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**People with Disabilities and the Charter: Disability rights at the Supreme Court of Canada  
under the Charter of Rights and Freedoms**

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**Abstract**

The inclusion of people with disabilities as a designated group for rights protection in the Canadian Charter of Rights and Freedoms was viewed as a triumph of disability advocacy in Canada. And yet, a number of commentators look back with disappointment over the 30 years since the Charter was passed. This paper employs an empirical approach to examine an important subset of cases invoking the Charter of Rights and Freedoms to promote disability rights. Specifically, it examines 14 cases heard by the Supreme Court of Canada to uncover the types of disability issues that have been addressed, and the approach of Supreme Court justices to these issues. In order to qualify for inclusion, cases had to have an appellant with a disability, and to directly address a disability discrimination issue. The current study shows a very limited impact of the Charter, despite expectations of a discernible shift in the position of people with disabilities within Canadian society. There is still no consistently applied “disability lens” in the policy environment, and there are relatively few tangible indicators of the kinds of considerations offered to other enumerated groups, such as Ministry or oversight committees dedicated to their issues.

**Keywords**

Charter of Rights; Disability case law; Physical disabilities; Mental disabilities; Constitutional law; Equality; Justice; Models of disability

**In memoriam**

We mourn the passing of our friend and colleague, Dr. Stan Corbett. We gratefully acknowledge his guidance with this paper, and his many contributions to human rights law and policy.

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**Introduction**

The inclusion of people with disabilities as a designated group for rights protection in the Canadian Charter of Rights and Freedoms was viewed as a triumph of disability advocacy in Canada, and as a high point in disability policy (Boyce et al., 2001; McColl & Jongbloed, 2007). The Canadian Charter of Rights and Freedoms (1982; part of the Constitution Act of Canada) protects equality, mobility, legal, democratic and linguistic rights of Canadians. In particular, Section 15 (which came into effect in 1985) ensures equal treatment before and under the law for five designated groups: people with disabilities, women, ethnic minorities, Aboriginal people, sexual and transgendered minorities. The Charter supersedes the policies or actions of any level of government or its agents, and is enforced by the courts rather than by a government agency or panel. Its processes are individual and complaint-based -- a corrective form of rights protection (Bickenbach, 2006; Kelly, 2005).

The Charter holds an iconic place in Canadian society as the primary guarantor of minority rights, alongside federal and provincial human rights codes. It is lauded as a powerful legal tool that has invigorated the struggles of people with disabilities in Canada (Armstrong, 2003). It has achieved a number of important legal milestones that have been well documented by other authors (Lepofsky, 1998; Armstrong, 2003; Peters, 2004; Porter, 2005; Arthurs & Arnold, 2005). For example, the Andrews case (1989) clarified that the definition of

discrimination must include unintentional effects of legislation that fails to take account of the circumstances of a designated group. Meieron (1999) validated that the burden of proof in a discrimination case lies not with the complainant, but with the alleged discriminator (usually the employer). Eaton (1997) and Eldridge (1997) affirmed the use in law of the social model of disability, accounting for the impact of context on the definition of disability. Eaton (1997) reinforced the presumption in favour of integration vs. segregation. Granofsky (2000) and Martin/Laseur (2003) further refined the definition of disability.

And yet despite these achievements, a number of commentators look back over achievements during the Charter era with disappointment (Arthurs & Arnold, 2005; Porter, 2005). They claim that the Charter has not achieved the far-reaching social change that was expected initially. Designated groups have not made the progress expected in terms of positive measures to mitigate disadvantages (Porter, 2005). Instead of leading to systemic corrective action, Charter cases have typically resulted in individual compensation (Lepofsky, 1998). Legislative reform has seldom been effected, and instead, Charter decisions have merely codified judicial practices already in place (Arthurs & Arnold, 2005). While the Charter has afforded a further degree of discrimination protection, some commentators suggest that it has made little difference in the day to day lives of people with disabilities. In other words, its impact is considered by some to be more symbolic than substantive (Peters, 2004). Although Western democracies like Canada are seen as "human rights heaven" by some (Kim, 2011), there is little empirical evidence of the Charter's contribution to that perception.

This paper applies an empirical approach to describe a finite set of cases where the Supreme Court of Canada has interpreted the Charter of Rights and Freedoms in claims of disability-related discrimination. The analysis applies a historical framework, based on the

development of disability definitions and issues from philanthropic in the 1970s to social-political in the 1990s and beyond (McColl & Bickenbach, 1996).

