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Canada Tracks Disability Rights: A DRPI Model of Systemic Monitoring

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Chapter 11

CANADA TRACKS DISABILITY RIGHTS
Using a DRPI Model of Systemic Monitoring to Highlight Law and Policy Impacting Disability

Roxanne Mykitiuk and Yvonne Peters

INTRODUCTION

This chapter surveys laws and policies in Canada that affect the rights of persons with disabilities. It does so as part of a broader project on international disability rights monitoring and is guided by DRPI's National Law and Policy Monitoring Template (2008). The template is based on the Convention on the Rights of Persons with Disabilities (CRPD) and other international instruments. The template's purpose is "to monitor human rights for people with disabilities at the systemic level, that is, at the level of existing laws, policies, and programs," and to "identify and draw attention to the most critical gaps and deficiencies in the legislative and policy framework" (p. 2) based on human rights.

Providing an extensive review of disability law and policy in Canada is a large task. This is due to the division of law-making power among federal and provincial legislatures, and the functioning of three distinct branches of government: legislative, executive, and judiciary. In addition to this, measures affecting persons with disabilities are numerous and complex. Some of these measures "directly target some or all persons with disabilities," while others are of general application and "affect persons with disabilities, sometimes differently or disproportionately compared with persons who do not have disabilities" (LCO, 2012, p. 3). Likewise, some laws and policies deal with broad human rights principles and others are specific to certain sectors of society. The focus in this chapter is on describing and examining Canadian law and policy under specific parts of the template, namely access to justice and equal recognition before the law; education; health, habilitation, and rehabilitation; and work. It discusses the important law and policy instruments from the following Canadian

jurisdictions: federal, British Columbia (BC), Manitoba, Ontario, Quebec, and Newfoundland and Labrador. Its content thus reflects the geographic and cultural diversity of law and policy in Canada.

UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Canada was one of the first countries to sign the CRPD (Human Resources and Skills Development Canada [HRSDC], 2011, p. 1). It entered into force on 3 May 2008. Canada ratified the CRPD on 11 March 2010 (HRSDC, 2011, p. 1). Prior to ratification, the federal and provincial governments took initial steps to ensure that laws, policies, and programs in Canada were consistent with the CRPD (HRSDC, 2011, p. 6). Canada did not sign the Optional Protocol to the CRPD (UN, 2007), which allows "individuals or groups to make complaints concerning alleged violations of the provisions of the Convention by State Parties" (HRSDC, 2011, p. 7). Upon ratifying the CRPD, Canada also asserted that "[t]o the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards" (UN Treaty Collection, 2012).[1]

NATIONAL LEGAL LANDSCAPE ON DISABILITY

Canada is a federal state that operates under constitutional supremacy, meaning that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect" (Constitution Act, 1982, s. 52(1)). The human rights of all Canadians, including persons with disabilities, are protected through two main legal regimes: (1) the Canadian Charter of Rights and Freedoms, which is entrenched in the Constitution Act (hereafter the Charter), and (2) federal and provincial/territorial human rights legislation. These provide a broad guarantee to equality, prohibiting discrimination on a number of grounds, including disability.

The Charter applies to federal and provincial governments and matters within their legislative authority (Constitution Act, 1982, s. 32).[2] Section 15(1) of the Charter states, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The purpose of Section 15 has been described as preventing "the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration" (*Law v. Canada*, 1999, para. 51). Section 15(1) promotes substantive rather than formal equality, a concept that "rejects the mere presence or absence of difference as an answer to differential treatment" but rather focuses on "the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group" (*Withler v. Canada*, 2011, para. 39).

The Supreme Court of Canada has recognized that "the history of disabled persons in Canada is largely one of exclusion and marginalization" and because of this, persons with disabilities face "persistent social and economic disadvantage" (*Eldridge v. British Columbia*, 1997, para. 56). The recognition of this wider historical context informs a court's inquiry into disability discrimination claims made under Section 15(1) (*Eldridge v. British Columbia*, 1997, para. 55). While section 15(1) of the Charter aims at preventing governments from engaging in discrimination, section 15(2) enables governments to actively "combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation" (*R v. Kapp*, 2008, para. 16). The Supreme Court of Canada has recognized that legislatures need to "treat different individuals and groups in different ways" in order to govern effectively and that accommodating differences, "which is the essence of true equality," frequently requires distinctions to be made (*Andrews v. Law Society*, 1989, para. 31).

