human Rights Commission <http://www.chrc-ccdp.gc.ca/proactive_initiatives/default-eng.aspx>. As recently as 2006, they note that nearly one-half of all people with disabilities were not employed.

[10] That said, in recent years, wheelchair users have been elected to office in Alberta, British Columbia and the House of Commons. Stephanie Cadieux and Stephen Fletcher have served in the British Columbia and federal cabinets, respectively. The history of candidates with disabilities running for public office requires further research. The author is currently writing a book-length biography, with Benjamin Isitt, on a double amputee, E.T. Kingsley, who ran for both the British Columbia Legislature and the House of Commons numerous times between 1907 and 1926.

ric disabilities and much more. At times, this makes articulating a cohesive vision particularly challenging in a world where presenting a straightforward story is important for media coverage and for acquiring support by policy decision-makers.[11] Finally, people with disabilities face unique challenges in that, unlike most other identity communities, those born with disabilities very rarely share a disability identity with their parents. This means that disability rights consciousness must be fostered anew with each generation outside the home, creating significant political challenges and requiring constant outreach.[12]

What does the duty to accommodate entail? Since the Supreme Court's decision in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, we have enunciated a unified *bona fide* occupational requirement test that does not distinguish between adverse effect and direct discrimination.[13] As Lepofsky has argued, there are three key aspects to the duty to accommodate: (1) a duty to remove existing barriers that preclude a person with a disability from participating in existing services covered by the equality guarantee; (2) a duty to take interim steps to provide individualized accommodation where it proves impossible to immediately remove barriers; and (3) a continuing obligation to prevent the creation of future barriers.[14] The legal test for evaluating whether a workplace rule or standard constitutes a *bona fide* occupational requirement adopted

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[11] Samuel R. Bagenstos has written compelling scholarship on how framing disability rights legislation as welfare reform that would be cost effective acted as a narrative that unified an otherwise divided disability rights movement in the United States. See Samuel R. Bagenstos, "The Americans with Disabilities Act as Welfare Reform" (2003) 44 Wm. & Mary L. Rev. 921. In the worst-case scenario, disability rights advocates may adopt completely different positions in the same case, as has occurred during constitutional litigation regarding the funding of treatment for people with autism. See *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.) [hereinafter "*Auton*"] (finding the province's failure to fund a novel therapy for children with autism did not violate s. 15).

[12] For a thoughtful inquiry into the origins of disability rights consciousness among a sample of Americans with disabilities, see David M. Engel & Frank W. Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (Chicago: University of Chicago Press, 2003). The author is currently writing a monograph, with Morgan Rowe, on rights consciousness and identity based on in-depth interviews with 12 Canadian adults with physical disabilities.

[13] [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 (S.C.C.) [hereinafter "*Meiorin*"]. An example of direct discrimination would be "No Blacks allowed", while a height requirement would be a simple example of adverse-effect discrimination. Prior to *Meiorin*, some courts did not require a respondent who was held to have engaged in direct discrimination to accommodate, leading to absurd results. On this point, see 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 167-68 [hereinafter "Lepofsky, 'The *Charter*'s Guarantee'"].

[14] Lepofsky, "The *Charter*'s Guarantee", *id.*, at 169.

by the courts is quite similar. The three-part *Meiorin* test subjects potentially discriminatory workplace standards to scrutiny and inquires:

(1) Has the employer (or service provider) adopted the standard for a purpose rationally connected to performance?
(2) Did the employer or service provider adopt the standard in an honest and good faith belief that it was necessary for the fulfillment of that purpose?
(3) Has the employer or service provider demonstrated that the standard is reasonably necessary?

To demonstrate that the standard is reasonably necessary, the employer must show that it is impossible to accommodate employees with the characteristics of the claimant without experiencing undue hardship.[15]

In Part II, I evaluate selected Supreme Court decisions, including key section 15 rulings relating to education discrimination, pension benefit claims and discrimination in the provision of hospital services and a tribunal decision relating to accessibility of the railways. These cases encompass landmark victories that people with disabilities will cherish for years to come as well as disappointing losses that haunt us. In Part III, I suggest that the frustrations of the evolution of the section 15 jurisprudence more broadly may be balanced by the new opportunities presented by Canada's ratification of the CRPD and legislation such as the AODA.

II. THE SECTION 15 CASE LAW ON DISABILITY RIGHTS

Before discussing the section 15 case law with respect to disability rights, it is useful to have a brief overview of the evolution of section 15 case law. In *Andrews v. Law Society of British Columbia*,[16] the first section 15 case, the Supreme Court of Canada ruled in a decision striking down a citizenship requirement for members of the Bar that the focus should be on substantive equality, which does not necessarily entail identical treatment if the situation does not warrant it, and observed that insisting on it may well lead to inequality. Unfortunately, the case law became increasingly convoluted over time. The Supreme Court set out to clarify the law in *Law v. Canada (Minister of Employment and*

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[15] *Meiorin*, *supra*, note 13, at para. 54.

[16] [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 (S.C.C.) [hereinafter "*Andrews*"] (rejecting similarly situated test).

Immigration)[17] by requiring claimants to demonstrate a violation of human dignity, guided by four contextual factors. As Ryder and Hashmani have correctly noted, however, the section 15 jurisprudence has remained mired in confusion.[18] While space restrictions preclude a detailed discussion, the requirement that claimants articulate an appropriate comparator group has derailed many equality rights claims. The Court's analysis has unfortunately often been sidetracked into obscure and pedantic interpretations of whether a claimant has selected the appropriate comparator group.[19] The failure to select the correct group has often been fatal to the claim.[20] Second, the requirement to demonstrate a violation of human dignity has stymied some claimants' ability to demonstrate that they were subject to discrimination.[21] Although the Court appears to have acknowledged these flaws in the recent decisions in *R. v. Kapp*[22] and *Withler v. Canada (Attorney General)*,[23] where the Court adopted a test inquiring (1) whether the impugned law creates a distinction based on an enumerated or analogous ground; and (2) whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping,[24] it

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[17] [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, [1999] S.C.J. No 12 (S.C.C.) [hereinafter "*Law*"]. The *Law* test queries whether the law under scrutiny (i) draws a distinction based on personal characteristics that amounts to differential treatment; (ii) based on an enumerated or analogous ground; (iii) that causes discrimination "by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society". See *id.*, at para. 88.

[18] Ryder & Hashmani, *supra*, note 5, at 515.

[19] Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor Y.B. Access Just. 111 [hereinafter "Gilbert & Majury, 'Critical'"].