Specifically, the paper addresses the following questions:

1. What types of disability-related cases has the Supreme Court of Canada chosen to hear under the Charter of Rights and Freedoms? We will review a carefully chosen set of disability-related cases to identify the issues they address, and the types of people affected by those issues.
2. How has Section 15 in particular been used to protect against disability discrimination? We will consider five key cases in which Section 15 was invoked as a remedy against unfair treatment of disabled people under the law.
3. How have the Supreme Court justices regarded disability? We will examine the language used in the case decisions to assess how disability is portrayed and how that portrayal has evolved over time.

## **Methodology**

**Design:** The study was a qualitative historical document review, focused on Charter-based case law involving people with disabilities at the level of the Supreme Court of Canada between the years 1985 and 2013. Using narrative textual analysis, case descriptions and judicial decisions were examined for particulars of the issue and disability-specific arguments espoused by the justices. This approach codes and categorizes the text of the legal decisions to provide responses to the three questions above.

**Sample:** The sample of data for the current study consisted of the text of 14 decisions regarding disability discrimination. The CanLii database was used to conduct a preliminary search of Canadian case law based on the following inclusion criteria:

1. Case decided by the Supreme Court of Canada;
2. Case invoked the Charter of Rights and Freedoms (in particular Section 15) as the basis for the appeal;
3. The appeal related directly to a disabled person or to an issue of disability discrimination.

The initial set of cases was abstracted using the keywords: *disab\** (to capture both disability and disabled) AND “*Charter of Rights and Freedoms*”. The search was restricted to the years January 1985 – April 2013, and to those cases heard by Supreme Court of Canada. The search identified 194 cases. This set was confirmed by performing the same search in Westlaw and Quicklaw.

On the basis of a preliminary review of the case descriptions of each of the 194 cases (typically the first 1 or 2 pages of the decision), 145 were immediately excluded for the following reasons:

- 49 cases were excluded because the only reference to disability appeared when quoting from or paraphrasing the Charter, however disability was not central to the case;
- 43 were excluded because the word “disability” appeared only when citing or paraphrasing other legislation (both domestic and international), but again the case itself was not concerned with disability.
- 35 were excluded because the Charter was not the basis for the decision rendered;
- 29 were excluded because the word *disability* or *disabled* was used in another context, such as being disqualified, penalized, or incapacitated, such as by alcohol;

- 9 cases were excluded because the "disab\*" search term brought up the word "disabused", and there was no mention of disability;
- 8 were excluded that referred to a hypothetical situation where someone acquired a disability;
- 7 were excluded where the only mention of disability was a disability organization as an intervener. Although these cases often affected subsequent jurisprudence on disability, these cases did not meet our selection criterion of having a disabled appellant.

The remaining 14 cases constitute the set that are considered in this analysis. All of these cases specifically cite the Charter of Rights and Freedoms as the basis for seeking justice on behalf of a person with a disability.

Among the cases excluded from this analysis are several influential cases. For example, both *Eve vs. Mrs Eve* (1986) and the *Latimer* cases (2000 and 2001) are excluded because the person with a disability is not the appellant in the case upon which the Supreme Court decided. In both cases, the parent of the individual with a disability was the appellant in the case. Mrs. Eve attempted to seek the Court's approval to have her disabled daughter undergo sterilization to prevent reproduction. Robert Latimer sought special consideration in sentencing after killing his disabled daughter Tracey. Although both of these cases were highly publicized and highly influential for disability politics in Canada (Vanhala, 2011), they did not meet the criteria for this analysis.

Other important cases often cited in disability law (such as *Andrews*, *Grismer*, *Law and Meieron*) did not meet the criteria for inclusion in this set. Although they have contributed very significantly to issues like the definition of discrimination and the duty to accommodate, they did not pertain directly to disability, and therefore were excluded from this analysis. The purpose of

this analysis was to examine the disability-related cases that have been considered under Section 15 of the Charter of Rights and Freedoms.

**Data collection:** Judicial decisions on these 14 cases were reviewed by at least three of the authors. Transcripts of the decisions were reviewed in an attempt to understand the basis and rationale for the case, and the following information was abstracted: particulars of the case; identity of the disabled individual involved; brief history of the case and the issue raised; judicial decision and characterization of disability.

**Data analysis:** With regard to the first question, content analysis of the judicial decisions revealed the details of each case, including the legislation cited, the issue addressed, and type of disability. For the second question, five cases invoking Section 15 against charges of discrimination were analyzed in greater detail. This analysis focused on the specific contributions of these five cases to disability jurisprudence. With regard to the third question, the transcripts were reviewed for all references to disability, and text abstracted for further analysis. Open coding was then conducted to capture descriptions of disability, language used to refer to disability, characterization of disability issues. The data were coded to capture the five models of disability outlined in McColl & Bickenbach (1996): charitable, medical, economic, sociological, social/political. This analysis was undertaken by three investigators, and results triangulated to refine the coding strategy. NVivo, a qualitative data analysis software package was utilized to assist with text management and organization.

