

Research by Doctoral Students

DISABILITY RIGHTS FRAMEWORKS IN CANADA

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ABSTRACT

This article provides an overview of legislation and precedent-setting disability rights cases in Canada in the context of employment. It reviews the prevalence and impact of disabilities and identifies various types of accommodations that are ameliorative in the workplace. Key terms and concepts such as the Meiorin test, undue hardship, and bona fide occupational requirements (BFORs) are presented, and the article also includes a brief overview of provincial human rights legislation. Finally, several comparisons are drawn between Canadian and American approaches, and suggestions are made to integrate Canadian strategies into American disability rights frameworks.

Human rights legislation broadly encompasses laws that have been created and ratified to prevent discrimination against individuals on protected grounds. The Universal Declaration of Human Rights was the first of these laws, and it was adopted by the United Nations General Assembly in December of 1948 [1]. The members' intent was to develop a "universal" document that included "principles of nondiscrimination, civil and political rights, and social and economic rights." It was generated:

from the strong desire for peace in the aftermath of the Second World War . . . this was the first time in history that a document considered to have universal value was adopted by an international organization. It was also the first time that human rights and fundamental freedoms were set forth in such detail . . . although the 58 Member States which formed the United Nations at that time varied in their ideologies, political systems and religious and cultural backgrounds and had different patterns of socio-economic development, the

Universal Declaration of Human Rights represented a common statement of goals and aspirations—a vision of the world as the international community would want it to become [1].

One goal of human rights legislation is to eliminate unintended and overt discrimination in the workplace [2]. Nonetheless, despite scaffolding for global legislation and a call to arms regarding disabilities rights in the workplace [3], extensive differences continue to exist with regard to how various countries interpret and implement their own disabilities rights laws and policies. A study commissioned by the United Nations Human Rights Commission indicated that more than thirty-five countries enacted antidiscrimination laws to promote human rights and equality for people with disabilities between 1993 and 2003. However, results also indicated that discrimination against individuals with disabilities still occurs all over the world in broad areas such as employment, accessing medical services, obtaining housing, transportation, recreational opportunities, educational opportunities, and political activities such as voting [4]. This article focuses on specific practices, policies, and laws that are used in Canadian workplaces.

EMPLOYEES WITH DISABILITIES: PREVALENCE, ACCOMMODATIONS, DEFINITIONS, AND IMPACT

Who Are Individuals with Disabilities?

Estimates indicate that more than 10 percent of the world's population has a disability at any given time, which means that more than 600 million people across the planet [4] are potentially affected by policies, practices, and laws related to disabilities rights. Employees with disabilities are affected in many organizational areas, such as hiring qualifications and requirements, policies and procedures for both existing and new employees, pay, benefits, evaluation, discipline, and discharge [5-7]. How and when employers decide to make accommodations is influenced by a complex array of factors including organizational commitment, managerial attitudes, financial and material resources, and previous experience with employees who are disabled. Business owners and managers, legal personnel, and employees themselves are involved in a delicate process that seeks to meet the needs of disparate and sometimes antithetical goals that incorporate matters of both people and profit.

In Canada, attempts to estimate the prevalence and economic impacts for individuals with disabilities have been problematic and have generated conflicting data. One comparison indicates that major Canadian surveys conducted in 2001 for individuals over the age of 16 generated disability rates that range from 13.7 percent (National Participation and Activity Limitation Survey [PALS], with filters applied) to 31.3 percent (Canadian Community Health Survey) [8]. Data from persons living in Yukon, Nunavut, the Northwest Territories, and individuals

living on First Nations reserves are often not included in data collection efforts [9], which reduces the likelihood of obtaining representative data sets. In aboriginal communities and remote areas, disability rates have been estimated to approach 30 percent [10]. In the most recent and comprehensive national effort, data collected from PALS for 2001 [11] indicate that 3.6 million individuals have a disability of some form; this figure represents more than 13 percent of the population [8]. Nearly 1.5 million of these Canadians are within the working ages of 15-64, and they represent fully 10 percent of the population.

PALS data indicate that the highest disability rates were reported in Nova Scotia, while the lowest rates were reported in Quebec and include data collected in both French and English [8]. Significant differences also exist between different age groups; 2001 data indicate that disability rates are 3.3 percent for ages 0-14, 9.9 percent for ages 15-64, and 40.5 percent for individuals aged 65 and older. These estimates are several percentage points lower in each age bracket than data collected in 1991. The changes have been attributed to actual population changes, definitional differences, and methodological differences [8]. New PALS data were collected in 2007 and those results are anticipated to be available by early 2008.