[20] *Id.*

[21] See, *e.g.*, Leslie A. Reaume, "Postcards from *O'Malley*: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the *Charter*" [hereinafter "Reaume"] in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 373, at 398; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48 McGill L.J. 627 [hereinafter "Gilbert, 'Time'"]. But see Lee Ann Basser, "Human Dignity" in Marcia H. Rioux, Lee Ann Basser & Melinda Jones, eds., *Critical Perspectives on Human Rights and Disability Law* (Boston: Martinus Nijhoff Publishers, 2011) 17 [hereinafter "Rioux, Basser & Jones"] (defending the concept of dignity as crucial for disability rights).

[22] [2008] S.C.J. No. 42, 2008 SCC 41, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter "*Kapp*"] (dismissing a s. 15 challenge to an Aboriginal communal fishing licence).

[23] [2011] S.C.J. No. 12, 2011 SCC 12, [2011] 1 S.C.R. 396 (S.C.C.) [hereinafter "*Withler*"] (upholding a legislative framework that made distinctions based on age for supplementary death benefits).

[24] *Kapp*, *supra*, note 22, at para. 17. The Court in both *Kapp* and *Withler*, *id.*, cited Gilbert, "Time", *supra*, note 21 and Gilbert & Majury, "Critical", *supra*, note 19.

remains to be seen whether future decisions can rectify what critical scholars have justifiably regarded as an excessively convoluted jurisprudence that does not provide clear guidance to litigants.

Sixteen major cases specifically addressing disability rights issues, frequently but not exclusively in the section 15 or statutory human rights context, have been heard by the Supreme Court of Canada in the last 30 years.[25] In many of these cases, disability rights organizations were active

[25] How one selects such a list is inevitably always subject to debate. The Supreme Court cases I identify are: *E. (Mrs.) v. Eve*, [1986] S.C.J. No. 60, [1986] 2 S.C.R. 388 (S.C.C.) (the Court refuses to authorize non-therapeutic sterilization for a woman with an intellectual disability); *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.) (automatic detention of individuals found not criminally responsible by reason of insanity is found to be unconstitutional); *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.) (the majority finds that the provision in the *Criminal Code*, R.S.C. 1985, c. C-46 prohibiting assisted suicide does not violate the Charter rights of those who require assistance); *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] S.C.J. No. 55, [1996] 3 S.C.R. 566 (S.C.C.) (the distinction between insurance benefits provided to employees with physical disabilities and those with mental disabilities violated the Saskatchewan *Human Rights Code*, S.S. 1979, c. S-24.1); *Eaton v. Brant County Board of Education*, [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.) [hereinafter "*Eaton*"] (no presumption of integration in educational settings for students with disabilities is required by s. 15); *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.) [hereinafter "*Eldridge*"] (the government's failure to provide sign language interpretation to Deaf patients seeking medical treatment violated s. 15); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625 (S.C.C.) (*Criminal Code* provisions for accused persons found not criminally responsible do not violate the Charter); *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] S.C.J. No. 73, [1999] 3 S.C.R. 868 (S.C.C.) (failure to provide an individualized driving test to man with a visual impairment violated the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210); *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] S.C.J. No. 29, 2000 SCC 27, [2000] 1 S.C.R. 665 (S.C.C.) [hereinafter "*Mercier*"] (medical anomalies need not demonstrate physical impairments to constitute disabilities under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12); *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] S.C.J. No. 29, [2000] 1 S.C.R. 703 (S.C.C.) [hereinafter "*Granovsky*"] (holding that the rule requiring recent contributions to a pension plan for eligibility did not violate s. 15); *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.) [hereinafter "*Martin*"] (finding that chronic pain regulations that limited income benefits to injured workers with chronic pain violated s. 15); *Auton*, *supra*, note 11; *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] S.C.J. No. 15, 2007 SCC 15, [2007] 1 S.C.R. 650 (S.C.C.) [hereinafter "*Via Rail*"] (the majority restored the decision of the Canadian Transportation Agency ordering retrofitting of railway cars for passengers with disabilities); *Honda Canada Inc. v. Keays*, [2008] S.C.J. No. 40, 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.) (dismissal of an employee with chronic fatigue syndrome did not demonstrate sufficiently malicious and egregious conduct to warrant aggravated or punitive damages); and *R. v. Dinardo*, [2008] S.C.J. No. 24, 2008 SCC 24, [2008] 1 S.C.R. 788 (S.C.C.) (a new trial was ordered where a woman with intellectual disabilities alleging sexual assault made inconsistent statements). In March 2012, the Supreme Court heard the appeal in *British Columbia (Ministry of Education) v. Moore*, [2010] B.C.J. No. 2097, 2010 BCCA 478 (B.C.C.A.), affg [2008] B.C.J. No. 348, 2008 BCSC 264 (B.C.S.C.), revg [2005] B.C.H.R.T.D. No. 580, 2005 BCHRT 580 (B.C.H.R.T.) [hereinafter "*Moore*"] (the majority concluded that the lower court correctly quashed a human rights tribunal decision finding that failure to provide specialized services to a student with severe dyslexia violated the British Columbia *Human Rights Code*).

interveners, making arguments to encourage the adoption of principles in keeping with the social model.[26] Two of the most disappointing decisions for disability rights advocates were the decisions in *Eaton v. Brant County Board of Education*,[27] which upheld a segregated educational setting for a young girl with cerebral palsy as consistent with her equality rights, and *Granovsky v. Canada (Minister of Employment and Immigration)*,[28] which upheld the provision in the legislative framework funding federal disability pensions which requires employees to make regular and recent contributions in order to be entitled to a disability pension. On the other hand, *Eldridge v. British Columbia (Attorney General)*,[29] requiring the state to fund sign language interpreters for Deaf patients in hospitals, likely represents the most significant victory for progress under section 15 for people with disabilities to date.[30] Finally, while not a Charter case *per se*, the relatively recent — and sharply divided — decision of the Supreme Court in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*[31] granting victory to the Council sheds light on equality for people with disabilities in the vital area of accessing public transportation and warrants close attention. These four decisions are highlighted because they collectively illustrate the Court's evolving understanding of the social model of disablement and it is striking to note how the Court often articulated a progressive understanding of the social model even where it found against the claimant on the merits.

1. *Eaton*

Emily Eaton was a 12-year-old child with cerebral palsy placed by her school board in a segregated setting, against the wishes of her

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[26] This paper inevitably can analyze only selected decisions due to space constraints. Accordingly, I do not exhaustively survey religious or gender accommodation cases such as *Ontario (Human Rights Commission) v. Simpson-Sears Ltd.*, [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536 (S.C.C.) and *Meiorin*, *supra*, note 13, which of course remain very influential for the emergence of disability rights law and human rights jurisprudence more broadly in creating a unified *bona fide* occupational requirement test. See Dianne Pothier, "Tackling Disability Discrimination, at Work: Toward a Systemic Approach" (2010) McGill J.L. & Health 17, at para. 24. For my account of how the Canadian religious accommodation jurisprudence, unencumbered by American First Amendment doctrines prohibiting congressional establishment of religion, influenced the evolution of disability rights, see Ravi 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.