## **Results**

### **Description of disability cases**

The fourteen cases considered have been divided into two categories: 8 involving the Criminal Code of Canada, and 6 challenging other civil or administrative statutes (see Table 1).

**Table 1: Summary of Supreme Court cases invoking Charter in cases of alleged disability discrimination**

Case	Statute challenged and Charter Section cited	Type of Impairment
<b>R. v. Chaulk (1990) 3 SCR 1303</b>	Chaulk and Morrissette, teenagers on trial for first degree murder, argued that s. 16 (4) of the <b>Criminal Code of Canada</b> was unconstitutional. The requirement that the accused person prove his or her mental disorder is contrary to the presumption of innocence under s. 11 (d) of the Charter.	Psychiatric
<b>R. v. Swain (1991) 1 SCR 933</b>	Owen Swain challenged s. 542 of the <b>Criminal Code of Canada</b> , which allows the Crown to adduce evidence of the accused’s insanity over and above the wishes of the accused. The appellant invoked s. 7 of the Charter, which guarantees liberty of person and freedom from arbitrary imprisonment.	Psychiatric
<b>Rodriguez v. BC (1993) 3 SCR 519</b>	Sue Rodriguez, an adult woman with ALS, argued that s. 241 (b) of the <b>Criminal Code of Canada</b> , prohibiting giving assistance to commit suicide, violated her rights according to s. 1, 7, 12 and 15 of the Charter.	Physical
<b>Adler v. Ontario (1996) 3 SCR 609</b>	The parents of Leo Elergsma, a child with spina bifida, claimed that the <b>School Health Support Program</b> discriminated against their disabled son. They maintained that the failure to extend accessible transportation benefits that would be available in public education to private religious education was a violation of his s. 2 and s. 15 rights.	Physical, intellectual
<b>Eaton v. Brant Board of Ed (1997) 1 SCR 241</b>	The parents of Emily Eaton, a child with Cerebral Palsy, challenged s. 8 of the <b>Education Act</b> , which upholds the duty of a Special Education Tribunal to recommend educational placement for a child with special needs. They asserted that the Tribunal’s decision contravened their daughter’s s. 15 Charter right to be educated in an integrated setting.	Physical, visual, communication
<b>Eldridge v. BC (1997) 3 SCR 624</b>	Deaf appellant, Linda Warren, claimed that the <b>BC Hospital Insurance Act</b> was discriminatory in that it failed to require sign language interpretation in hospitals. In failing to provide equal access to health care for a deaf patient, the Act contravened s. 15 of the Charter.	Auditory
<b>Winko v. BC (1999) 2 SCR 625</b>	Winko, an inmate of the BC Forensic Psychiatric Institute, challenged <b>Criminal Code</b> s. 672.54, for discrimination against those found not criminally responsible due to mental disorder. The statute allowed the granting of a conditional rather than absolute discharge in these circumstances. Winko (LePage, Bese & Orlowski) claimed that such incarceration violated s. 7 and 15 of the Charter, arguing they received differential treatment on the basis of mental illness.	Psychiatric
<b>R. v. LePage (1999) 2 SCR 744</b>	see Winko	Psychiatric
<b>Bese v. BC (1999) 2 SCR 722</b>	See Winko	Psychiatric
<b>Orlowski v. BC (1999) 2 SCR 733</b>	see Winko	Psychiatric
<b>Granovsky v. Canada (2000) 1</b>	Granovsky challenged s. 42 & 44 of the <b>Canada Pension Plan Act</b> , which mandate minimum qualifying periods for contribution in claims for a disability pension. He	Physical,

<b>SCR 703</b>	claimed this infringed s. 15 of the Charter, because he was temporarily, rather than permanently, disabled.	temporary
<b>Nova Scotia v. Martin &amp; Laseur (2003) 2 SCR 504</b>	Laseur and Martin argued that s. 10 (b) of the <b>Worker’s Compensation Act</b> and the Functional Restoration Program Regulations infringed s. 15 of the Charter by excluding chronic pain as a basis for disability.	Pain
<b>Auton v. BC (2004) 3 SCR 657</b>	The parents of several autistic infants argued the <b>BC Health Insurance Act</b> discriminated against their children when it failure to fund Applied Behavioural Therapy. They stated that this exclusion violated s. 15 of the Charter.	Autism
<b>R. v. Demers (2004) 2 SCR 489</b>	Demers challenged s. 672.33, 572.54 & 672.81(1) of the <b>Criminal Code</b> , which requires that a defendant with be detained in a mental facility until either becoming fit to stand trial or the Crown fails to establish a case against him. This was claimed to be a violation of s. 7 of the Charter.	Intellectual