If a law does not fall under the ambit of section 15(2) and is found to violate section 15(1), a court will consider under section 1 of the Charter whether the measure in question is a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society." Where a Charter violation is not justified under Section 1, a court is allowed to give "such remedy as the court considers appropriate and just in the circumstances" (s. 24(1)). However, a breach of a Charter right does not necessarily entitle the victim to a remedy (*R v. Waller*, 1997, paras. 17–18).

While the Charter applies only to governmental action, human rights legislation applies to both the public and private sector. Enacted at the federal and provincial/territorial levels, this legislation prohibits discrimination on several grounds, including disability, in various social spheres, such as employment and the provision of services to the public (Newfoundland Human Rights Act, 2010, ss. 9–17, 19, 21 [NL HRA]; Ontario Human Rights Code, ss. 1–6 [OHRC]; Quebec Charter of Human Rights and Freedoms, ss. 10–19 [Quebec Charter]). The legislation is enforced through a complaints mechanism. Individuals or groups that encounter discrimination can file a complaint, at no charge, describing the harm they have experienced (Canadian Human Rights Act, s. 40 [CHRA]; BC Human Rights Code, s. 21 [BC HRC]; Manitoba Human Rights Code, s. 22 [MB HRC]). Complaints may be investigated (CHRA, ss. 43, 44; MB HRC, ss. 26–28), settled through mediation (BC HRC, s. 27.6; NL HRA, s. 26), or adjudicated before a panel (OHRC, ss. 34(1), 45.2; Quebec Charter, s. 49). Where a complaint is resolved by adjudication and discrimination has been found, the panel may provide remedies, including compensation or an order to redress or prevent discrimination (CHRA, ss. 49(2), 50, 53; BC HRC, s. 37).

Canada has developed a rich jurisprudence establishing key human rights principles. Of particular importance to persons with disabilities is the "duty to accommodate." This principle requires governments and the private sector to restructure their policies, practices, and standards to include the needs of persons with disabilities (Canadian Human Rights Commission, 2005). For example, urban transportation systems must accommodate persons who use wheelchairs or other mobility aids (Baker & Godwin, 2008, pp. 56–57). The duty to accommodate does not apply to those situations where the accommodation required

would cause undue hardship such as extreme cost, significant business disruption, or serious safety risks (Canadian Human Rights Commission, 2005). Special programs to prevent disadvantage or relieve hardship are not considered discriminatory, but the requirements and implementation of such programs differ depending on jurisdiction (NL HRA, s. 8; Québec Charter, ss. 86–92).

EQUAL RECOGNITION BEFORE THE LAW AND ACCESS TO JUSTICE

Equal Recognition Before the Law

Under article 12 of the CRPD, persons with disabilities must be recognized as persons before the law and "enjoy legal capacity on an equal basis with others in all aspects of life." This is the one article of the CRPD to which Canada has filed a reservation. A survey of Canadian law reveals many examples of legislative provisions relating to civil capacity and incapacity. For example, the Civil Code of Québec states that every "human being possesses juridical personality and has the full enjoyment of civil rights" (art. 1) and that every person is "fully able to exercise his civil rights" (art. 4). More generally, the Quebec Charter of Human Rights and Freedoms states, "Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law" (s. 6).

In Manitoba and Ontario, a person is incapable of managing property where the person "is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision" (Substitute Decisions Act, s. 6 [SDA]). The Vulnerable Persons Living with a Mental Disability Act, s. 81 [VPA]). A capable person may appoint a substitute decision-maker under a power of attorney (Ontario Ministry of the Attorney General, 2000, p. 4–5; The Powers of Attorney Act s. 10). Where it is believed that a person is incapable of managing property, an individual can apply (VPA, s. 82(1)) or be appointed as a guardian of the incapable person's property (Ontario Ministry of the Attorney General, 2000, p. 4–5).