[27] *Eaton*, *supra*, note 25.

[28] *Granovsky*, *supra*, note 25.

[29] *Eldridge*, *supra*, note 25.

[30] Rosenbaum & Chadha, *supra*, note 1, at 356.

[31] *Via Rail*, *supra*, note 25.

parents, after a period in an integrated environment which the school board concluded was not successful nor in her best interests.[32] As in cases involving racial segregation and inequality in education, disability discrimination in education strikes at the heart of what it means for people with disabilities to be included in society and the very core of dignity.[33] Emily's parents challenged the school board's Identification, Placement and Review Committee decision through the administrative tribunal system established to adjudicate such decisions. The Special Education Appeal Board and the Special Education Tribunal considered Emily's intellectual, emotional and social needs as well as possible safety concerns presented by her presence in an integrated classroom. They unanimously confirmed that the segregated placement was appropriate.[34]

When the Eatons exhausted these remedies, they sought judicial review while simultaneously placing Emily in an integrated setting through the local publicly funded Catholic school board.[35] The Divisional Court rejected the notion that there ought to be a presumption in favour of educational integration of children with disabilities.[36] Rather, it preferred that such decisions be made on a case-by-case basis. Granting deference to the administrative tribunals that had considered Emily's case, the Divisional Court upheld the segregated placement.[37] However, the Court of Appeal, in an excellent decision by Arbour J.A., as she then was, allowed the appeal. It took judicial notice of the historical and social context of segregation to conclude that a segregated environment amounted to the sort of exclusion and isolation that legally constituted a burden of disadvantage within the definition of section 15.[38] It also rejected arguments by the school board that disability discrimination was simply distinguishable from race or sex discrimination because schools

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[32] *Eaton*, *supra*, note 25, at para. 7. For a more in-depth treatment of *Eaton*, see Lepofsky, "The *Charter*'s Guarantee", *supra*, note 13, at 197-211; Ravi Malhotra & Robin F. Hansen, "The United Nations *Convention on the Rights of Persons with Disabilities* and Its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education" (2011) 29 Windsor Y.B. Access Just. 73, at 93-94 [hereinafter "Malhotra & Hansen"].

[33] The iconic case in the United States is of course *Brown v. Board of Education*, 347 U.S. 483 (1954). For a compelling discussion of how *Brown* relates to disability rights, see Beth A. Ferri & David J. Connor, *Reading Resistance: Discourses of Exclusion in Desegregation and Inclusion Debates* (New York: Peter Lang Publishing, 2006), at 23-39.

[34] *Eaton*, *supra*, note 25, at para. 8. Their arguments included the possibility that Emily might put dangerous objects in her mouth. How this would not also be a risk in a segregated environment is unclear.

[35] Lepofsky, "The *Charter*'s Guarantee", *supra*, note 13.

[36] *Eaton*, *supra*, note 25, at para. 27.

[37] *Id.*

[38] *Id.*, at para. 35.

had to teach students in accordance with their abilities or disabilities.[39] In the section 1 analysis, Arbour J.A. concluded that the *Education Act*[40] did not minimally impair Emily Eaton's equality rights because it permitted a violation of her Charter rights. Therefore, the *Education Act* was to be interpreted consistently with Charter values. This meant placing students with disabilities in the least restrictive environment where parents did not consent to a segregated placement.[41]

The Supreme Court allowed the school board's appeal and concluded that the tribunal's order did not violate section 15. The Court, speaking through Sopinka J., held that there ought to be no presumption of integration in evaluating how students with disabilities ought to be accommodated in education in line with their best interests because this would make proceedings more technical and adversarial.[42] What is of particular interest for our purposes is the analysis used to understand disability discrimination. On the one hand, Sopinka J. makes very troubling distinctions between race or gender discrimination and disability discrimination. First, he states that disability discrimination can be distinguished from race or gender discrimination because there is no individual variation in the case of race or gender discrimination.[43] This seems *prima facie* inaccurate as a duty to accommodate applies to all grounds including gender. Any number of workplace standards may discriminate against some (but clearly not all) women who are physically incapable of meeting a particular standard.[44] He also observes that disability discrimination is about accommodating people with disabilities and not about the attribution of stereotypical characteristics.[45] In fact, disability discrimination encompasses both aspects. While there are no doubt accommodations that many people with disabilities require in

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[39] *Id.*, at para. 36. Justice Arbour correctly ruled that any such argument should only be considered during the s. 1 analysis.

[40] R.S.O. 1990, c. E.2.

[41] *Eaton*, *supra*, note 25, at para. 39. This follows the American statutory requirement that long preceded the Charter. See *Education for All Handicapped Children Act of 1975*, Pub. L. No. 94-142.

[42] *Eaton*, *id.*, at para. 79. Justice Sopinka observes that it seems inconsistent that the Court of Appeal made a finding that segregated placements constitute a violation of s. 15 but would defer where parents of a child with disabilities selected the segregated placement. On this specific point, I would concur and question in a society committed to substantive equality how much deference should be given even to parents who select segregated settings.

[43] *Id.*, at para. 69.

[44] This was the very issue in the Supreme Court's landmark decision in *Meiorin*, concerning accommodating a female firefighter who was incapable, like most women, of meeting the standards of the required aerobics test. See *Meiorin*, *supra*, note 13.

[45] *Eaton*, *supra*, note 25, at para. 67.

order to function effectively in school or in the workplace, people with disabilities are also subjected to stereotyped characteristics. One basic but disturbing example is the statistical data demonstrating that both medical professionals and able-bodied laypeople tend to evaluate the quality of life of people with disabilities significantly more poorly than do people with disabilities themselves.[46] A second illustration is the growing literature on harassment of people with disabilities, indicating that one cannot neatly distinguish disability discrimination from other enumerated grounds.[47]

The failure to create a presumption of integration also ignores, as Lepofsky has noted, the significant power differential between parents seeking to have their children placed in integrated settings and publicly funded school boards who have experienced legal counsel readily available.[48] School boards have far greater resources to make legal arguments and have historically had a vested interest in operating segregated facilities for children with disabilities. Yet the *Eaton* Court rejects integration as the default norm without providing any sociological evidence that students with disabilities benefit from segregated settings.[49] This in effect creates a presumption in practical terms for segregated schooling once a school board decides that is appropriate. Parents seeking an integrated option are then placed in a situation where they will have to challenge the decision again and again.[50]

Having said that, Sopinka J. also clearly demonstrates an understanding of the social model of disablement. He comments that "it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimina-

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[46] Carol Gill, "Health Professionals, Disability and Assisted Suicide: An Examination of Relevant Evidence and Reply to Batavia" (2000) 6 Psychol., Pub. Pol'y & L. 526, at 528-32; John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, "Hedonic Adaptation and the Settlement of Civil Lawsuits" (2008) 108 Colum. L. Rev. 1516, at 1532.