*Criminal cases:* Eight cases involved disabled individuals who charged that the Criminal Code of Canada discriminates against disabled persons. Seven of the eight appellants were charged with violent crimes ranging from breaking and entering to sexual assault and murder, between 1990 and 2004. One was found unfit to stand trial (*R v Demers*), and six not criminally responsible by reason of mental illness (*R v Chaulk*; *R v Swain*; *Winko v. BC Forensic Psychiatric Institute*; *R v Lepage*; *Bese v. BC Forensic Psychiatric Institute*; *Orlowski v. BC Forensic Psychiatric Institute*).

- In *R v. Chaulk* (1990), the appellants Robert Chaulk and Francis Morrisette were convicted of first degree murder. They sought approval to invoke the defence of mental disorder (i.e. to be considered disabled) in order to be found not criminally responsible for their crimes. They claimed that their Charter rights were violated when they were required to prove their disability, thus violating their right to the presumption of innocence.
- Sue Rodriguez (1993), an adult woman with amyotrophic lateral sclerosis, claimed Charter protection to be able to do what a non-disabled person could do -- to end her life at the time of her choosing. In other words, she sought to have assisted suicide not treated as a criminal offence when the individual in question is disabled. In addition to violating the Section 15

“equality” provision, Ms. Rodriguez maintained that the application of the Criminal Code to her situation constituted cruel and unusual treatment (Section 12), and violated her right to liberty and security of person (section 7).

- Owen Swain (1999) was charged with assault and held in a mental health facility due to overt psychiatric symptomatology. Swain was declared not criminally responsible (i.e., disabled), despite his choice not to raise that defence himself. He sought Charter protection to be considered as if non-disabled by the Court, and to control his own defence, with the possibility of being found not guilty.
- Joseph Winko (1999) was charged with aggravated assault, assault with a weapon, and possession of a weapon for purposes dangerous to the public peace; Denis Lepage was charged with possession of a weapon for a purpose dangerous to the public peace; Gordon Bese (1999) was charged with breaking and entering with intent to commit an indictable offence; and Travis Orłowski (1999) was charged with an number of offences. All four Appellants were found not criminally responsible by reason of mental disorder. They challenged that the Criminal Code discriminates against people with mental illness by incarcerating them even if they have not been declared guilty.
- Rejean Demers (2004) was accused of sexual assault. He was declared unfit to stand trial due to mental disability, and sought an absolute discharge should he be deemed both “permanently unfit” and not a significant threat to the safety of the public.

*Civil proceedings:* The remaining six cases used the Charter of Rights and Freedoms as the basis for a claim that some aspect of civil law was discriminatory towards a person with a disability.

Three cases, heard between 1996-7, focused on the *need for accommodations* in order to overcome inequity for people with disabilities.

- The Adler case (1996) acted on behalf of a number of Appellants one of whom was the Elergsma family. The case sought to have transportation expenses paid for children attending a private religious school. In the case of the Elergsma family, their son required wheelchair accessible transportation, an accommodation he would have received this accommodation had he attended the public education system. Although the child in question had a disability, the discrimination the parents are claiming is on the basis of religious preference.
- The Eaton family (1997) sought extensive medical accommodations for their daughter Emily, a 12 year old with severe cerebral palsy, to allow her to attend school in an integrated classroom. The Board of Education recommended a special education placement for Emily. The Ontario Court of Appeal overturned the school board's ruling, and recommended Emily be permitted to attend the neighbourhood school. The Supreme Court heard the school board's appeal of the provincial court's decision.

In the Eldridge case (1997), the appellant Linda Warren, who was deaf, went into labour prematurely with twins and was forced to write notes back and forth to communicate with health professionals caring for her. By failing to provide sign-language interpretation, Ms Warren maintained that the hospital had violated her Section 15 right to equal treatment under the law. The British Columbia Court of Appeal found in favour of the hospital, stating that language interpreters were not a medically-necessary service. Ms. Warren appealed to the Supreme Court of Canada under Section 15 of the Charter.

The remaining three cases, heard between 2000 and 2004, sought to clarify the *definition of disability*, in order to access benefits intended for people with disabilities.

- Allan Granovsky (2000) suffered a back injury at work, and was compensated by the Manitoba Workers Compensation Board for a temporary condition. When that pension expired, Mr Granovsky sought to qualify for the Canada Pension Plan Disability benefit, but was denied coverage because he had not accumulated a sufficient period of contribution to the plan.
- Martin & Laseur (2003), also injured at work, sought to have chronic pain included within the definition of disability, according to the Nova Scotia Workers Compensation Board. Previously chronic pain had been explicitly exempted from inclusion.
- The Autons (2004), on behalf of a group of like-minded parents of children with autism, sought provincial health insurance coverage for intensive behavioural management therapy. They claimed their disabled children were being discriminated against because this service was not an insured benefit. The appellants challenged the province’s authority to define “medically necessary” services, and to deny coverage for “non-essential services”.