The relevant statutes also lay out the duties and powers of the substitute decision-maker. They are those of a fiduciary, meaning their "powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith" for the benefit of the person with a disability (VPA, s. 99; SDA, s. 32(1)).[3] While not yet challenged in court, a breach of duty may not lead to liability if, in BC, the representative complies with the relevant statute (Representation Agreement Act, s. 23(1) [RAA]), and in Manitoba and Ontario, if the representative acted honestly, reasonably, and diligently (VPA, s. 107(2); SDA, s. 37(2)). A decision-maker must encourage the participation of the person with a disability in the making of a decision (RAA, s. 16(2); VPA, s. 103). There are also provisions regarding the termination of a decision-maker, which typically occurs when an agreement ends or a decision-maker is discharged (SDA, ss. 12, 20, 28; Civil Code of Québec, arts. 295–97). The provinces have similar regimes for addressing the appointment, obligations, and rules regarding decision-makers for personal and/or health care (RAA, s. 2(a); VPA, Division 3).

Access to Justice

Under article 13(1) of the CRPD, state parties are required to ensure "effective access to justice for persons with disabilities on an equal basis with others" through appropriate accommodations in order for persons with disabilities to participate directly and indirectly in all legal proceedings. There are various accommodations federally and provincially that enable persons with mental or physical disabilities to participate in legal proceedings both directly and indirectly. A litigation guardian may bring or answer a proceeding on behalf of a "person under a disability," whose definition includes minors and those who are "mentally incompetent" or "incapable" (Supreme Court Civil Rules, s. 20–2(2); Rules of the Supreme Court, 1986, ss. 1.03(o), 8.01(1) [NL RSC]). A court can remove, appoint, or substitute a litigation guardian if it is in the best interests of the person with a disability (Court of Queen's Bench Rules, ss. 1.03, 7.01; Rules of Civil Procedure, ss. 1.03(1), 7.01(1) [ON RCP]). In claims involving a person under a disability, the court must approve a settlement before it is binding (ON RCP, s. 7.08(1); NL RSC, s. 8.06).

Section 14 of the Charter states that a party or witness to any proceeding who is deaf "has the right to the assistance of an interpreter."[4] Under the Canada Evidence Act, where a witness has a physical or mental disability and has difficulty communicating, the court may permit him or her to give evidence "by any means that enables the evidence to be intelligible," provided that he or she has the necessary capacity (s. 6). The Act also states that a person whose mental capacity to testify as a witness is challenged may testify if he or she can communicate the evidence and promises to tell the truth (s. 16). The Ontario Courts Accessibility Committee was developed in 2007 with the goal of making Ontario's courts more accessible to persons with disabilities (Lang & Merritt, 2011).

Right to Life, Liberty, and Security of Person

The CRPD also requires state parties to ensure that persons with disabilities have the right to life, liberty, and security of person on an equal basis with others, that they are not deprived of this right arbitrarily or unlawfully, and if liberty is deprived, it is on an equal basis with others and is in compliance with international human rights law and the CRPD (arts. 10, 14). Section 7 of the Charter states "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." As Section 7 includes "everyone," persons with disabilities are protected on an equal basis with persons without disabilities. Section 7 is not limited to criminal or penal matters (*Blencoe v British Columbia*, 2000, para. 45).

Under Section 672.54 of the Criminal Code, an accused person who has been found not criminally responsible (NCR) may be discharged absolutely, discharged with conditions, or "detained in custody in a hospital" depending on "the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused." The disposition made must be "the least onerous and least restrictive to the accused" (s. 672.54). The Supreme Court of Canada has explained that, throughout the NCR process, "the offender is to be treated with dignity and accorded the maximum liberty

compatible with Part XX.1's goals of public protection and fairness to the NCR accused" (*Winko v. British Columbia*, 1999, para. 43). The Court concluded that the NCR scheme does not violate Section 7 of the Charter.

Freedom from Exploitation, Violence, and Abuse

The Criminal Code prohibits the sexual exploitation of a person with a disability (s. 153.1). The offence is made out where someone in a relationship of authority or dependency has sexual contact with a person who has a disability and there is no consent. Under Section 215(1)(c), everyone is under a legal duty "to provide necessaries of life to a person under his charge if that person . . . is unable, by reason of . . . mental disorder . . . to provide himself with the necessaries of life." Other provisions in the Criminal Code that are of more general application also address exploitation, violence, and abuse against persons with disabilities. These include, for example, the criminal negligence, abandoning child, and child pornography provisions (ss. 163.1, 218–221).