Despite an inability to pinpoint an exact proportion of the population, individuals with disabilities clearly represent a substantial portion of a nation's human capital. One author noted that a majority of workplaces already include employees who live with medical conditions such as high blood pressure, diabetes, and arthritis [12]. In Canada, psychological and musculoskeletal claims tie as the most frequent and costly disabilities [13], and it has been estimated that up to 75 percent of the world's aged population are limited in their activities due to pain or discomfort [10].

Accommodations

In general, Canadian legislation does not specify a minimum number of employees that would trigger a requirement to provide accommodations. Consequently, any and all Canadian companies are obligated to make "reasonable accommodations" for employees with disabilities. These accommodations include (but are not limited to) modifying existing buildings; restructuring schedules or jobs; reassigning employees to vacant positions; adjusting or modifying exams, training materials, or policies; and providing qualified interpreters [7].

Some data indicate that accommodations needn't be cost- or time-prohibitive. Findings from one American study indicate that fully 95 percent of private firms report that they have modified their facilities to be accessible, modified their interview places or questions, or made other accommodations to create more user-friendly circumstances for individuals with disabilities [14]. According to a 2000 survey by the American-sponsored Society for Human Resource Management (SHRM), a majority of employer respondents stated that they had modified physical facilities (82 percent), modified or changed human resource policies (79

percent), and changed job descriptions or work hours (67 percent) to accommodate the needs of employees with disabilities [6]. Extensive guidelines are also available that elucidate best practices with regard to workplace disability management. One Canadian publication provides fully seventy-five guidelines in areas such as disability prevention, early intervention, communication, gradual re-immersion for employees who are disabled during their work tenure, and stakeholder education, commitment, and involvement for both management and employees [13].

What Is a Disability?

Despite these encouraging reports, many debates are still under way regarding who qualifies for accommodation, under what circumstances, and what type of accommodations are appropriate. Arguably, the most pivotal debate involves what qualifies as a “disability,” and the lack of definitional clarity is problematic [5]. Confusion also exists around employers’ roles and obligations, or what is termed the “duty to accommodate” [2]. Despite significant precedents, initiatives, and legislation, contemporary research continues to chronicle ongoing discrimination in the workplace [6], and most organizations are not fully cognizant of either the extent or breadth of their legal obligations. Consequently, many fail to conform to extant requirements [5]. The difficulty of understanding disability-related legislation is compounded by conflicting interpretations of critical terms such as “disabilities,” “reasonable accommodations,” “bona fide occupational requirements,” and “undue hardship” [5, 6, 8, 9, 15]. Employers have much to gain by understanding and supporting the employment needs of disabled workers, but the first step involves understanding relevant legislation and definitions contained in these laws [16].

Overall, three key pieces of federal legislation have shaped Canadian disabilities rights. The most recent is the Employment Equity Act of Canada (EEAC), which was passed in 1995. The EEAC’s contents are clearly delineated by the Canadian Human Rights Commission [17]. In short, the purpose of the EEAC is 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 fulfillment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences [18].

Further, the EEAC’s definition of “persons with disabilities” includes:

persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who (a) consider themselves to be disadvantaged in employment by reason of that impairment, or (b) believe that an

employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment, and includes all persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace [18].

Federally identified disabilities include difficulties or impairments in hearing, seeing, speech, mobility, agility, learning, memory, developmental areas such as congenital (e.g., Down syndrome) or environmental (e.g., lead poisoning) disorders, chronic or intermittent pain, and some emotional, psychiatric, or psychological conditions [10]. Additional federal classifications of disabilities include environmental sensitivities, drug addictions, chronic conditions (e.g., hemophilia, diabetes), and other limiting or restrictive conditions [5].

The second foundational law is the Canadian Charter of Rights and Freedoms (CCRF), which was ratified as Part 1 of the Constitution Act of 1982. It has been described as “probably the most far-reaching legal challenge for human resource managers” [19, p. 173]. Courts are charged with the difficult task of balancing the rights of individuals with the rights of groups, and the relative newness of the CCRF creates the opportunity for challenge on many fronts [19]. Nonetheless, the CCRF is a seminal piece of national legislation, and it represents the first national constitution in the world that provides individuals with disabilities with rights of equality [5]. The CCRF Section 15(1) [20] 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, nation or ethnic origin, colour, religion, sex, or mental or physical disability [20, 21].