In summary, of the 14 cases identified for this analysis, 8 sought redress from provisions of the Criminal Code of Canada, 2 from educational programs, 2 from health legislation and one each from workers’ compensation and pension statutes. Nine challenged federal statutes and five provincial (2 Ontario, 2 BC, 1 Nova Scotia). The individuals with disabilities involved in these cases included 6 with psychiatric impairments, 4 with physical impairments, 3 with intellectual impairments, 2 with sensory impairments and one with pain. (This list adds to more than 14 as some individuals have multiple disabilities).

## **Disability discrimination and Section 15**

With regard to the second research question about the application of Section 15 in cases of disability discrimination, five cases were selected for fuller discussion: Rodriguez, Eldridge, Eaton, Granovsky and Martin/Laseur. These five cases are considered by various sources to have made significant contributions to disability jurisprudence (Corbett, 2007; Lepofsky, 1998; Peter, 2004; Stienstra, 2012; Vanhala, 2011). They are explored in chronological order, examining how Section 15 was interpreted in cases of alleged disability discrimination. These cases invite the Supreme Court of Canada to clarify what it means to be a person with a disability in Canada, and what sorts of assurances of human rights protections they may expect under the law.

*Rodriguez (1993)* sought to have the Criminal Code of Canada amended to permit assisted suicide in the case of a terminal disabling condition. A majority of the superior court agreed that the Criminal Code article preventing assistance with suicide did apply unequally to someone with a disability; however, they found that the fundamental principle of the sanctity of life took precedence over the claim of inequality. This case established that the court had a duty to place greater emphasis on protecting the sanctity of life of a disabled person than to ensure the right of equality.

Although explicitly a defeat for the appellant, the case was considered a victory for the disability community in general. The disability community, represented by COPOH (Coalition of Provincial Organizations of the Handicapped, now the Council of Canadians with Disabilities [CCD]), was ambivalent about participation in this case, because of the complexity of competing rights claims – the right to life versus the right to autonomy. In the end, they were prompted to engage with the case actively when the vulnerability of disabled individuals was underlined by

the Latimer case (Vanhala, 2011). They ultimately maintained that a decision in favour of Ms. Rodriguez would have contributed to "negative stereotypes and attitudes ... about the lack of value and quality inherent in the life of a person with a disability".

[At the time this paper went to publication, the Supreme Court of Canada overturned much of the Rodriguez decision in the matter of *Carter v. Canada (Attorney General)*, 2015 SCC 5). In a unanimous decision the Court found that failure to provide assisted suicide for terminally ill and or disabled persons did violate the right to life, liberty and security of the person (S. 7 of the Charter). The court relied on a medical model, using a medical assessment of informed consent and decision capacity as the basis for this exemption. The court suspended the law against assisted suicide for 12 months].

*The Eaton family (1997)* also lost their case when the Supreme Court upheld the decision of the Brant County School Board to place their daughter Emily in special education. The Supreme Court ruled that the special education placement was in the child's best educational interests. The justices noted the uniqueness of disability among the enumerated grounds for discrimination. The other four grounds (sex, visible minority, aboriginal status, and sexual identity) are simple dichotomies -- yes or no situations -- whereas disability is a matter of degrees; therefore considerably more judgement is required in discerning the presence or absence of discrimination against someone with a disability, particularly someone who may not be competent in the eyes of the law (such as a minor child).

The Court established that not every instance of inequality is discrimination. In some instances, differential treatment is warranted by individual circumstances. In order not to create a disadvantage for the disabled individual (or an advantage for the non-disabled), it may be necessary for some individuals or groups to be treated differently. For example, disabled

students may be afforded extra time to complete assignments, in recognition of the legitimate differences in their way of completing a task. In order for inequality to be considered discrimination, it must be shown that differential treatment creates a disadvantage or withholds a benefit. The charge of discrimination is especially apt when the circumstances in question are presumed or inferred, rather than verified.

A number of disability groups were present at the Eaton hearing. Advocacy Resource Centre for the Handicapped (ARCH) represented the Eaton family. Several other groups also attended as Interveners – the Council of Canadians with Disabilities (CCD; formerly COPOH), the Canadian Association for Community Living, People First Canada, Easter Seal Society, and the Down’s syndrome Association of Ontario. These organizations sought to uphold the value of integration over segregation. Although the Court explicitly supported the principle of integration, they recognized that segregation can also be in support of equality in some circumstances. The court expressly stated that failure to provide the necessary services is also a form of discrimination. They acted in what they felt to be the best interests of the child; however, the disability community interpreted the verdict as a setback in the struggle for inclusion.

