

Book Review
Compte rendu

Law and Disability in Canada: Cases and Materials

Edited by Laverne Jacobs
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1. Introduction

Over 35 years after the *Canadian Charter of Rights and Freedoms*¹ enshrined the rights of people with disabilities, Canada has its first textbook on law and disability. The book is written with some specific audiences in mind: researchers, legal educators, law students, and students in other university programs such as disability studies, social work, and human resources.² However, the text is a rich resource for anyone interested in legal issues faced by people with disabilities in Canada.

The book is a primer on core areas of Canadian law that affect people with disabilities, as well as a showcase for new research. The contributors include five law professors working at Canadian universities as well as two graduate students, pursuing advanced degrees in Canadian law. Each chapter covers a different and important issue. The chapters are related and, when read together, they provide a larger picture of the law's aspirations towards equity for people with disabilities and the many ways in which it falls short of this goal. However, the chapters can also each be read as standalone contributions. This book review starts with summaries of each chapter: we have reviewed them in some detail to enable potential readers to identify those chapters which are most relevant to their interests or work. Our review then examines how this book contributes to legal practice, legal education, and the understanding of disability justice in Canada today.

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

² Laverne Jacobs et al, "Preface" in Laverne Jacobs, ed, *Law and Disability in Canada: Cases and Materials* (Toronto: Lexis Nexis, 2021) iii at iii.

2. An Overview of the Law and Disability in Canada

Chapter 1, “Equality Rights Instruments and the Importance of a Disability Lens” by University of Windsor Professor Laverne Jacobs, provides a primer on four different legal instruments that are intended to enhance the equity of people with disabilities: Section 15 of the *Charter*,³ human rights legislation, accessibility legislation, and the United Nations *Convention on the Rights of Persons with Disabilities*.⁴ How courts have applied section 15 of the *Charter* to disability issues is illustrated with short excerpts from two cases: *Eldridge v British Columbia (AG)*⁵ (where the failure of a hospital to provide sign language interpreters to deaf patients was found to breach the *Charter*) and *Auton (Guardian ad litem of) v British Columbia (AG)*⁶ (where the government’s failure to fund a new treatment for autistic children was not found to breach the *Charter*). The application of human rights legislation is illustrated with an excerpt from *Moore v British Columbia (Education)*,⁷ where the Supreme Court of Canada held that a dyslexic student’s human rights were violated when he was not provided with sufficient support to meaningfully access an education in the public system.

Throughout the text, the authors ask questions designed to stimulate discussion and reflection. These questions draw out the complexity and, sometimes, inconsistencies in the law. For example, in Chapter 1 the authors ask the readers to consider whether the analysis in *Eldridge* and *Auton* are reconcilable.⁸ In *Eldridge*, the court held that the government was required to provide sign language interpreters for deaf patients. In *Auton*, the court accepted that the government was not required to provide a new form of therapy for autistic children. The juxtaposition of *Eldridge* and *Auton* invites the reader to consider how section 15 can be applied robustly, to advance substantive equality, or in a technical, formalistic way that “bespeaks a thin and impoverished vision” of its equality guarantee.⁹

Chapter 1 concludes by introducing the social model of disability, which “locates the disablement of individuals in environmental,

³ *Charter*, *supra* note 1 at s 15.

⁴ *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTS 3, Can TS 2010 No 8 (entered into force 3 May 2008) [CRPD].

⁵ *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].

⁶ *Auton (Guardian ad litem of) v British Columbia (AG)*, 2004 SCC 78 [*Auton*].

⁷ *Moore v British Columbia (Education)*, 2012 SCC 61.

⁸ Laverne Jacobs, “Equality Rights Instruments and the Importance of a Disability Lens” in Laverne Jacobs, ed, *Law and Disability in Canada: Cases and Materials* (Toronto: Lexis Nexis, 2021) 3 at 20 [Jacobs, “Equality Rights”].