The third important federal law is the Canadian Human Rights Act (CHRA) [22], which has been in effect since March of 1978. It applies to governmental employees and employees of businesses and industries that fall under federal jurisdiction, organizations that are considered to be a part of the Federal government, and organizations that are federally regulated [19]. Interestingly, statutory exemptions occur for “organizations of a fraternal, philanthropic, or educational nature” [17, p. 223].

Although it predates the CCRF, the CHRA expands the areas of equity contained in the CCRF and includes the following language:

All individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted [19, p. 176].

The Impact of Human Rights Legislation on Employers and Employees

Employers have historically been granted broad latitude in their hiring, firing, discipline, and scheduling practices as long as they conformed to extant contracts or collective agreements [2]. However, under the rubric of Employment Equity, Canadian companies are now charged with increasing the numbers of specific underrepresented groups of individuals such as women, minorities, and individuals with disabilities that have historically been exposed to and victims of discrimination. Similarly, there are ever-increasing judicial decisions that govern how organizations hire, evaluate, and terminate individuals, and this legislation is particularly pointed with regard to individuals who are disabled [23].

Canada has more than 30 separate legislative pieces covering labour relations, and this diversity has been referred to as “legislative fragmentation” [24, p. 224]. Although these different laws contribute to confusion, jurisdictional questions, a decentralized bargaining structure, and potential barriers with regard to global trade due to an absence of one unifying national standard, this diversity may also “contribute to innovation and change . . . (and provide) . . . advantages of a system that allows for comparatively low-risk legislative innovation and experimentation” [24, p. 225]. Additionally, each province has the authority to create human rights laws, and provincial legislation covers most private sector workers. In fact, provincial private sector labour relations acts have been created to cover the 90 percent of unionized Canadian workers who do not fall under the Canada Labour Code (which applies to federal or provincial employees in such areas as railroads and airlines). In general, the Public Service Staff Relations Act covers federal government employees, whereas provincial government employees and most other public sector workers are governed by patchworks of individual provincial laws. An overview of these provincial laws is provided in a later section of this article.

Toward a Unified Definition of “Disability”

Although several indicators point to declining numbers for the employment of individuals with disabilities, two important issues have been raised; first, how individuals with disabilities are identified, and secondly, whether altering definitions of “disability” will actually improve the employment prospects of those individuals who are protected by various pieces of legislation [10]. Although the ultimate social and political goals of legislation are to remove all barriers so that no one perceives himself or herself as substantially limited, it is impossible to estimate the incremental magnitude of those legislative and practical changes until an accurate baseline is established. Some scholars have argued that the definition of disability should be more minimally defined so that legal decisions could then be made based on an individual’s qualifications [6], while other commentators claim that it should be established in relation to the particular law under which it is

being interpreted; e.g., *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited* [25].

Individuals with disabilities, employers, legal and court personnel, and researchers all arrive at very different conclusions when interpreting language used in various laws. An additional layer of confusion is added when alternative definitions, assistive technological innovations, and goals of independence are considered [14]. Efforts are under way to distinguish a disability from either an impairment (e.g., a medical abnormality such as a ruptured eardrum) or a functional limitation (e.g., difficulty hearing) [9]. One other perspective on defining disability involves the idea that disability should not be viewed as a dichotomous measure [26]. In one study that looked at individuals with epilepsy, results indicated that the overall impact is likely to be disability specific with gradations among levels of severity and interference [26]. It has been suggested that appropriate education, training, and rehabilitation also have some level of disability-related specificity, which has additional important implications for policy makers and social services programming [26].

“Disabilities” have been defined medically, economically, and, most recently, socially, or sociopolitically [16, 27]. The medical definition has historically been utilized in the determination of disability pay through social programs, but it has a key weakness in that it refers only to limitations in an employment-based context. As such, it does not adequately capture individuals who do not work but are limited by their disability in other areas of their lives [16]. In contrast to the de facto strict environmental constraints that are omnipresent in the medical model (where it is assumed that an individual should adapt to his/her environment) and the economic model (where disabilities are largely defined by available employment opportunities without regard for environmental adaptation), the sociopolitical model encompasses the broadest definition. This approach is based in a broader context that recognizes the interplay of factors between individuals and their environments [16], emphasizes the abilities of each individual person [5], and considers the “attitudinal environment” as well [28].