[47] See generally Mark C. Weber, *Disability Harassment* (New York: New York University Press, 2007).

[48] Lepofsky, "The *Charter*'s Guarantee," *supra*, note 13, at 204-205.

[49] *Id.*, at 205-206. There is in fact an abundance of evidence about the disturbing nature of segregated education, ranging from deficient teaching to degrading practices such as mass medical examinations of students with disabilities in school gymnasia who were required to strip in order to train medical students. See Nancy Hansen, "Surmounting Perfect Body Syndrome: Women with Disabilities and the Medical Profession" in Houston Stewart, Beth Percival & Elizabeth R. Epperly, eds., *The More We Get Together...* (Charlottetown: Gynergy Books, 1992) 49, at 51. Disability rights advocates including parents of children with disabilities have every reason to be skeptical about claims that segregated environments are in the best interests of the child.

[50] *Id.*, at 209.

tion against them".[51] In so doing, Sopinka J. recognizes the importance of a robust concept of equality that goes beyond treating likes alike and honours the promise articulated in the Charter. It is clearly an adoption of the social model in that it acknowledges that state actors, including school boards, are required to provide accommodations to students with disabilities that may entail changes to their structures, scheduling and services. Second, the Court properly rejected arguments by the school board that there was simply no discrimination in placing a student with a disability in a segregated environment within the Court's section 15 jurisprudence because this was, in fact, appropriate and authorized by the statutory framework.[52] By using the language of segregation, the Court implicitly rejected arguments by the school board that excluding students with disabilities from regular classrooms ought not to be regarded as segregation.[53] This too is an adoption of the social model and recognizes the harm that segregated environments can do for students with disabilities. By refusing to create a hierarchy of rights and distinguishing racial discrimination and disability discrimination, the Court properly, despite the ultimate holding, took a view that adopted the social model.

2. *Granovsky*

A second loss for the disability rights community was the Supreme Court's decision in *Granovsky*.[54] Allan Granovsky was a man who had a long history of temporary and intermittent medical problems due to a back condition following a workplace accident. As a result, he did not satisfy the conditions to qualify for a permanent disability pension under the *Canada Pension Plan*[55] that required contributions to be made in either two of the last three years or in five of the previous 10 years.[56] However, section 44(2) of the CPP, known as the drop-out provision, exempted those with permanent disabilities from making contributions. Granovsky alleged that the recency of contribution rules violated his equality rights under section 15 because his temporary disabilities

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[51] *Eaton*, *supra*, note 25, at para. 67.

[52] Lepofsky, "The *Charter*'s Guarantee", *supra*, note 13, at 200-01.

[53] *Id.*, at 201.

[54] *Granovsky*, *supra*, note 25. I provide a more in-depth analysis of *Granovsky* in Ravi Malhotra, "Martha Nussbaum's Capabilities Approach and Equality Rights for People with Disabilities: Rethinking the *Granovsky* Decision" in J.E. Magnet and B. Adell, eds. (2009) 45 S.C.L.R. (2d) 61.

[55] R.S.C. 1985, c. C-8 [hereinafter "CPP"].

[56] *Granovsky*, *supra*, note 25, at para. 44.

prevented him from working and making the required contributions. In other words, the drop-out exemption was underinclusive. The Pension Appeals Board did not agree. Since Granovsky's disabilities were temporary, he simply did not meet the statutory definition and was not entitled to an exemption according to the Pension Appeals Board.[57]

The Federal Court of Appeal also concluded that the CPP ought to be upheld. Nevertheless, Stone J.A. found that the distinction contained in the legislation between people with disabilities and able-bodied people did violate section 15. Applying a section 1 analysis, the Court found that Parliament was best suited to engage in the intricate balancing that was required in this complex area of social welfare.[58]

The Supreme Court of Canada, speaking through Binnie J. and articulating its first decision since the three-part *Law* test had been released for the interpretation of section 15,[59] found that section 15 was not violated and dismissed Granovsky's appeal despite the arguments of interveners such as the Council for Canadians with Disabilities.[60] The Court began its reasons with the rather inauspicious remarks that it was unclear what the implications of a section 15 violation would be for future cases. Using a classic floodgates argument, the Court pondered whether a finding that people with temporary disabilities were discriminated against in the pension legislative scheme might lead to chaos in paratransit systems that provide door-to-door transportation for people with disabilities.[61]

In applying the *Law* test, the Court found that while the first two branches of the test were met by Granovsky, he failed to demonstrate that his human dignity was harmed by the CPP in a manner inconsistent with his equality rights. The Court concluded that the legislative scheme made entirely legitimate distinctions and well-crafted exceptions in order to

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[57] *Id.*, at paras. 18-19. Concurring in the result, the Honourable C.R. McQuaid concluded that the scheme already distinguishes arbitrarily between those who have sustained a workplace injury and a much larger group whose injuries were sustained outside the workplace and are also precluded from contributing.

[58] *Id.*, at paras. 20-23. Justice McDonald found that there was no s. 15 violation since the pension rules applied equally to all individuals.

[59] *Law*, *supra*, note 17, at para. 88.

[60] *Granovsky*, *supra*, note 25, at para. 3. The fact that the CCD embraced Mr. Granovsky, however, speaks well of its commitment to cross-disability politics, which is unfortunately not universal in the disability community.

[61] This particular comment is especially ironic given that virtually all paratransit systems in Canada are fraught with so much delay and so many bureaucratic rules that disability rights advocates have sought to ensure that regular transportation systems are accessible. For an overview of the problems with paratransit in Ontario, see Ena Chadha, "Running on Empty: The 'Not So Special Status' of Paratransit Services in Ontario" (2005) 20 Windsor Rev. Legal Soc. Issues 1.

best serve those with permanent disabilities.[62] In its view, Granovsky failed to show that the pension scheme undermined the dignity of people with temporary disabilities or their "legitimate aspirations to human self-fulfilment".[63] The Court also suggested that Granovsky chose the wrong comparator group in arguing that his situation ought to be compared with able-bodied people. Stressing the importance of selecting the correct comparator group, the Court concluded that Granovsky ought to have compared his situation with those with permanent disabilities.[64] Consequently, there was no breach of his constitutional rights.