⁹ *Eldridge*, *supra* note 5 at para 73.

architectural, attitudinal and other barriers to their inclusion found in society.”¹⁰ The author suggests that people can adopt a “disability lens” to policies by considering how these structural barriers prevent people with disabilities from being included in society and by working to ensure that social institutions do not disregard the needs of people with disabilities. This approach can be contrasted with ableism, which refers to when “social institutions disregard the needs of people with disabilities.”¹¹ The author then examines the issue of Medical Assistance in Dying (“MAiD”) through a disability lens and offers that such a lens focuses the discussion on how easy access to MAiD could “perpetuate disadvantages that ... exist for people with disabilities, such as living in poverty.”¹²

Chapter 2, “Examining the Right to Community Living for People with Disabilities in Canada” is also by Professor Jacobs and it introduces a number of concepts and legal principles that govern the living situations of people with disabilities. Community living refers to the principle that people with intellectual disabilities should be empowered to live in the community, instead of institutions.¹³ This concept is enshrined in Article 19 of the *CRPD*,¹⁴ as well as provincial legislation including human rights statutes and legislation governing services to people with intellectual disabilities. The author includes excerpts from two cases where plaintiffs with intellectual disabilities challenged their continued institutionalization. In the American case of *Olmstead v LC*,¹⁵ the court held that the plaintiff’s continued institutionalization violated the *Americans with Disabilities Act*.¹⁶ In the Canadian case of *Nova Scotia (AG) v MacLean*,¹⁷ the court held that the plaintiffs’ ongoing institutionalization violated provincial human rights legislation.

As a complement to the idea of community living, the author introduces the concept of independent living, which holds that all people with disabilities should take the lead in organizing “their daily activities with assistance at times they saw fit” as opposed to being the passive “recipients of services.”¹⁸ This latter concept is illustrated with a biographical sketch of Ed Roberts, a disability rights activist whose efforts opened up the campus

¹⁰ Jacobs, “Equality Rights”, *supra* note 8 at 40.

¹¹ *Ibid* at 41.

¹² *Ibid* at 43.

¹³ Laverne Jacobs, “Examining the Right to Community Living for People with Disabilities in Canada” in Laverne Jacobs, ed, *Law and Disability in Canada: Cases and Materials* (Toronto: Lexis Nexis, 2021) 45 at 45 [Jacobs, “Examining the Right”].

¹⁴ *CRPD*, *supra* note 4 at art 19.

¹⁵ *Olmstead v LC*, 527 US 581 (1999).

¹⁶ *Americans with Disabilities Act of 1990*, 42 USC § 12101 et seq (2010).

¹⁷ *Nova Scotia (AG) v MacLean*, 2017 NSCA 24.

¹⁸ Jacobs, “Examining the Right”, *supra* note 13 at 47.

at UC Berkeley to students with physical disabilities. The author notes that this mission of empowering people with disabilities to direct their own lives has been taken up by a network of independent living centres across the United States and Canada.

Chapter 2 ends by canvassing the impact of COVID-19 on people with disabilities: they have experienced disruptions to the services provided by personal assistants, they have been subjected to triage protocols in the healthcare system that discriminate against people with disabilities, and some have been denied access to communication assistants while hospitalized.

Chapter 3 is written by Osgoode Hall Law School doctoral student Odelia Bay. It examines how the law attempts to protect people with disabilities in their work lives. It introduces the principle that people with disabilities should be accommodated in workplaces up to the point that doing so creates an undue hardship for their employers. The chapter includes an excerpt from the Supreme Court of Canada's decision in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*,¹⁹ which sets out the legal framework courts use when evaluating if employers have satisfied their legal obligation to reasonably accommodate employees. The application of the framework to disability discrimination is illustrated with an excerpt from *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*,²⁰ where an employee was terminated for absenteeism related to her physical and mental health issues.

The chapter then examines how the human rights framework can apply to workers with episodic disabilities: "long-term conditions with fluctuating and unpredictable periods and degrees of wellness and disability that impact aspects of daily life, including work."²¹ The author suggests that the idea of 'crip time' might be analytically useful; crip time captures how people with disabilities experience time in ways that depart from mainstream, ableist conceptions. The chapter ends with an Ontario labour arbitration decision where a professor with a bipolar disorder was allowed to resume the duties of his job at a more gradual pace than

¹⁹ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1.

²⁰ *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43.

²¹ Odelia Bay, "Working Crip Time: Understanding Workplace Accommodation and Episodic Disability" in Laverne Jacobs, ed, *Law and Disability in Canada: Cases and Materials* (Toronto: Lexis Nexis, 2021) 73 at 74.

his employer wished.²² The author invites readers to consider how this decision incorporates the idea of crip time.