In Canada, bona fide occupational requirements (BFORs) are central to the analysis of current definitional issues in disabilities rights in the context of the work environment, and they refer to workplace rules that are “essential” to a particular organization’s jobs [5]. The requirements are subject to the guidelines of the Meiorin decision [29], which found that discrimination is taking place unless individuals have been provided with accommodation for a disability. The Meiorin test states that employers must now prove on a “balance of probabilities” that a discriminatory standard is a BFOR that is rationally related to a particular activity, has been established in good faith, and is necessary to satisfy a goal or purpose [30]. In essence, it was a landmark decision that created a legal requirement for employers to develop and implement proactive initiatives with the goal of eliminating rules, policies, or practices that are discriminatory in areas which are prohibited grounds [5]. On the other hand, employees are responsible for reporting information regarding the extent

and impact of their disability, and employees are also expected to work with their organization to define and establish necessary accommodations or adaptations required as an integral necessity for job performance [5].

ECONOMICS AND JUSTICE IN THE CONTEXT OF DISABILITIES

The Economics of Disability

Estimates place national disability costs to up to 20 billion Canadian dollars per year [31], but a 30 percent to 50 percent cost cut is estimated to be possible with strong disability management and return-to-work programs [32]. One study found evidence that, despite the costs associated with employing individuals who require modifications or accommodations, the monetary expenditures may pay off handsomely in dividends of longevity and loyalty. In one large U.S. employer, the turnover rate of individuals with disabilities is one-fifth that of nondisabled employees [33].

Some people with a disability have never held any job, and many work in temporary and low-paying jobs. Of Canadian adults with disabilities, 65 percent earn less than \$10,000 per year, while only 5 percent earn \$30,000 or more [32]. These high rates of underemployment, unemployment, and wage discrepancies among people with disabilities are due to physically inaccessible work places, uncomfortable social environments due to negative peer perceptions, extensive and intimidating recruitment and interviewing, and significant competition within the work force [34]. The toll exacted by disability also goes far beyond financial cost; job satisfaction is decreased when assistive technology or accommodations are not provided [35], and reported life satisfaction is nearly half that reported in a nondisabled population, or 34 percent versus 61 percent [36].

Undue Hardship

As previously noted, Canada has no absolute number of employees that render compliance mandatory. Instead, costs for providing accommodations are generally analyzed by their level of disruption, or if they are “unduly burdensome” to the employer, rather than by a pure cost analysis [6, p. 17]. Although operational size has influenced court decisions in the past, neither inconvenience nor “minor interference” has proven acceptable to meet the terms of undue hardship. Canadian interpretations of undue hardship include requiring organizations to borrow money in order to finance accommodations and, under the Ontario Human Rights Commission (1989) guidelines, businesses in that province may incur burdensome costs at a level that may even “alter the essential nature or substantially affect the viability of the enterprise” [37, p. 93]. However, exceptions are possible if it can be shown that a business would in fact be harmed to its detriment, e.g., when modification requirements are impossible, pose risks that are serious, or

cost excessive amounts of money [34]. Canada's *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [38] enlisted the Supreme Court of Canada to clarify six considerations influencing undue hardship: financial cost, safety, organizational size, employee and task interchangeability, and the morale effects on both employees and extant collective agreements [5, 38]. Interpreters of case law continue to review prior decisions and set new precedents for both definitions and applications of undue hardship. Decisions that interpret and ultimately reconcile this variation could clearly have profound implications for future defenses mounted by Canadian employers if and when their livelihoods are threatened.

Justice

Although justice is an integral piece of the workplace-disabilities puzzle, there are multiple stakeholders with a variety of agendas that make resolving complex issues difficult [39]. Several decades ago, the observation was made that workplace discrimination results from the interaction of broad spectra that include individual personality characteristics, prejudice, ignorance, geography, chronology, market forces, and employers' tastes [40]. International efforts have been undertaken to overcome many of these elements, and one scholar asserts that justice is the vehicle that can "transform degrading, oppressive and dehumanizing systems" [26, p. 1]. Through the lens of individuals with disabilities, the availability and distribution of jobs, opportunities for promotions, and the perceived fairness of these events are strong factors in whether discrimination is felt to be occurring.

The perceptions of nondisabled workers regarding the justness and fairness of accommodations are often omitted in models of justice. Co-worker reactions are important because they affect how a person with a disability is received, whether an accommodation is requested, provided, and implemented, and whether, with collective influence, public policy is eventually changed [41]. One exception to this oversight is a model that recognizes the importance of nondisabled co-workers as stakeholders, explains when co-workers make judgments of fairness, and describes what factors influence judgments of distributive justice. This model further posits that equity rules and need rules (simply whether an accommodation is "needed") work together in co-workers' judgments of distributive fairness, that need rules are affected by a person's liking, empathy, and concern for the person who has received the accommodation, and that factors of resource scarcity and outcome interdependence will affect co-workers' perceptions of accommodations [41].