There is no question that the formalistic reasoning employed in *Granovsky* was disappointing to disability advocates and marked a retreat from the original promise of substantive equality. The use of human dignity to undermine equality claims has been extensively critiqued in the human rights literature.[65] Similarly, Gilbert and Majury have compellingly shown the folly of substituting arbitrary comparator groups that make it harder for equality-seeking groups to prove their cases.[66] I want to focus my energies, however, on the positive side of *Granovsky*. Despite its many problems, Binnie J. demonstrates a surprisingly sophisticated understanding of models of disablement and the social model. He comments explicitly on the distinction between physiological impairment and socially created handicap, and notes the role of the Charter in seeking to redress such handicaps through accommodation. He accurately observes that "[a] government inclination to write people off because of their impairment justifies scrutiny even if the impairment has resulted in very real functional limitations".[67] He even makes reference to the World Health Organization's seminal classification document on

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[62] The Court thus comments:

> Both the pension entitlement and the drop-out provision target a specific group of CPP contributors whose needs and circumstances correspond precisely to the purpose of the legislation. There is no such exact fit (or correspondence) between the drop-out provision and the appellant who experienced only bouts of *temporary* disability from time to time during the contribution period.

See *Granovsky*, *supra*, note 25, at para. 61.

[63] *Id.*, at para. 69.

[64] *Id.*, at paras. 51-52. The Court specifically rejected arguments by the CCD that in a specific year, Granovsky was in fact permanently disabled. The Court instead evaluated his health status over the entire contribution period. It also rejected arguments that the comparator group ought to be between people with disabilities and able-bodied people.

[65] See Reaume, *supra*, note 21; Gilbert, "Time", *supra*, note 21.

[66] Gilbert & Majury, "Critical", *supra*, note 19.

[67] *Granovsky*, *supra*, note 25, at para. 37.

impairments, disabilities and handicaps that goes some distance to embodying social model principles.[68]

A second point to note is that the *Granovsky* Court accepts the claimant's disabilities as legitimate. While he is ultimately unsuccessful, the Court does not question that Granovsky is a person with a disability and rejects arguments to the contrary.[69] This is no small achievement. The American jurisprudence devoted years trying to resolve this question.[70] The broad Canadian definition of disability accepted and applied by dozens of human rights tribunals and labour arbitration panels and confirmed again in *Granovsky* has had a real impact on the lives of people with disabilities, particularly in the workplace context.[71] This later culminated in the Supreme Court's holding in *Mercier*, a case involving a gardener who was denied employment after a medical examination revealed that she had an anomaly in her spinal column that created no actual impairment, that there need not be a demonstrable impairment for a person to be able to claim disability discrimination where the medical diagnosis was clearly a factor in the employment decision.[72] In achieving this understanding of disability rights, Binnie J. prepares fertile ground for future cases.

3. *Eldridge*

Perhaps the greatest legal victory for people with disabilities was the Court's unanimous decision in *Eldridge*.[73] The appellants were individuals who were born Deaf and used sign language as their means of communication. They argued that the lack of sign language interpretation impeded their ability to communicate with their physicians during medical care, particularly given the low literacy levels of many Deaf

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[68] *Id.*, at paras. 34-38.

[69] *Id.*, at para. 52.

[70] For a good overview, see Samuel R. Bagenstos, "Subordination, Stigma, and 'Disability'" (2000) 86 Va. L. Rev. 397 (analyzing U.S. Supreme Court jurisprudence on the definition of disability). Eventually Congress had to enact new legislation in 2008 to remedy the issue, the *Americans with Disabilities Amendments Act of 2008*.

[71] Michael Lynk, "Disability and the Duty to Accommodate: An Arbitrator's Perspective" in Kevin Whitaker *et al.*, eds., *Labour Arbitration Yearbook, 2001-2002* (Toronto: Lancaster House, 2002) 51, at 61-64 (noting that disability in Canadian human rights and labour arbitration law includes obesity, short stature, HIV, depression, alcoholism, hypertension, panic attacks, fear of flying, colour blindness and dyslexia, among other conditions).

[72] *Mercier*, *supra*, note 25.

[73] *Eldridge*, *supra*, note 25.

people, and therefore violated their equality rights under section 15.[74] The lower courts had all found in favour of the respondent Ministry.[75] Remarkably, the actual cost of sign language interpretation, about $150,000, was extremely small in proportion to the global provincial health budget, but the Ministry feared setting a precedent that would lead to the funding of interpreters for non-English speaking immigrants.[76] Justice La Forest, speaking for the Court, found that the Charter applied to decisions of the hospitals as they were engaged in discretionary decisions granted to them by statute in furtherance of a specific governmental policy.[77] He then concluded that section 15 was violated because effective communication was essential for the provision of quality medical services; a failure to communicate could lead to a patient's inability to follow a course of treatment or even misdiagnosis with highly detrimental consequences.[78] Once the state decides to provide a benefit, it must do so in a non-discriminatory manner where a failure to do so has an adverse effect on an enumerated group.[79] To suggest, as did the respondents, that in a world without government-funded medical services, Deaf people would have been responsible for both paying physicians and paying for sign language interpretation is simply beside the point.[80] The judgement was subject to highly negative attacks both in the popular media such as *The Globe and Mail*[81] and by some legal scholars who regarded the case primarily through the prism of the powers of the judiciary to interfere with legislative choices that have significant fiscal implications.[82] The reasoning in *Eldridge* embodies precisely the kind of analysis that disability rights advocates need: embracing a rich form of equality that recognizes that accommodation may have to be provided and existing practices modified in order for all

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[74] *Id.*, at paras. 5-8. Literacy would affect the ability to communicate via notes as an alternative.

[75] In dissent, Lambert J.A. of the British Columbia Court of Appeal found that s. 15 was violated but that the violation was saved by s. 1 given the need to accord deference to the legislature in making difficult policy choices about public finances. See *id.*, at paras. 11-16.

[76] *Id.*, at para. 4. The cost amounted to only approximately 0.0025 per cent of the provincial health budget. See *id.*, at para. 87.

[77] *Id.*, at para. 42. In a world of privatization, this doctrine is also of growing importance. I cannot develop the full implications of a deconstruction of the public/private distinction in the available space. For the classic interpretation, see Karl Klare, "The Public/Private Distinction in Labour Law" (1982) 130 U. Pa. L. Rev. 1358.

[78] *Eldridge*, *id.*, at para. 69.

[79] *Id.*, at paras. 79-80.

[80] *Id.*, at paras. 68.