In BC, the Adult Guardianship Act provides support and assistance to "adults who are abused or neglected and who are unable to seek support and assistance" due to physical restraint or a physical handicap (s. 44). Community care facilities, which are defined as premises in which a person provides care to three or more persons who are not related by blood or marriage, are governed by the Residential Care Regulation created under the Community Care and Assisted Living Act. A licensee of a community care facility must ensure that a person in care is not subjected to "financial abuse, emotional abuse, physical abuse, sexual abuse or neglect" (Residential Care Regulation, s. 52). Legislation in other provinces similarly protects persons with disabilities against abuse or neglect (VPA, ss. 20.1, 20.2; Long-Term Care Homes Act, 2007, ss. 19(1), 20). Statutes of more general application, such as those that protect persons from family violence, may be applicable in preventing exploitation, violence, and abuse of persons with disabilities (cf. the Domestic Violence and Stalking Act).

Education

Inclusive Education System with Accommodation

Article 24 of the CRPD requires state parties to recognize the right of persons with disabilities to education without discrimination. In particular, state parties must ensure that persons with disabilities are not excluded from the general education system and have access to an "inclusive, quality and free" primary and secondary education on an equal basis with others. There must also be reasonable accommodation and support measures provided to persons with disabilities in an environment that "maximize[s] academic and social development" to ensure an effective education.

Education is a "service" under human rights legislation (*Jaffer v. York University*, 2010, para. 36). Also, the Charter applies to the public education system (*Wynberg v. Ontario*, 2006). Thus, any potentially discriminatory action taken by a school or school board is reviewable through the human rights complaints process or through

Charter litigation. In addition, legislation and policy specific to education sets out the right of every child between certain ages to free education, and aims to accommodate students with disabilities. To provide BC as an example, the BC Supreme Court has stated that all students are entitled to an appropriate educational program and that "a specialized, varied and dynamic program might be necessary" (*Hewko v. British Columbia*, 2006, para. 275). BC aims for an inclusive education system, which does not necessarily mean full integration in regular classrooms, but includes "meaningful participation and the promotion of interaction with others" (BC Ministry of Education, 2011, p. 2). School boards may also make use of "resource rooms, self-contained classes, community-based programs, or specialized settings" (BC Ministry of Education, 2011, p. 2). Students will only be placed in a setting other than "a neighbourhood school classroom with age and grade peers" where the school board "has made all reasonable efforts to integrate the student, and it is clear that a combination of education in such classes and supplementary support cannot meet their education or social needs, or when there is clear evidence that partial or full placement in another setting is the only option after considering their educational needs or the educational needs of others" (BC Ministry of Education, 2011, pp. 2–3). An individual education plan is to be developed for students with special needs, which must be reviewed every year (BC Ministry of Education, 2011, p. 3). In the November 2012 decision of *Moore v. British Columbia*, the Supreme Court of Canada substantially restored the finding of the BC Human Rights Tribunal in a complaint against the province. The court agreed that closing a program providing intensive services and assistance to children with "severe" learning disabilities, without conducting an assessment or providing alternatives, constituted discrimination on the basis of disability. The complainant was awarded compensation for having to pay for private school to obtain similar services.

Regarding the application of the Charter in education, in *Eaton v. Brant County Board of Education*, the Supreme Court of Canada recognized that disability, as an enumerated ground of discrimination in Section 15 of the Charter, is different from the other grounds because it varies depending on the individual and the context (1997, para. 69). This creates a "difference dilemma" because segregation can either be protective or violative of equality depending on the specific individual (para. 69). The Court held that "[w]hile integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality" (para. 69). Therefore, when the integrated setting is unable to meet a child's needs, a special education placement outside of this setting will be required for accommodation (para. 77). Moreover, accommodation must be in the child's best interests and considerations of equality must be examined from the child's point of view (para. 77). In that case, the Court found it important that the tribunal whose decision it was reviewing had held that integration resulted in the child being isolated in a "disserving and potentially insidious way" (para. 75).[5]

Delivery of Education in Appropriate Languages and Modes

State parties are required to "enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community" (art. 24(3)). Therefore, state parties must ensure that education is delivered in an appropriate manner by facilitating the learning of Braille, sign language, alternative script, and augmentative and alternate modes and means of communication (art. 24(3)). In Newfoundland, a student with an exceptionality is defined as a student with certain strengths or needs, which may be cognitive, emotional, behavioural, medical, social, or physical (Newfoundland and Labrador Department of Education, 2012a). The Department of Education provides various supports and services for students with an exceptionality. General services include alternate format materials, assistive technology, home tutoring, special transportation, and a student assistant (Newfoundland and Labrador Department of Education, 2012b).