EMPIRICAL RESEARCH ON DISABILITIES

Although individuals with disabilities represent a potentially significant portion of the labor pool and there are many anecdotal articles available, there is

relatively little empirical data regarding disabled employees' workplace experiences [3, 5]. Prior to recent legislation dealing explicitly with worker-related disability rights, North American research has traditionally focused on "disincentives" in government-sponsored work programs as well as employment and wage factors for individuals with disabilities. Historical research was largely conducted in a negative light; in the 1970s and 1980s, many laboratory and field studies identified negative perceptions of individuals with disabilities and attributions of "self-pity or helplessness" [6, p. 13]. Current research indicates that some measures of employment trends show reduced numbers of workers who report health conditions that qualify as a work disability due to fear of litigation and extensive costs of implementing workplace accommodations [16], although the vast majority of this research takes place in the U.S. Finally, as previously noted, incidence rates are difficult to quantify based on differences of inclusion or exclusion criteria.

Canadian researchers used data from the Ontario Workers' Compensation Board's Survey of Workers with Permanent Impairments and sought to explore the consequences of implementing reasonable accommodation in the quest to equalize opportunities for individuals with disabilities [42]. Using a hedonic wage procedure that assesses the differences between monetary and nonmonetary areas of jobs (including risk, benefits, pensions, and relative status/perquisites), an analysis of actual accommodation cost was conducted. Results indicate that injured workers at organizations who were rehired after their injuries bore fewer of the actual costs of subsequent accommodations through lower wages in comparison to employees that were hired by a different organization post-injury [32, 42]. In fact, returning to the time-of-accident employers resulted in 27 percent higher wages [42]. Both workers' compensation and vocational rehabilitation appear to be mediating factors in these results [32].

Recent data also indicate that variations among the organizational policies and practices in a stratified random sample of hospitals, nursing homes, private clinics, and community clinics demonstrated significant differences with regard to union versus nonunion environments and organizations with formal versus no disability management policies [43]. Another pilot study looked at the psychological processes related to obligation and attitude with regard to requests for accommodations from employees with disabilities [3]. Their results indicated that managers were more willing to make informally requested accommodations when the employee's disability was not the employee's fault (e.g., congenital deafness versus onset due to chronic exposure to loud music), when evaluatory documentation showed "top-notch" performance, and when the magnitude of the request was reasonable. Summarily, the authors concluded that informal requests are more frequently fulfilled for those with congenital conditions and high-performing employees, whereas employees with controllable-onset conditions or poor performance evaluations would be better served by using legal mechanisms to have their disability-related needs met.

Finally, from a different empirical perspective, Danieli and Woodhams contended that one of the major goals of disabilities research should be emancipation [44]. Emancipatory research is rooted in the beliefs that disability should be viewed from a social or sociocultural model and that research should only be undertaken by individuals with disabilities for the goal of providing direct practical benefit to individuals with disabilities. Although it is unlikely that only individuals with disabilities will conduct disability research, an emerging trend is to use participatory research and to ensure that the results are thoroughly and widely disseminated to populations of individuals with disabilities [44]. These goals seek to continue the education and reduce barriers to facilitate a more fully barrier-free, integrated workforce.

LEGAL ISSUES, CASES, AND PRECEDENTS

Landmark decisions have occurred that have affected the current direction of disability rights, and several seminal cases are reviewed to frame the current state of disabilities rights in Canada. These decisions have served to strengthen the power of individual human rights while eroding the long-held authority of a company's single-minded loyalty to its balance sheet. Legal issues regarding disability and discrimination have historically centered around four areas: actuarial versus individual risk, an employee's burden of proof, infusing human rights principles into a judicial system, and addressing disciplinary and discharge procedures [2].

Canadian Case Law

Canadian case law includes several cornerstone decisions that have had a wide-ranging influence on subsequent decisions. In *Meiorin*, or *British Columbia v. BCGSEU* (1999) [29, 37], a female fire fighter was unable to complete an "aerobic standard"; after being provided with several opportunities to meet the requirements, she was dismissed from her position [17]. This case raised substantial questions regarding what accommodations are reasonably necessary for employees to perform their jobs safely, effectively, and without the adverse influence of bias or prejudice. The pivotal 1999 *Meiorin* case raised serious questions and had many implications [17], and the Supreme Court's intent in its decision was to set a new standard of a unified approach and abolish categorization of discrimination [5, 6, 34].