[81] David Beatty, "Canadian Constitutional Law in a Nutshell" (1998) 36 Alta. L. Rev. 605, at para. 24.

[82] See, *e.g.*, *id.*, at paras. 24-25.

to flourish. The challenge is to ensure that such reasoning is systematically applied in future cases.[83]

Nevertheless, some attention should be paid to the issue of remedies. In *Eldridge*, the Court simply issued a declaration of unconstitutionality without specifying a precise remedy.[84] It also delayed the effect of the declaration for six months to allow the British Columbia provincial government to enact solutions for sign language interpretation in line with the Court's ruling.[85] As Roach has correctly noted, however, transferring the remedial aspect back to the legislature poses particular problems in equality rights cases, which have typically lasted years by the time they reach the Supreme Court, involving vulnerable minorities who may be justifiably skeptical that the political process will effectively work for them.[86] Although British Columbia made some efforts to provide sign language interpretation, first via a toll-free line and eventually via the provision of sign language interpreters upon request to attend physician and hospital visits, there is evidence that dozens of Deaf or hard-of-hearing patients in other provinces such as Ontario have filed human rights complaints about a continued lack of access.[87] This highlights the limitation of even the most positive legal ruling for social transformation if the political will is not there to enforce effective remedies that create accessible realities on the ground.

4. *Via Rail*

Finally, while it is not a Charter decision, the narrow victory of disability rights activists in the Supreme Court in 2007 by a margin of 5-4 in

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[83] Clearly, this challenge is significant. In *Auton*, *supra*, note 11, the Supreme Court dismissed a claim that the British Columbia government's failure to provide funding for Applied Behavioural Analysis ("ABA") for children with autism, an emerging therapy, violated the Charter. The Court distinguished its analysis in *Eldridge*, *supra*, note 25, holding that *Auton* concerned access to a benefit that was not conferred by law, rather than unequal access to medical services given to all. The Court then ruled that even if ABA was a benefit provided by law, there would be no s. 15 violation because the complainants selected the wrong comparator group. Although *Auton* was decided in part through the now discredited comparator group reasoning, it still reflects a significant retreat that is worrisome for equality rights advocates.

[84] *Eldridge*, *id.*, at para. 96.

[85] *Id.*

[86] Kent Roach, "Remedial Consensus and Dialogue Under the *Charter*: General Declarations and Delayed Declarations of Invalidity" (2002) 35 U.B.C. L. Rev. 211, at para. 20. Indeed, the Charter claimant has spent years in litigation at this point precisely because the government was found to be violating her Charter rights.

[87] *Id.*, at paras. 26-28.

Via Rail warrants careful attention from legal scholars.[88] The case concerned a complaint by the Council of Canadians with Disabilities to the Canadian Transportation Agency ("CTA") that the purchase of 139 railway cars, known as the Renaissance cars, by Via Rail constituted undue obstacles for people with disabilities in violation of section 172 of the *Canada Transportation Act*.[89] The CTA has jurisdiction over accessibility concerns in transportation for people with disabilities. It succeeded the Canadian Transportation Commission and it has applied Charter equality values in a number of cases with respect to transportation accessibility for people with disabilities, including the provision of an additional free seat for those people with disabilities who require attendants to travel.[90] This bodes well for advocates of disability rights, as it brings the adjudication of constitutional principles closer to people's everyday lives by enabling administrative tribunals to more rapidly address equality rights issues.[91]

In its *Via Rail* complaint, the CCD enumerated some 46 deficiencies with the railway cars including, *inter alia*, inaccessibility of its sleeper cars, lack of access to washrooms, inaccessibility of the economy coach cars which required wheelchair users to use special on-board wheelchairs, and inadequate accommodation for those with visual impairments and who used service animals.[92] The Renaissance cars were also significantly less accessible than the existing fleet which they were to replace.[93] Via Rail took the position that modifications for wheelchair access were too expensive and that its staff could deliver meals to customers who were wheelchair users and assist them in using the washroom.[94] After a lengthy investigation taking up nearly three years and various preliminary orders, the CTA concluded that 30 of the 139 railway cars had to be

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[88] *Via Rail*, *supra*, note 25. For a comprehensive discussion, see 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 [hereinafter "Baker & Godwin"].

[89] S.C. 1996, c. 10. The CTA has authority to hear complaints about accessibility in federally regulated transportation. Section 5 of the Act sets out a National Transportation Policy that is committed to accessibility for people with disabilities.

[90] Baker & Godwin, *supra*, note 88, at para. 6.

[91] The debate within administrative law on the appropriate scope of the power of administrative tribunals in evaluating formal constitutional challenges, which was not in issue in *Via Rail*, is well beyond the scope of this paper. But see *Martin*, *supra*, note 25 (holding that a workers' compensation tribunal may decide Charter questions where it is explicitly or impliedly authorized to decide questions of law).

[92] *Via Rail*, *supra*, note 25, at para. 18.

[93] *Id.*, at para. 36.

[94] *Id.*, at para. 11.

modified to enable wheelchair users to be able to use their own wheelchairs independently in the railway car in using its washrooms.[95] The net cost to Via Rail was determined to be under $700,000, or equivalent to the lost revenue the company accepted by accommodating passengers who wear coats.[96] The Agency also found that Via Rail had been extremely uncooperative in providing timely technical information regarding cost estimates during its investigation.[97] This was only the start of an epic battle that would nearly bring the CCD to the point of bankruptcy.[98]

The Federal Court of Appeal quashed the decision of the CTA in a disappointing decision indicating how far disability rights advocates still have to go. Justice Sexton for the majority concluded that the Agency was entitled to limited deference on human rights issues and failed to consider Via Rail's arguments about the accessibility of the network as a whole and the interests of passengers without disabilities.[99] In other words, the fact that Jill uses a wheelchair and wants to travel on an inaccessible route from Halifax to Toronto is irrelevant so long as accessible routes exist somewhere in the entire network. Such a perspective is blatantly inconsistent with equality values that the Charter seeks to promote. The Federal Court of Appeal as a whole also found that the Agency wrongly violated Via Rail's procedural fairness rights by not giving it adequate opportunity to respond to the Agency's requests for information on cost and feasibility.[100] It remitted the case to the Agency for reconsideration in light of both additional evidence that Via Rail proffered and its arguments about accessibility to the network as a whole.[101]

The five-person majority of the Supreme Court, speaking through Abella J. and joined by McLachlin C.J.C. and Bastarache, LeBel and Charron JJ., held that given that the CTA is a highly specialized agency with a particular mandate, it ought to have been granted deference on human rights issues that concern transportation, as intended by Parliament.[102] It went on to find that the CTA decision correctly evaluated the factors in play, including the financial impact of wheelchair access on

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95 *Id.*, at para. 6.
96 *Id.*, at paras. 70-71.
97 *Id.*, at paras. 5-7.
98 Baker & Godwin, *supra*, note 88, at para. 1.
99 *Via Rail*, *supra*, note 25, at para. 76.
100 *Id.*, at para. 79.
101 *Id.*, at para. 82.
102 *Id.*, at para. 97. The Court noted at para. 98 that the "scheme and object of the Act are the oxygen the Agency breathes".