Chapter 4 is written by Freya Kodar, an Associate Professor at the University of Victoria Faculty of Law. It introduces two federal income support programs that are available to individuals with disabilities who have a history of working in the paid labour force. The Canadian Pension Plan Disability Benefit²³ provides income support to workers who have a severe and prolonged disability that prevents them from working. The Employment Insurance Sickness Benefit²⁴ provides income support to workers who are temporarily unable to work due to illness, injury or a quarantine requirement. The chapter contains case excerpts wherein courts interpret eligibility criteria under the Canadian Pension Plan Disability Benefit, including what factors a decision-maker should consider when deciding whether a person is capable of working, and criteria around how to calculate if a person has demonstrated enough of a recent work history to qualify for benefits. The author notes that when people are unable to qualify for these benefits because they lack a sufficient work history, they may qualify for income support under provincial programs aimed at individuals with disabilities.

Chapter 5 is co-authored by Professor Jacobs and Ruby Dhand, a Professor at Thompson Rivers University, Faculty of Law. It examines how women and girls with disabilities experience gendered disability discrimination, and how Canada has failed to fulfill its obligation to provide substantive equality to women and girls with disabilities under Article 6 of the *CRPD*.²⁵ It looks at the role gendered discrimination played in the homicide of Tracy Latimer, a severely disabled girl who was killed by her father. It includes an excerpt from the case of *H(A) v Fraser Health Authority*,²⁶ where a 39-year-old First Nations woman with fetal alcohol syndrome was involuntarily and unlawfully detained for 11 months. The case illustrates how women with disabilities are at a heightened risk of receiving forced treatment or being unlawfully detained. The chapter then turns to consider how gendered disability discrimination manifests in the federal prison system, where women with mental health problems are viewed as a threat and dealt with through administrative segregation (solitary confinement). It illustrates this phenomenon with the story of Ashley Smith, a 19-year-old who committed suicide while in administrative segregation. The chapter ends by considering how

²² *Laurentian University Faculty Association v Laurentian University (Dr X Grievance)* (2015), 255 LAC (4th) 20, [2015] OLAA No 184 (Lab Arb).

²³ *Canada Pension Plan*, RSC 1985, c C-8, s 44(1)(b).

²⁴ *Employment Insurance Act*, SC 1996, c 23, s 21.

²⁵ *CRPD*, *supra* note 4 at art 6.

²⁶ *H(A) v Fraser Health Authority*, 2019 BCSC 227.

gendered disability discrimination impacts the parenting opportunities of women with mental health issues or intellectual disabilities. It uses the case of *Children's Aid Society of Niagara Region v C(M)*²⁷ to illustrate how mothers with intellectual disabilities regularly have their parenting rights terminated.

Chapters 6 and 7 are authored by two University of Manitoba law professors, David Ireland and Richard Jochelson, and graduate student, Brayden McDonald. These chapters report on a large-scale review of case law that the authors carried out to understand how individuals with mental and physical disabilities experience different stages of the criminal justice process, including arrest, detention, trial, and sentencing. They provide admirably succinct descriptions of a few cases from each stage to illustrate overall trends in the case law; but they also note that it can be difficult to generalize because there is so much variety amongst the types of disabilities that people have.

A few themes stand out from these two chapters. First, more cases involve people with mental health issues than physical disabilities. Second, Crown lawyers often take positions that suggest they are skeptical of people who raise disability issues. Third, many people with disabilities, who are engaged in the criminal justice system, experience intersectional forms of marginalization. In particular, Indigenous people experience disabilities at higher rates than other individuals in Canada and are disproportionately criminalized; thus many of the people with disabilities in the criminal justice system are Indigenous. The authors highlight a number of the recommendations of the Truth and Reconciliation Commission of Canada²⁸ and ask the readers to consider two questions: (1) how would implementing the recommendations improve the situation of Indigenous people with disabilities and (2) how could these recommendations be used to improve the situation of people with disabilities more generally?