A second Supreme Court case explored the distinction between direct and adverse impact (or indirect discrimination). The decision in *Central Alberta Dairy Pool v. Alberta* contributed to a significant evolution in laws that deal with bona fide occupational requirements (BFORs) and accommodation [38]. Direct discrimination involves non-neutral policies that cannot be uniformly applied, exclude specific persons or a protected group, or make generalizations about

individuals based on their membership in a particular group (e.g., persons with HIV determined to be medically unfit [*Thwaites v. Canada (Armed Forces)*]) [45]. In instances of direct discrimination, employers are not required to provide rehabilitative programming, but they must apply the *Meiorin* test to determine whether a specific skill or requirement can be considered a BFOR. Individualized equal treatment must be applied unless strong evidence underscores the necessity for a particular rule or an individual assessment is demonstrated to be impossible [38].

Adverse impact discrimination, on the other hand, was considered to be more general and indirect; in these cases, only subgroups of people are affected (e.g., people with substance dependency, which is considered to be a disability under Canadian law). Unlike direct discrimination, adverse impact discrimination cannot invoke BFORs; instead, it triggers the duty and obligation for an employer to accommodate a person's disability unless doing so would incur an undue hardship (*Thwaites v. Canada (Armed Forces)*) [30, 45]. These were determined to be subtle yet important differences that have significantly affected the landscape of Canadian human rights legislation and litigation.

Discrimination

Discrimination is another term that is frequently analyzed. In Canada, the CHRA requires simply that a plaintiff prove discrimination on a protected ground, as found in *Ontario (Human Rights Commission) v. Simpsons-Sears Limited* (known as the *O'Malley case*) [25]. This decision was initially supported by both a human rights tribunal and by the Commission, but a re-analysis and more stringent interpretations were subsequently developed in the Supreme Court of Canada's decision in *Law v. Canada (Minister of Employment and Immigration)* [46]. In *Law*, the Court chose to interpret the concept of discrimination using section (1) of the CCRF, which was written with regard to a "constitutional standard of equity" rather than according to human rights laws. *Wignall v. M.N.R.* [47] reported three inquiries that should be made under that provision:

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? [30].

Although it represents a decision made a decade earlier, this distinction is clarified in *Belyea v. Canada (Statistics Canada)* [48], where a tribunal ruled in favor of the defendant. Mr. Belyea, an individual with epilepsy, asthma, and allergies, was denied a position as a census taker primarily due to the fact that he did not own a car. The following decision was handed down:

The Tribunal finds that Mr. Belyea was not discriminated against because of his disability. The requirement that he have a car available is not discriminatory on its face, and it is not only persons who cannot drive because of a disability who are affected by this requirement. Others could be excluded because they cannot pass the driver's test or because they do not have a car due to economic reasons. An employment practice can only be classified as discrimination which rules out an individual or a group that is protected by the Act for adverse treatment. A reasonable job requirement that excludes a broader range of people does not warrant a finding of discrimination unless there is an intention to discriminate [30].

In *Grismer v. British Columbia*, a truck driver had his driver's license revoked based on provincial laws after failing a peripheral vision test resulting from homonymous hemianopia [49]. Invoking the *Meiorin* decision, which states that discrimination is taking place unless individuals have been provided with accommodation for a disability, the court found that the superintendent of motor vehicles did not accommodate Grismer's disability by permitting him to wear his glasses during the test [6]. Multiple decisions at the federal court level in Canada have upheld similar decisions, whereby the establishment of a disability must occur before the implementation or application of assistive devices and without regard to their corrective capacity. In *Canada (Attorney General) v. Hebert*, the Canadian Armed Forces were not permitted to discriminate against an individual on the basis of a visual acuity disability, and they were subsequently ordered to revoke the use of visual acuity tests that did not permit applicants to use corrective glasses [50].

Provincial Legislation

The Canadian provincial codes and acts serve two fundamental purposes that sometimes work in opposition: they are legal documents that are used and interpreted by courts and by various boards, but they also serve as "a primary source of information for citizens for information about their rights" [51]. Provincial legislation is developed and administered by individual human rights commissions that are operated by individual provincial governments (e.g., the B.C. Human Rights Tribunal, the Government of Nunavut, the Human Rights Commission of Newfoundland and Labrador, the Alberta Human Rights and Citizenship Commission, and, in Quebec, the Commission des Droits de la personne et des Droits de la Jeunesse). The regulatory entities of New Brunswick, Northwest Territories,

Ontario, Prince Edward Island, Manitoba, Saskatchewan, Nova Scotia, and Yukon Territory are all simply termed human rights commissions and use their respective provincial names [52].