The appellants in *Eldridge* (1997) were successful in their case against the Government of British Columbia, resulting in revisions to the BC Medicare Protection Act and the BC Hospital Insurance Act, requiring health facilities to provide language services to patients, including sign language for deaf patients. This case was important for a number of reasons. It upheld that public institutions, such as hospitals and schools, are obligated under the Charter, as they are delegated instruments of government. The Charter therefore has jurisdiction as it would with the government itself.

Secondly, the Eldridge decision affirmed that “adverse effects discrimination” must also be considered a violation of Section 15. Even though there was no intention to discriminate, the failure to adequately take account of the needs of an enumerated group could be considered discrimination. It is not necessary that the imposition of a burden be intentional; rather the failure to ensure the absence of a burden for a member of an enumerated group could constitute discrimination. In this case, it was the failure of the hospital to adequately take account of the needs of deaf patients that gave rise to the claim of discrimination. The hospital “unintentionally” created a barrier to care by failing to provide translation.

Third, the Court invoked the “Oakes test” in response to the hospital’s claim that the appellant’s request for sign language interpretation would result in an undue financial hardship. The test asks if every effort was made to ensure that the acknowledged human rights breach is minimized to the greatest extent possible. The Court found that the hospital had not made an adequate attempt to provide interpretation services, as would be expected in a free and democratic society.

The disability community was represented at the Eldridge hearing by the Disabled Women’s Network (DAWN), the Women’s Legal Education and Action Fund (LEAF), the Canadian Association of the Deaf, the Canadian Hearing Society and the Council of Canadians with Disabilities, represented by ARCH. The Eldridge case was considered a triumph by disability advocates, and expected to herald a new era in the enforcement of disability accommodations. To date, although frequently cited in disability cases, the case has not had the impact expected, even within health care systems across the country. Many medical offices remain inaccessible, as do examining and diagnostic technologies and suites. Some

commentators suggest that the disability community did not do enough in the aftermath of Eldridge to consolidate the victory (Vanhala, 2011).

Allan *Granovsky* (2000) lost his appeal for Canada Pension Plan Disability benefits, when the Supreme Court upheld the requirement under the statute that he meet a minimum contribution to the plan to be eligible to receive the pension. Mr. Granovsky maintained that his failure to contribute to the plan was because of a temporary disability. Had his disability been “severe and permanent”, the requirement to contribute would have been waived. He maintained that the law discriminated against those with temporary disabilities. The Court applied a three-part test to ascertain if in fact the law was discriminatory. A law could be considered discriminatory if:

1. there was differential treatment – in this case, of people with temporary or episodic disabilities vs. the relevant comparator group – those with severe and prolonged disabilities;
2. the differential treatment was based on an enumerated ground - disability;
3. the differential treatment perpetuated a view of disabled people as less worthy than others.

The court found that the latter was not the case. Rather, it upheld the intent of the Canada Pension Plan, which was to provide a benefit to permanently disabled workers who had contributed to the plan.

The Granovsky case was important in that it underlined the difference between simple differential treatment, as was acknowledged in this case, and discrimination. Discrimination, while it need not be intentional, must undermine the citizenship of the complainant. In this case, it was determined that Mr. Granovsky was not discriminated against; he simply did not qualify

for the benefit he sought. There was an acknowledgement that a program had to draw lines in order to uphold its stated intent, and in this case, the line between contributors to the plan and non-contributors was not discriminatory.

*Martin and Laseur (2003)* won their case against the Nova Scotia Worker's Compensation Board. The Supreme Court found that in fact there did appear to be discrimination, and the Nova Scotia Worker's Compensation Act was in violation of the Charter when it excluded chronic pain as a basis for eligibility for compensation. Although eligible in every other way for compensation, they were denied access because the cause of their disability was chronic pain. The treatment of Mr. Martin & Mr. Laseur was deemed discriminatory because it met all three conditions of the test applied above in *Granovsky*: Martin and Laseur were treated differently from other injured workers, the differential treatment was related to their disability, and furthermore, the differential treatment did perpetuate negative attributions about people in chronic pain. This case opened the door for those in pain to be considered legitimately disabled, and thus eligible for disability benefits.