Teachers and Training

To ensure effective learning, state parties must "take appropriate measures" to employ teachers who are qualified in sign language and/or Braille and to train professionals and staff who work at all levels of education (CRPD, art. 24(5)). In general, teachers in the various provinces must meet certification or licensing requirements in order to teach in the public school system (Education Act (Ontario), s. 262; Education Act (Quebec), s. 23). Particular certification is required for those working in specific roles with children with special needs (Ontario Schools for the Blind and the Deaf, s. 23). More general training is provided to other staff about working with students with special needs (BC Ministry of Education, 2011, pp. 6–7).

Access to General Tertiary Education, Vocational Training, and Adult Education

State parties to the CRPD must ensure that persons with disabilities have access to general tertiary education, vocational training, adult education, and lifelong learning on an equal basis with others and that reasonable accommodation is provided (art. 24(5)). BC offers adult special education programs and services to assist persons with disabilities in post-secondary studies (BC Ministry of Advanced Education, n.d.). Support services may be technological, physical, or academic (e.g., materials in alternate formats). Classroom and exam supports (e.g., note-taking, interpreter, extra time) are also available. A report submitted to the Newfoundland and Labrador Minister of Education in December 2004 recognized that many of the supports in the elementary and secondary school system do not follow students to the post-secondary level (Ludlow & Farrell, 2004, p. 31). Individual post-secondary institutions may provide necessary accommodations, such as Memorial University, where the Glenn Roy Blundon Centre for Students with Disabilities "assist[s] students by facilitating access to information, services, and campus facilities in accordance with the university's Academic Accommodation Policy for Students with Disabilities" (Memorial University, 2012).

Under the Labour Market Agreement for Persons with Disabilities, funding has been

provided to Ontario colleges and universities to assist them in making their programs and services accessible to persons with disabilities (Ontario Ministry of Community and Social Services, 2011, pp. 20–22). In Quebec, with regard to university, college, and tertiary-level educational institutions as well as organizations that provide vocational training, the Office des personnes handicapées du Québec must promote the inclusion of persons with disabilities (An Act to Secure, s. 25(e.1)).

Health

Article 25 of the CRPD requires state parties to recognize "that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability." Therefore, state parties must ensure that persons with disabilities have access to gender-sensitive health services. Under the Canadian constitution, individual and public health, like education, are made largely matters of provincial legislative concern; hence, the legislation, policy, and case law discussed will be primarily provincial (Constitution Act, 1867, ss. 92(7), (13), (16); Jackman, 2000, p. 110).

Specialized Health Services, Habilitation, and Rehabilitation

The CRPD requires state parties to provide "health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons" (art. 25(b)). Related, under article 26 of the CRPD, state parties must assist persons with disabilities to "attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects in life." Therefore, state parties must "organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes" (art. 26). Article 26 requires that habilitation and rehabilitation programs be based on individualized assessments and begin at the earliest stage possible.

In BC, the Ministry of Children and Family Development offers a variety of individualized early childhood intervention programs for children "who show signs of, or are at risk of having, a developmental delay or disability" (BC Ministry of Children and Family Development, n.d.). The provision of these programs resulted in the case of *Auton v. British Columbia*, in which the autistic infant claimants alleged that BC's failure to fund Applied Behavioural Analysis or Intensive Behavioural Intervention therapy (ABA/IBI) was a violation of their Section 15(1) Charter rights (2004, para. 1). The Supreme Court of Canada found that the Canada Health Act, read in conjunction with BC's Medicare Protection Act, did not require funding for all medically required services (para. 35). Funding is only required for core services provided by medical practitioners, and the province has discretion in terms of funding non-core services (para. 35). Therefore, since BC did not legislate funding for ABA/IBI therapy, there was no benefit provided by law that had to be implemented in a non-discriminatory manner (paras. 46–47).