Although all Canadian citizens are covered under federal statutes and all provincial human rights codes or acts list protected grounds and types of disability under which individuals can seek protection, they do differ in their language and in their specificity. These differences occur in both the laws themselves and in subsequent interpretations by human rights commissions and tribunals. For example, Saskatchewan's specifies "race or perceived race" [53], while New Brunswick's simply states "race" [54]. Similarly, where Ontario's code simply uses the word "disabilities" [55], Nova Scotia's code specifies "actual or perceived" disabilities [56], which more closely mirrors the EEAC's language of individuals who "consider themselves to be disadvantaged" [17]. PEI's [57] and Nova Scotia's human rights acts [56] both specify pregnancy as a protected ground, while Nova Scotia [56] cites "source of income" and Saskatchewan [53] lists "receipt of public assistance" as protected grounds.

Although these appear to be minor distinctions, applying and interpreting their intent is far more complex. For example, PEI expressly includes addiction in its definition of physical and mental disability, although it also states that employees are not required to provide reasonable accommodation to individuals who are unwilling to make efforts to confront his/her addiction [57]. However, this is a difficult distinction to draw. Provincial tribunals also have provided interpretations of some federal legislation; for example, obesity is a condition that has been interpreted as a disability in British Columbia and in Saskatchewan, but no other provinces recognize obesity because the federal statute states that only disabling conditions caused as a result of illness, birth defect, or injury are eligible for protection [58].

There are other differences as well. In some provinces (e.g., Nova Scotia, Newfoundland), exclusions of compliance are granted to domestic staff living in single-family residences, while Yukon [59] permits exclusions for individuals who are employed in private homes, tenants in private homes, and individuals who work in organizations that are "exclusively" for purposes of social or cultural nature, religion, charity, education, and athletics. In Alberta [60], the Employment Standards Code grants broad powers to the Lieutenant Governor in Council and explicitly states that this authority can exempt "an employment, employer, or employee from Part 2," which covers the employment standards. Additionally, the Director is authorized to issue an employment permit such that an employer can, if the employer and the employee are satisfied "in all the circumstances," pay a prospective disabled employee less than minimum wage [60, Division 10, Section 67(1)]. Finally, different provinces provide different language options on their Web site; the Government of Nunavut offers four languages [61], while the Northwest Territories Human Rights Commission offers eleven languages [62].

Remedies

In Canada, complaints are handled by provincial human rights tribunals [23] and, in some cases, by the Supreme Court of Canada. Workers are entitled to file charges against their employers, apply for reinstatement or retroactive wages, receive compensation for any legal costs incurred as a result of fighting discrimination, and receive compensation for a loss of self-respect or hurt feelings. In cases of unionized workers, grievances are filed initially rather than invoking more broad human rights legislation [26].

DISCUSSION

Human rights legislation encompasses many broad-range, large-scale human resources issues within the workplace. Combined with its subsequent implementation, interpretations, and precedent-setting case law, human rights legislation affects planning and recruiting, selection and training, and wages and salaries [27], and it is increasingly becoming a significant part of the bedrock of overall labor relations.

Canada is experiencing increased rates of retirement and decreased rates of birth, and each of these factors is likely to contribute to a labour shortage in the near future. Senior citizens are the fastest-growing demographic category in Canada, and survey results indicate that rates of disability increase as people age; in individuals who are 65 or over, the rate of disability rockets to more than 40 percent [8, 9]. Despite a widespread assumption that only a minority of individuals actually require accommodation or “need” provisions for disabilities, statistics indicate that almost every person will have some form of disability within his or her lifetime [16, 63]. Consequently, one author has commented that all non-disabled persons should identify themselves as merely “temporarily able-bodied” [64, p. 92]. Other factors also contribute to globally increasing rates of disability. Despite advances in disease prevention, events such as war, violence, disasters, and poor medical care in developing countries over the last few decades have significantly increased the population of individuals with disabilities [4].