### **Portrayals of disability in Supreme Court decisions**

Qualitative analysis of the text of these cases offers several key insights into the portrayal of disability by the Supreme Court of Canada, and the development of that portrayal over time. The Supreme Court of Canada is a body of nine judges, who select the cases that they will hear on the basis of their value for the clarification of Canadian law. The earliest characterization of disability in the modern disability movement is the *charitable model*, wherein the person with a disability is portrayed as the victim of personal tragedy, and the societal response is one of philanthropy. There is evidence in the transcripts that the charitable model persists in the

contemporary lexicon. In *Laseur/ Martin* and *Rodriquez*, the language of suffering, victimization and vulnerability are used to describe the condition of the disabled individual.

There is some evidence also for the *economic model*, wherein disability is defined in terms of the ability to be economically productive. In cases such as *Granovsky* and *Martin/Laseur*, where the issue is worker's compensation, it stands to reason that the plaintiffs will be portrayed in terms of their ability or inability to be gainfully employed. According to the economic model, the role of society *vis à vis* those who are disabled by virtue of the inability to work is to provide for them financially.

The *sociological model* is also in evidence among the larger set of cases. The sociological model characterizes disability as marginalization, and defines disabled people as those who deviate from the norm. The sociological model is particularly evident in the cases involving criminal detention. These disabled plaintiffs are judged in terms of whether or not they pose a threat to society, and whether or not they can be permitted to interact freely in society.

The most common portrayal of disability among lay audiences and in the media is still the *medical model*. The medical model defines disability in terms of the illness, impairment or diagnosis that the person has. It vests the power for identifying disability in the hands of professionals. It locates disability in the person, and it defines society's response to disabled people as assessment and treatment. In several cases, the appellants are referred to as "*patients*", rather than as citizens.

Finally, since *Eaton* (1997), there has been evidence in many of the cases of the *social/political model* of disability. This model asserts that the cause of disability lies not primarily in the individual and his or her pathology, but rather in a society and/or political

system that fails to embrace the breadth of the human experience. While not denying the presence of impairment or diagnosis, the social model asserts that this in and of itself is merely a difference in the human condition; instead, what “disables” people is the necessity of interacting in a society that gives inadequate consideration to the variety of ways of being in the world. According to the social model, the responsibility of society is to create a human-made environment where physical, social and language barriers are eliminated. The presence of the social model in the transcripts reviewed is evident in the portrayal of people with disabilities as rights-holders, eligible for accommodations and considerations that result in equity. As stated in *Granovsky*:

*“Section 15 (1) [of the Charter] is ultimately concerned with human rights and discriminatory treatment, and not with biomedical conditions”.*

## **Discussion**

### **Summary of findings**

This study set out to discover how the Supreme Court of Canada has engaged with the Charter of Rights and Freedoms in a finite set of cases explicitly involving people with disabilities in Canada. The purpose of the paper is three-fold: to identify and discuss the issues, to describe the development of anti-disability-discrimination provisions under the Charter, and to ascertain how the judiciary interacted with these cases. While the paper directly addresses legal issues, it is written for a lay audience, and therefore does not perhaps address all of the legal implications of these and other related cases.

The paper discusses 14 cases selected by the Supreme Court of Canada, where disabled claimants sought redress against discrimination using the Charter of Rights and Freedoms. Eight

of these were criminal cases and 6 were civil cases. They represent a broad range of issues, from pensions to health care to inclusive education, and a variety of different types of disabilities. Of interest is the fact that in 30 years since the Charter (and Section 15 in particular) became law, only 14 cases specifically focusing explicitly on disability have found their way to the Supreme Court. As mentioned before, there have of course been other Charter challenges not involving a disabled person that have been influential in disability law (such as *Andrews, Law, Meieron*). There have also been other cases invoking the Charter that involved disabled people (such as *Eve and Latimer*), but these have not been primarily about disability discrimination. There have been cases heard by the Supreme Court invoking the Human Rights Code on behalf of people with disabilities (such as *Battlefords and Via Rail*). Finally there have been countless other cases invoking the Charter on behalf of people with disabilities at lower courts. Only 14 however, have specifically used the Charter to address discrimination on the basis of disability at the level of the Supreme Court of Canada. This is particularly surprising in the face of evidence that disability-related claims make up the majority of cases heard by provincial and federal human rights commissions (Minister of Public Works and Government Services, 2012; 2015). Not only do disability claims outweigh other sources of human rights complaints, they also constitute the highest proportion of successful claims, suggesting that in fact, disability discrimination continues to exist.