A variety of programs are offered for children with disabilities in Manitoba, Ontario, and

Newfoundland and Labrador, including ABA and IBI for children diagnosed with autistic spectrum disorder (ASD) (Manitoba Family Services and Labour, n.d.-a; Newfoundland and Labrador Department of Health and Community Services, 2012; Ontario Ministry of Children and Youth Services, 2011). As persons with disabilities reach adulthood, various services and programs are offered that assist with living and participating in the community. These include residential programs (Ontario Ministry of Community and Social Services, 2012), day services (Manitoba Family Services and Labour, n.d.-a), and home and other assisted living services (Newfoundland and Labrador Department of Health and Community Services, 2012).

Article 26(2) requires state parties to promote initial and continued training for professionals and staff working in habilitation and rehabilitation services. Community Living BC provides training and development policies and programs to its staff to "ensure continuous learning" (2010). Manitoba Family Services and Consumer Affairs provides various training workshops and professional development opportunities for staff employed in day and residential services under Community Living disABILITY Services, as well as to others who provide support services to persons with disabilities (Manitoba Family Services and Labour, n.d.-b). In Ontario, regulations under the Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act (2008) describe quality assurance measures for the services and programs funded under the legislation Quality Assurance Measures. The regulations under the Accessibility for Ontarians with Disabilities Act, 2005 (AODA) requires every provider of goods or services to properly train members of their staff with regards to the provision of goods or services to persons with disabilities (Accessibility Standards for Customer Service, s. 6). State parties must also "promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities" (CRPD, art. 26(3)). A variety of programs in the provinces aid persons with disabilities in obtaining assistive devices and technologies (Ontario Ministry of Health and Long-Term Care, 2012; Curateur public Quebec 2011).

Quality of Health-Care Professionals

Under the CRPD, state parties must require health professionals to "provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent" (art. 25(d)). To accomplish this goal, state parties are encouraged to raise awareness "of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care" (art. 25(d)). Legislation sets out the requirement to obtain informed consent. BC, Ontario, and Quebec have legislation regarding consent to medical care, wherein care cannot be provided without consent, with a few exceptions (e.g., emergency) (An Act Respecting Health Services and Social Services, s. 9; Civil Code of Québec, arts. 10, 11; Health Care and Care Facility Act, s. 5 [BC HCCA]; Health Care Consent Act, 1996, s. 10 [ON HCCA]). It is presumed that an individual is capable of providing consent to health care, from the age of majority in BC (BC HCCA, s. 3), age 16 in Manitoba (The Health Care Directives Act, s. 4(2)), any age in Ontario (ON HCCA, s. 4(2)), 16 in Newfoundland (Advance Health Care Directives Act, s. 7), and age 14 in Quebec (Civil Code of Québec, art. 14). As an example of a definition of capacity, Manitoba law states, "a person has capacity to make health care decisions if he or she is able to understand the information that is relevant to making a decision and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision" (The Health Care Directives Act, s. 2). Where a person lacks capacity to consent to care, statutes set out the process for substitute decision-making (VPA; RAA). In provinces without a statute on capacity or consent to health care, such as Newfoundland, similar common law norms govern consent and capacity (*P.H. v. Eastern Regional*, 2010). The Supreme Court of Canada has held that courts' *parens patriae* jurisdiction, that is, their power to make decisions in the best interests of minors and mentally incompetent individuals, can never be used to authorize non-therapeutic sterilization (*E. (Mrs.) v. Eve*, 1986, paras. 86–87).

Discriminatory Denial of Health Care or Health Services, or Food and Fluids

Under the CRPD, state parties must prevent the discriminatory denial of health care, health services, or food and fluids on the basis of disability (art. 25(f)). Canadian law is varied in determining if and when withholding or withdrawal of treatment is permitted. The Manitoba Court of Appeal found that "neither consent nor a court order in lieu is required for a medical doctor to issue a non-resuscitation direction where, in his or her judgement, the patient is in an irreversible vegetative state" (*Child and Family Services of Manitoba v. R.L.*, 1997, para. 17). The Court went on to say that the decision "is a judgement call for the doctor to make having regard to the patient's history and condition and the doctor's evaluation of the hopelessness of the case" (para. 17). However, this case only answers the question of when treatment can be withheld and does not answer the question of whether withdrawing treatment should be treated the same way (*Golubchuk v. Salvation Army Grace General*, 2008, para. 25). The Ontario Court of Appeal considered the removal of life support *and* the transfer to palliative care to be a "treatment package" that could not be separated because death is imminent when life support is removed (*Rasouli v. Sunnybrook*, 2011, paras. 50–52). Therefore, consent by the substitute decision-maker is required for the entire treatment package—the removal of life support *and* the transfer to palliative care (*Rasouli v. Sunnybrook*, 2011, para. 58). As of November 2012, the case is before the Supreme Court of Canada (*Cuthbertson v. Rasouli*, 2011).