Via Rail, in assessing whether removal of the barriers constituted an unreasonable burden, and did so in a manner consistent with Canadian human rights legislation.[103] It specifically found that the CTA appropriately considered the fact that the purchase of the railway cars violated the comprehensive Rail Code, a voluntary agreement on accessibility standards to which Via Rail had itself agreed in consultation with the Canadian Human Rights Commission, disability advocacy organizations such as the Council of Canadians with Disabilities, and the CTA.[104] The majority also expressly articulated an understanding of the social model in approving of the CTA's ruling that the cars must be accessible to individuals using their personal wheelchairs. Wheelchairs are generally customized to the specific person's needs and the notion that Via Rail could substitute a generic wheelchair was inconsistent with both dignity and practices across leading Organisation for Economic Co-operation and Development countries with respect to railway systems.[105]

Perhaps most importantly for further disability rights jurisprudence, the majority rejected the respondent's argument about the network defence. The majority correctly understood that Canadians with disabilities elect to travel to particular locations and that the accessibility of other routes is completely irrelevant to a wheelchair user faced with a barrier. The fact that Via Rail had no clear answer as to how they would provide accommodations apart from the use of taxis or the demeaning and unsafe option of physically transferring wheelchair users did not help its case.[106] The majority therefore lambasted the majority of the Federal Court of Appeal for being inattentive to the duty to accommodate principles set forth in cases such as *Meiorin*.[107] Without discussing every nuance of this complex decision, with respect to the specific accommodations required, the Court appropriately placed significant weight on the fact that Via Rail was so uncooperative in providing information on cost estimates when it had the onus to demonstrate that it was complying with its duty to accommodate passengers with disabilities.[108] The onus is clearly on the respondent to demonstrate that the accommodation would

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[103] *Id.*, at para. 139; Baker & Godwin, *supra*, note 88, at para. 53.

[104] *Id.*, at paras. 145-150, 163.

[105] *Id.*, at paras. 151-165 (noting American, British and Australian practices). A personal wheelchair is typically customized to meet the ergonomic needs of the client. Stripping the person with a disability of such a tool is consequently very invasive and demeaning.

[106] *Id.*, at paras. 174-176.

[107] *Id.*, at para. 189.

[108] See, *e.g.*, *id.*, at para. 200.

constitute an undue obstacle.[109] Similarly, Via Rail's obstructionist conduct largely led the majority to reject that it experienced any procedural unfairness with respect to evidence on the cost of accommodation, such as the Schrum report, that it proffered at the Federal Court of Appeal, since the majority properly concluded that Via Rail should have disclosed such information earlier to the CTA.[110]

In dissent, Deschamps and Rothstein JJ., joined by Fish and Binnie JJ., held that when applying human rights principles, the Agency did not have specialized expertise and was only entitled to deference on a standard of correctness, the lowest standard of deference.[111] The dissent also declined to consider the voluntary Rail Code as a legally binding instrument to which it would accord deference because it had not been adopted by the Governor in Council as a formal regulation.[112] Its primary focus was on the difficult financial situation faced by Via Rail and how that ought to be a significant factor when weighing the competing considerations. Indeed, the dissent found that the majority did not properly apply the *Meiorin* test in failing to give sufficient weight to Via Rail's purpose of efficiency and maintaining viability as stipulated in its enabling statute.[113] Accordingly, the dissent would have remitted the case back to the CTA.[114] Fortunately for disability rights advocates, the majority properly stressed the primacy of human rights and gave it a robust interpretation. Advocates can effectively use the majority judgment in *Via Rail* in future challenges in the coming years. In Part IV, I turn to some key trends that are likely to affect how we interpret future disability rights litigation.

III. RECENT DEVELOPMENTS: THE CRPD AND THE AODA

Two recent developments that merit careful consideration by legal advocates are the CRPD and the AODA. Although a full treatment is well beyond the scope of this paper, legal advocates would be well advised to pay close attention to how case law under each instrument

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[109] *Id.*, at para. 297. The test for determining undue obstacles in the transportation context and undue hardship is the same. See *supra*, note 15 and accompanying text.

[110] *Id.*, at para. 237.

[111] *Id.*, at para. 284.

[112] *Id.*, at paras. 344-351.

[113] *Id.*, at paras. 337-338. This is a breathtaking conclusion as it would allow a respondent to defeat a claim involving human rights, which is accorded quasi-constitutional status in Canadian law, simply by claiming financial difficulties.

[114] *Id.*, at para. 370.

unfolds. The CRPD, enacted in 2006, entered into force May 3, 2008 and ratified by Canada in 2010 at the beginning of the Paralympic Games, was the fastest negotiated international human rights convention in the world and specifically addresses equality rights of people with disabilities in some 50 articles.[115] It encompasses a wide range of rights that protect the person, autonomy rights, rights of access to participation, liberty rights and economic, social and cultural rights, and is fully grounded in the social model perspective of empowerment and barrier removal.[116] It also establishes, as have other major international human rights conventions, an Optional Protocol to facilitate individual or group complaints against a state party that are reviewed by the treaty monitoring body, the Committee of the Rights of Persons with Disabilities, a group of some 12 experts who serve four-year terms.[117] Regrettably, Canada has yet to sign the Optional Protocol nor has Parliament enacted implementing legislation specifically designed for the CRPD.[118]

Although state parties undertook to create no new rights, in reality, there are some innovative aspects of the CRPD that may assist disability rights advocates. Article 19, for instance, establishes a right to attendant services.[119] Article 20 outlines a right to personal mobility.[120] This includes a right to affordable assistive technology and training in its use.[121] Article 24 concerns education and has specific contextualized language about the inclusion of people with disabilities. It states in part that State Parties

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[115] Gerard Quinn, "A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities" [hereinafter "Quinn"] in Gerard Quinn & Lisa Waddington, eds., *European Yearbook of Disability Law*, Vol. 1 (Portland; Intersentia, 2009) 89, at 91; Stefan Tromel, "A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities" [hereinafter "Tromel"] in Quinn & Waddington, *id.*, 115, at 116. See also Deborah A. Ziegler, ed., *Inclusion for All: The UN Convention on the Rights of Persons with Disabilities* (New York: International Debate Education Association, 2010). This literature is massive and I can only provide selected references here. For a more in-depth treatment of the issues, including the controversial question of whether state parties must enact implementing legislation, see Malhotra & Hansen, *supra*, note 32, at 84-90.