A second finding of the study is the development of the concept of disability discrimination over the period under study. The *Rodriguez* decision upheld the issue of fundamental justice over disability rights – asserting that the life of the individual was the primary concern of the law, even over the autonomy of the person. The *Eaton* decision, although respectful of the concepts of inclusion and integration, demonstrated that formal equality is not

enough in disability jurisprudence. Disability rights require substantive equality – or, that people with disabilities sometimes be treated differently in order to be afforded equal opportunity. The Eldridge case was the first clear victory for a disability discrimination case. This decision established the principle of adverse effects discrimination. Discrimination does not have to be direct or intentional; it can be just as damaging to fail to take account of the needs of a designated group. The Granovsky case further clarified the distinction between differential treatment and discrimination. Granovsky was treated differently because he did not qualify for the benefit he was seeking. He was not discriminated against, because there was no effect of undermining his humanity or citizenship. Finally, Martin and Laseur's case further clarified the breadth of the concept of disability. Whereas previously a disability was defined by the underlying medical condition, Martin and Laseur were successful in claiming disability benefits on the basis of pain.

Lepofsky (1998) asserts that inequalities can result from different types of disability discrimination. *Direct discrimination* occurs when disabled people are intentionally treated differently (worse) than other citizens under the law. Of the cases reviewed here, there were no instances of direct discrimination. There were no cases of intentional segregationist policy or other intentional human rights violations. *Indirect discrimination or adverse effects discrimination* occurs when equal treatment creates a disadvantage for some because of an inadvertent negative effect. This is the most common type of discrimination affecting people with disabilities, and usually happens when the consequences for a particular group (ie., people with disabilities) were never considered by the lawmakers. All of the cases considered here refer to this type of discrimination. For example, the drafters of the Criminal Code of Canada never considered the situation of a disabled woman seeking to die, but not being capable of doing so by

her own hand. In each of these cases, the law was written without explicit consideration of the situation of people with disabilities. Thus when faced with someone with a particular disability, the law needs to be re-considered in light of a particular challenge.

Nierobicz & Theroux (2008) suggest that most disability discrimination is a function of lack of awareness of obligations toward disabled citizens, either as employees or customers. However McKenna (1997-8) makes a case for more overt resistance to disability human rights. He refers to concepts like management rights and free market doctrine to demonstrate some of the arguments put forward in opposition to making appropriate accommodations for disabled employees or customers. He notes that businesses often invoke concerns for undue hardship or commitment to quality to exempt themselves from fulfilling statutory obligations towards people with disabilities. Armstrong (2003) notes that the cost of not including people with disabilities are seldom figured into these types of equations.

The final question addressed in this research was the issue of how the treatment of disability cases has evolved over time, and how the portrayal of disability by Supreme Court justices signals that development. Our analysis shows that while there is evidence of all five models of disability in the cases considered (philanthropic, economic, sociological, medical and social), since the mid 1990's, the social model has prevailed.

## **Conclusion**

According to Vanhala (2011), social movements have two choices when seeking to assert citizenship rights – political lobbying or legal action. The current study addresses the latter as it applies to disability rights. The qualitative approach used in this study allows us to examine legal decisions, and to extract messages that a lay audience can appreciate. Empirical studies are

rare in constitutional law (Arthurs & Arnold, 2005). For that reason, this study offers a unique perspective on these 14 carefully selected cases. It provides a view of the impact of the Charter of Rights and Freedoms thirty years down the road.

As stated at the outset, there has been disappointment expressed in the impact of the Charter on the real life situation of people with disabilities in Canada. The effectiveness of the legal opportunity afforded by the Charter can be assessed based on its influence on public policy (Vanhala, 2011). While Charter-based jurisprudence has consolidated the primacy of the social model of disability (specifically, the necessity of removing barriers and the duty to accommodate), it has had only modest direct effects on the legal infrastructure of Canada. Despite expectations of a discernible shift in the position of people with disabilities within Canadian society (Porter, 2005), there is still no consistently applied “disability lens” in the policy environment. (For an example, see <http://www.disabilitypolicyalliance.ca/research/disability-policy-lens/>). While other enumerated groups enjoy considerations like a Ministry devoted to their issues (Aboriginal Affairs and Status of Women), there are relatively few tangible indicators of political attention to disability issues (Stienstra, 2012).

The legal approach to rights claims has a number of inherent limitations that undoubtedly affect its ability to produce broad social change. First and foremost, the judicial system is individually based, and offers few assurances that broader scale changes will follow from case law. The current analysis supports this critique. Secondly, the cost to individuals and organizations can be great, often beyond the means of individuals or groups already struggling for their fair share. In previous years, there were federal funds available to assist with these costs, but that resource has been discontinued. Thirdly, the legal approach requires a very

specific skill set that may not be available to all groups. This paper has outlined the real achievements made in preventing disability discrimination and promoting disability rights through legal applications of the Charter at the Supreme Court level. These benefits have been realized by legal opportunities employed deliberately and strategically.

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