Under Section 241 of the Criminal Code, aiding or abetting someone to commit suicide is an indictable offence and may lead to imprisonment for a term of not more than 14 years. The homicide provision also covers a form of assisted suicide (s. 222(5)(c)). Further, Section 14 prohibits any person from consenting to have death "inflicted" upon him or her.[6]

Right to Work

Under article 27 of the CRPD, state parties recognize the right of persons with disabilities to work on an equal basis with others. State parties are required to take measures to ensure that persons with disabilities can earn a living "by work freely chosen or accepted in a labour market," and that work environments are "open, inclusive and accessible to persons

with disabilities" (art. 27(1)). In Canada, the primary source of law for protecting the rights of persons with disabilities in the employment area is federal and provincial human rights legislation. In addition, the federal and provincial governments have enacted legislation and developed policies to promote the employment of persons with disabilities.

Prohibition of Discrimination, Protection of Rights, and Accommodation

State parties must ensure that discrimination on the basis of disability is prohibited in matters concerning employment, "including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions" (CRPD, art. 27(1)(a)). Also, state parties must ensure that reasonable accommodation is provided to persons with disabilities (CRPD, art. 27(1)(i)). Human rights statutes in Canada provide very broad protection from discrimination with respect to employment. For example, the human rights legislation in Manitoba states that "[n]o person shall discriminate with respect to *any aspect* of an employment or occupation" (MB HRC, s. 14; emphasis added). The definition of "any aspect" includes the opportunity to participate or continue to participate in the employment; the customs, practices, and conditions of the employment; training, advancement, or promotion; seniority; any form of remuneration or other compensation received; and any other benefit, term, or condition (MB HRC, s. 14(2)).

The federal, BC, Manitoba, Newfoundland, and Ontario legislation all provide an exception affecting the above prohibition: where discrimination relates to a *bona fide* occupational requirement or qualification (BFOR), it does not contravene the legislation (CHRA, s. 15(1)(a); BC HRC, s. 13(4); MB HRC, s. 14(1), NL HRA, s. 14(2), OHRC, ss. 11(1), 17). In each case, to show a BFOR, statute and case law dictates that there must be accommodation to the point of undue hardship (CHRA, s. 15(2); MB HRC, s. 9(1)(d); OHRC, ss. 11(2), 17(2), 17(3); *Leonard v. Newfoundland and Labrador*, 2011, para. 46). Once an employee has shown that something is *prima facie* discriminatory on the ground of disability, the onus falls on the employer to show that it is a BFOR (*Entrop v. Imperial Oil Ltd*, 2000, para. 63). The common law provides a test from the case of *British Columbia v. British Columbia Government and Service Employees' Union,* 1999. In this case, the Supreme Court of Canada set out the following three-step test for establishing that an employment standard is a BFOR:

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. (para. 54)

Promotion of Employment

State parties are required to employ persons with disabilities in the public sector, and to promote employment in the private sector as well as opportunities for self-employment and entrepreneurship (CRPD, arts. 27(1)(f), 27(1)(g), 27(1)(h)). The federal government has enacted the Employment Equity Act, which has as its purpose "to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by . . . persons with disabilities" (s. 2). The statute applies to private sector employers and to most public sector employers (s. 4(1)). Every employer under the statute is required to implement employment equity by identifying and eliminating employment barriers, instituting positive policies and practices, and making reasonable accommodations to "ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation" in the Canadian workforce (s. 5). An employer is not required to take a measure that would cause undue hardship (s. 6(a)). Employers are required to prepare an employment equity plan specifying measures to be taken and long-term goals (s. 10)). Employers must then make all reasonable efforts to implement the plan and monitor its implementation on a regular basis (s. 12).