[116] Quinn, *id.*, at 104.

[117] Janet E. Lord & Rebecca Brown, "The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities" in Rioux, Basser & Jones, *supra*, note 20, 273, at 298-99; Michael A. Stein & Janet E. Lord, "Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities and Future Potential" (2010) 31 Hum. Rts. Q. 689, online: <http://ssrn.com/abstract=1533482>, at 5. The first committee was elected on November 3, 2008. See Stein & Lord, *id.*, at 1.

[118] "Convention and Optional Protocol Signatures and Ratification", online: <http://www.un.org/disabilities/countries.asp?id=166>; Malhotra & Hansen, *supra*, note 32, at 84-90.

[119] CRPD, *supra*, note 6, Art. 19.

[120] *Id.*, Art. 20.

[121] Tromel, *supra*, note 115, at 119.

shall ensure that "people with disabilities can access an inclusive, quality and free primary and secondary education on an equal basis with others in the community in which they live".[122] On its face, this is a potentially powerful tool in future cases involving the integration of students with disabilities in educational settings. Creative counsel could do much with these provisions to advance the equality rights of people with disabilities. While relatively few Canadian cases have considered the CRPD to date, counsel are likely to craft arguments based on the CRPD in the years to come.[123] I would argue that the future interpretation of section 15 must be carefully considered in light of Canada's responsibilities under the CRPD, especially as courts have embraced the application of international law in other contexts such as the landmark immigration law rulings in *Baker v. Canada (Minister of Citizenship and Immigration)*[124] and *Suresh v. Canada (Minister of Citizenship and Immigration)*.[125] While, as I discuss below, legislatures have a clear role to play in crafting disability-specific legislation that enumerates specific accessibility rights for people with disabilities, the bold interventions of courts in recent years in applying international human rights conventions in the interpretation of domestic law suggests that the CRPD will play an increasingly important role and counsel would be well advised to pay it close attention and employ it as a tool to deepen equality whenever they can.

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[122] CRPD, *supra*, note 6, Art. 24.

[123] A Quicklaw search produces three court cases to date: *Leobrera v. Canada (Minister of Citizenship and Immigration)*, [2010] F.C.J. No. 692, [2011] 4 F.C.R. 290 (F.C.), (applying the CRPD to interpret the definition of children with disabilities for the purposes of immigration applications); *Cole v. Cole (Litigation guardian of)*, [2011] O.J. No. 3418, 2011 ONSC 4090 (Ont. S.C.J.) (argument about substitute decision-making referring to the CRPD); *Brown v. Canada (National Capital Commission)*, [2008] F.C.J. No. 927, 2008 FC 733 (F.C.) (rejecting the argument by the interveners that, based on the CRPD, the duty to accommodate includes a duty to consult stakeholders). It is interesting that at least two of the lawyers in these cases, Martin Anderson and David Shannon, are lawyers with physical disabilities. Mr. Shannon has since been appointed Chief Executive Officer of the Nova Scotia Human Rights Commission. See Aly Thomson, "David Shannon, CEO of Nova Scotia Human Rights Commission, brings resolve to job" *Winnipeg Free Press* (March 25, 2012), online: <http://www.winnipegfreepress.com/canada/david-shannon-ceo-of-nova-scotia-human-rights-commission-brings-resolve-to-job-144145555.html>.

[124] [1999] S.C.J. No 39, [1999] 2 S.C.R. 817 (S.C.C.) [hereinafter "*Baker*"] (holding that immigration law may be interpreted in light of Canada's responsibilities under the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3.

[125] [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3, at paras. 59-65 (S.C.C.) [hereinafter "*Suresh*"] (holding that deportation to a state where the appellant may be tortured may be interpreted in light of Canada's responsibilities under the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36).

Finally, the AODA legislation enacted in 2005 in Ontario opens up a new arena for activism that warrants close attention by legal counsel and the disability community throughout Canada. Although not all regulations have been released, the AODA seeks to emulate the success of the American experience with the *Americans with Disabilities Act* as an alternative to the complaint-based human rights system which many disability rights advocates rightly perceive as a failure.[126] It outlines regulations in a number of areas including customer service, transportation, employment, information and communications, and the built environment.[127] The Customer Service Standard regulation came into effect on January 1, 2012 and requires organizations with more than 20 employees to have a written plan on their strategies for accessible customer service and to file it with the Ministry.[128] The standards relating to transportation, employment, and information and communications were consolidated in a single Integrated Accessibility Standards Regulation that is in effect.[129] However, actual requirements are to be phased in over the next decade.[130] Finally, the Built Environment Standard has yet to be promulgated.[131] Collectively, these highly specific regulations, a reflection of compromises among the various stakeholders, open up new vistas for disability rights advocates that can work in tandem with equality rights claims and human rights arguments to achieve a better solution for Canadians. Their potential, in conjunction with the CRPD, to transform disability rights law is significant and advocates should be prepared to make the most of them and hopefully enact analogous provisions throughout the country.

IV. CONCLUSION

While section 15 has undoubtedly had a troubled history, I believe that a cautiously optimistic approach is warranted on the facts in the case

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[126] The alarming problems with provincial human rights systems are beyond the scope of this paper. However, to provide one illustration, very few cases were being referred by Human Rights Commissions to tribunals and there were endemic delays in the system. See, *e.g.*, Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Toronto: Government of Ontario, 1992), at 86-87.

[127] "Other Standards", online: <http://www.mcss.gov.on.ca/en/mcss/programs/accessibility/other_standards/index.aspx> [hereinafter "Other Standards"].

[128] "Accessible Customer Service for organizations with 20 or more employees", online: <http://www.mcss.gov.on.ca/en/mcss/programs/accessibility/customerService/Over20.aspx>.

[129] Integrated Accessibility Standards, O. Reg. 191/11.

[130] "Other Standards", *supra*, note 127.

[131] *Id.*

of disability rights. Although disability rights advocates have certainly not always won at the Supreme Court of Canada, the language used by judges even in cases where they have not found section 15 to be violated holds out promise for future rights claimants. Again and again, judges have demonstrated that they have an understanding of the social model and have applied it to rectify the effect of structural barriers, discriminatory regulations and attitudes that unfairly impede the lives of people with disabilities. I am hopeful that initiatives such as the CRPD and the AODA can breathe new life into disability rights law for future generations.