In Chapters 8 and 9, Ireland, Jochelson and McDonald report on their review of Inquest Reports in the Province of Manitoba that involved the deaths of people with disabilities. Inquests are carried out when a person dies while under the care or supervision of the state. Chapter 8 canvasses inquests involving deaths in the criminal justice system including during interactions with the police, in police custody, and in jail. Chapter 9

²⁷ *Children's Aid Society of Niagara Region v C(M)*, [2000] OJ No 3268, 2000 CarswellOnt 3115 (Sup Ct (Fam Div)).

²⁸ Truth and Reconciliation Commission of Canada, [*Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*](#) (Ottawa: Truth and Reconciliation Commission, 2015), online (pdf): <publications.gc.ca/collections/collection_2015/trc/IR4-7-2015-eng.pdf> [perma.cc/A4JP-WMH7].

canvasses inquests involving deaths in non-criminal contexts such as hospitals, foster care, and supported living facilities. Again, the authors provide thumbnail sketches of the facts from some of the cases to help illustrate themes. A large number of the deaths in both criminal and non-criminal contexts were by suicide. Addiction played a central role in many of the deaths in the criminal justice system but was largely absent from the non-criminal inquests. Many of the reports pointed to institutional failures including “lax procedures and poor staff communication” as well as “a not insignificant trend of victimization of [people with disabilities].”²⁹ Yet, despite many inquiries making similar recommendations over the years, little seems to change.

In Chapter 10, Professor Dhand examines how specialized courts can be used to address barriers that people with mental health disabilities face when navigating a court system that is premised on sanism, for example, an irrationally narrow conception of how people should reason and think.³⁰ Mental health courts aim to divert individuals with mental health issues from the criminal justice system by giving people charged with less serious criminal offences the chance to opt for an “individualized treatment/support plan as an alternative to criminal sanctions.”³¹ These plans seek to address the underlying cause of the criminal activity by ensuring participants receive treatment for their mental health condition, and by assisting them to find adequate housing and work or other income supports. The author canvasses critiques of the courts, including that the accused’s participation in them is not genuinely voluntary, they are used to impose pharmacological treatments on people that render them compliant, and they divert resources away from the healthcare system. The author also summarizes a number of positive evaluations of the courts. The chapter concludes with recommendations about how existing courts could be improved.

3. Law and Disability in Canada Could Shape How Law is Taught and Practiced

This book has the potential to shape how law is taught and practiced in Canada by grounding substantive legal doctrine in a rich thematic framework. Readers will come away from the book with a better

²⁹ David Ireland, Richard Jochelson & Brayden McDonald, “Inquests, Disability and Marginalization in Encounters Outside of the Criminal Justice System” in Laverne Jacobs, ed, *Law and Disability in Canada: Cases and Materials* (Toronto: Lexis Nexis, 2021) 221 at 244.

³⁰ Ruby Dhand, “Access to Justice for People with Mental Health Disabilities and Addictions: Navigating Mental Health and Specialized Courts” in Laverne Jacobs, ed, *Law and Disability in Canada: Cases and Materials* (Toronto: Lexis Nexis, 2021) 247.

³¹ *Ibid* at 253.

understanding of how barriers for people with disabilities can be socially created. They will learn of the incredible diversity amongst people with disabilities. They will be exposed to the intersectional struggles of Indigenous people with disabilities, and women and girls with disabilities. It is a book about getting to know the experience and struggles of people with disabilities, then viewing the identified issues through a disability lens.

For law professors, this book offers a succinct and weighty education in law and disability. One way to read the book is as an invitation to incorporate a disability lens into how professors teach their courses. For courses like employment law, constitutional law, criminal law and procedure, and housing law, there are materials in the book that can be directly incorporated. For professors teaching other courses, drawing the connections between the book and their materials will require more effort, but the text provides a strong foundation from which to start this work.

Consider, for example, civil procedure. A person teaching civil procedure may use the human rights system, the complaint process under the *Accessible Canada Act*,³² and the complaint mechanism under the Optional Protocol of the *United Nations Convention on the Rights of Persons with Disabilities*³³ to illustrate the plurality of dispute resolution mechanisms available to potential clients. They may also discuss how lawyers should respond when an adverse party asks for a procedural accommodation in the litigation process because of a disability. The book is critical of how Crown lawyers respond with skepticism to such requests in criminal proceedings; similar questions arise in civil litigation. The discussion of episodic disability raises pressing questions about how time limits should be applied in civil litigation when they provide for an automatic stay while a litigant is disabled.³⁴ These automatic stays presume that people experience disability as a binary (disabled or not) condition that exists constantly, and for a definite period. Episodic disabilities belie these presumptions.