The provinces also have initiatives in place to promote the employment of persons with disabilities. Some of these aim to raise awareness about the benefits of hiring persons with disabilities, and connect employers with persons with disabilities (Manitoba Family Services and Labour, 2008; WorkAble Solutions BC, n.d.). Other approaches are compulsory. In Ontario, employers are now required to notify employees and the public about available disability accommodation (Integrated Accessibility Standards, ss. 21–25), or in the case of a public body in Quebec, to analyze its workforce and take other steps to promote disability employment equity (An Act Respecting Equal Access, ss. 3, 9, 13).

CONCLUSION

This chapter has provided an overview of Canadian legislation, case law, and policy, guided by DRPI's National Law and Policy Monitoring Template (DRPI, 2011). It has covered the federal and a representative sample of provincial jurisdictions with respect to how Canada implements some of the major substantive norms of the CRPD. This analysis is only a starting point. This chapter has not attempted to complete the methodology set out in the template by asking how Canadian law and policy instruments are functioning in practice, and how well they satisfy the articles of the CRPD. It is, in fact, likely that simply stating the ideals of disability equity contained in Canadian law paints an overly optimistic picture of life with a disability in Canada. Nonetheless, this chapter takes a step toward addressing larger issues. With a thematic presentation of sources of law and policy, one can proceed to seek input from community organizations and persons with disabilities about their experiences in their countries, in order to identify human rights gaps and strategies for improvement. The legal framework can also be compared with those in other countries, in order to learn

from other approaches. In these ways, national law and policy, through reform and improved enforcement, can become better able to fulfill the requirements of the CRPD and other international instruments, and to enrich society and the lives of persons with disabilities.

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NOTES

1. In addition, Canada reserved with respect to the CRPD article 12(4), (on safeguarding measures that relate to the exercise of legal capacity) "the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal."
2. In unclear situations, courts determine whether an entity is a government actor, or whether an act is governmental for the purpose of deciding if the Charter applies (*McKinney v. University of Guelph*, 1990). The Charter will *not* apply in cases of civil litigation with private parties "where no act of government is relied upon to support the action" (*Retail, Wholesale and Department*, 1995, para. 39). Such a litigant can, however, argue that the common law is inconsistent with Charter values and should be modified (*Hill v. Church of Scientology*, 1995, paras. 95–98).
3. Newfoundland's statute does not explicitly set out the requirements regarding good faith or integrity. These are prescribed by the common law (see *Vincent v. Kirkpatrick*, 2004, para. 34).
4. The Supreme Court of Canada emphasized the importance of this right in *R. v. Tran*, (1994, paras. 38–39), saying it goes to the "very integrity of the administration of criminal justice in this country."
5. The paper is reflecting back on the laws in the Canadian jurisdictions the authors examined. They have not provided an analysis of the law in light of human rights principles. Thus the contradiction between the finding in this case and the delineation of equality in the CRPD is not discussed here. More recent DRPI studies have more fully explored the fit of policy, law, and program with the human rights principles used as the basis of systemic monitoring.
6. In February 2015, the Supreme Court of Canada made a declaration of invalidity to section 241(b) and section 14 of the Criminal Code in *Lee Carter et al. v. Attorney General of Canada et al.*

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Chapter 12

FEDERALISM, DECENTRALIZATION, AND HUMAN RIGHTS
Level of Implementation of the CRPD in Developing Countries: Lessons from Latin America

José M. Viera[1]

INTRODUCTION

This chapter discusses the effects of international treaties on people's lives in the Latin American region. In order to do so, however, we need first to understand some crucial concepts and how they impact on diverse contexts. When we discuss human rights and disability rights in the context of Latin America, there are two clear and separate interpretations of the same reality. On one hand, a great majority of the countries in the region have ratified the Convention on the Rights of Persons with Disabilities (CRPD) (UNEnable, 2014) and Latin American governments are usually part of international bodies. This can make one believe that social changes are being experienced by minorities and that their living conditions are being continuously improved. On the other hand, however, when one deeply explores the history of the region over the last century and asks what has changed after international treaties were adopted, the answer is not positive at all. It is rather a poor picture, showing that social demands are still unmet and, that behind many speeches, the living conditions have remained far from acceptable for too many people. In order to better understand how nations and other actors have recently moved into a situation where they are more connected and where societies begin to know what happens beyond their national frontiers, we will start with a definition of globalization. Next, the chapter will address a few other concepts, such as federalism and decentralization, to enable comprehension of the gap between what is promised by politicians and policy-makers and what currently happens to people on the ground. Taking the example of three countries in the