³² *Accessible Canada Act*, SC 2019, c 10.

³³ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2518 UNTS 283, CAN TS 2019 No 29 (entered into force 3 May 2008, accession by Canada 2 January 2019).

³⁴ See e.g. *Limitations Act, 2002*, SO 2002, c 24, Schedule B, s 7; *Limitations Act*, RSA 2000, c L-12, s 5.

This book will also be an incredible resource for practicing lawyers. 6.2 million Canadians (about 22%) have a disability,³⁵ and many will develop one if they live long enough. Lawyers will encounter individuals with disabilities as clients, as adverse parties, as opposing counsel. They may themselves be or become disabled. This book gives them tools—substantive, procedural, and ethical—to navigate these encounters and advocate capably for their clients. Chapter 1 should be required reading for all members of the bar, and lawyers would benefit from reading other chapters that are relevant to their practice areas.

This text is not an exhaustive analysis of the legal issues facing people with disabilities in Canada. Nor could it be. People with disabilities are a diverse group and the law touches their lives in a myriad of ways. Yet the project the authors have undertaken with this text is an important one and we hope that its scope might be expanded in future editions. As to what can be usefully added to the book, we offer two suggestions.

First, the text could be expanded to incorporate material tailored to core courses in the law school curriculum. Disability lawyer and activist, David Lepofsky, has called on law schools to incorporate material relevant to people with disabilities throughout the curriculum.³⁶ This text could advance this mission by developing chapters that could easily be used by educators teaching first-year law courses, which are relatively standard across Canada. Constitutional law and criminal law are well covered in the text, but materials tailored to contracts, property, and tort would be welcome. Key upper year courses, such as civil procedure and evidence, also warrant attention.

A second suggestion is that there is more space to explore and critique the reasons for the slow, inconsistent progress on disability equity in the period since the enactment of the *Charter*. The promise of *Eldridge* was followed by the disappointment of *Auton*. Public inquests keep making the same recommendations to better protect people with disabilities, but the recommendations are not followed, and this inaction has fatal consequences for people with disabilities. It leaves one to wonder if adopting a disability lens is a sufficient intervention when disabled people remain underrepresented in the legal profession, and the profession as a

³⁵ Jacobs, “Equality Rights”, *supra* note 8 at 3 citing Statistics Canada, [A demographic, employment and income profile of Canadians with disabilities aged 15 years and over, 2017](#), by Stuart Morris et al, Catalogue No 89-654-X2018002 (Statistics Canada: 28 November 2018), online: <www150.statcan.gc.ca> [perma.cc/CSC6-QTEV].

³⁶ David Lepofsky, “People With Disabilities Need Lawyers Too! A Ready-To-Use Plan for Law Schools to Educate Law Students to Effectively Serve the Legal Needs of Clients with Disabilities, As Well As Clients Without Disabilities”, Windsor YB Access Just [forthcoming].

whole is only in its infancy with disability inclusion. As readers, we would welcome the authors' reflections on the reasons why the legal system has been slow to embrace equity for people with disabilities.

This textbook underlines the need for change across a range of systems—health care, child welfare, education, prison, and housing to name a few—if Canada hopes to achieve meaningful equity for people with disabilities. Lawyers can play a role as advocates, but meaningful change will require other people working in these systems to better understand their legal obligations to people with disabilities. This book can help with this project. The authors have explicitly aimed their book at students in programs such as social work and human resources. The authors have used plain language and provided mini primers in most of the chapters, so that individuals without any legal training can understand both the doctrinal questions and their connections to the authors' theoretical framework. This is not simply a textbook about disability equity in Canada: it is a book that will foster equity by encouraging discussions that move beyond law schools. Equity becomes a reality not when courts make decisions or when legislators write new laws, but when people begin to adopt the equity-seeking aspirations of Canadian law into their daily interactions. This book educates people so they can translate the best aspirations of Canadian law into practices that will advance disability justice.