Overall, an employer’s willingness to provide accommodation is an interdependent blend of employee characteristics, employer characteristics, and the perceptions of the employer regarding the nature, scope, and extent of the requisite accommodation [65]. Although physical access constitutes the bulk of what is perceived as accommodation, access to information and communication are, though less frequently mentioned or addressed, equally important [34].

Lessons for Our Neighbours from the South

Although Canada has based many of its disability rights laws on U.S. precedent, Canada has made several independent decisions that can provide valuable insight for American disability legislation and other countries, as well. One striking

example involves the *Meiorin* test [29], which goes to the heart of whether laws should be interpreted to the letter or according to the spirit and intent of their drafting. For example, based on the U.S. Supreme Court's rulings in the *Sutton* Trilogy [66], the "letter of the law" would mean that employees may no longer be eligible to be considered as "substantially limited in a major life activity . . . when using mitigating measures to reduce the impact of the disorder" [14, p. 5]. As such, a person who wears glasses to correct his/her vision would not be considered disabled. In the spirit of the law, however, other questions arise. Would this definition then cover an individual with a prosthetic leg who becomes fatigued by standing, walking, or driving long hours, or would this person be held to the same standards as a nondisabled person? This is a particularly germane debate for nonphysical disabilities such as mental or psychological disabilities that are recognized in Canada and that are steadily increasing [67].

Under the historical medical model used in the United States, individuals with disabilities have been expected to either seek medical intervention for "correction" of their handicap or to adapt within a particular environment [27]; in both cases, they are perceived as irreparably handicapped. However, under the sociopolitical interpretation that is gaining momentum, individuals who are able to work in adapted environments may, in fact, no longer qualify as disabled. Paradoxically, while this may be extremely valuable from a mental health perspective, it negates the perceived need for modifications for future employees. In turn, this perception may have the counterproductive outcome of reducing the overall accommodations provided within any given organization and having the net effect of shutting out future applicants with disabilities. Caution must be exercised in both definition and interpretation if we are ever to provide the maximum amount of support and accommodations for individuals with disabilities. By using the *Meiorin* test and by acknowledging even "correctable" conditions as disabilities (such as individuals with diabetes who receive appropriate medication), Canada has made great strides in establishing humane and unified ground rules with regard to accommodating persons with disabilities.

Canada has also made concrete progress with regard to reducing the ambiguity surrounding the definition of disability and criteria for being identified as disabled. Although there are ongoing debates that have yet to be fully reconciled, Canada's invocation of BFORs appears to have generated much higher levels of homogeneity with regard to definitional interpretations, while employers, employees, courts, and legislators in the United States are still struggling mightily to establish more consistent interpretations and applications in order to provide support to a population that is ten times the size of Canada's. The sheer volume of cases in the United States is perhaps the biggest stumbling block for consistent interpretation and application. Nonetheless, requiring employers to explicitly identify and describe bona fide occupational requirements has gone a long way toward reconciling the interpretive disparities among employers, employees, judges, researchers, and policymakers in Canada who work with different sets of assumptions [14].

Surprisingly, the very U.S. laws that protected and supported individuals with disabilities and served to inform Canadian legislation have considerably narrowed the American consideration of what qualifies as a disability [63], which is particularly relevant for the funding of social programs and disability insurance. These critical areas will continue to receive intense scrutiny as both countries grapple with aging populations and reduced numbers entering the workforce to supplant extant governmental programs.

There are at least two other major differences between American and Canadian disability rights frameworks that merit mention. The first is in regard to the percentage of cases that are found in employees' favor, while the second involves classification of drug and alcohol use. In the United States, complaints are handled by the EEOC; workers are entitled to file charges against their employers, seek reinstatement, petition for retroactive wages, and request other "injunctive relief" [7]. In the United States, more than 158,000 claims related to discrimination against individuals with disabilities were filed between 1990 and 2001, and 28 percent included claims for alleged wrongful discharge or failure to provide reasonable accommodation. Rulings were generally in favor of the employers and summary judgments were usually awarded, effectively precluding jury trials. In fact, fewer than 12 percent of these cases were found in favor of the plaintiff [6]. In comparison, a review by this author of all 47 Canadian human rights cases heard at the federal level for the twenty-year period from 1985 to 2004 indicated that 54 percent were found in favor of the plaintiff [68].

A second area where immense differences exist involves the treatment of alcohol and drug use. These issues are common in both countries, and they are also expensive with regard to absenteeism, productivity, and safety. Whereby Canadian legislation views addiction as a disability and in many cases requires employers to support rehabilitative services, the ADA expressly excludes alcoholics and current drug users. It also permits employers to prohibit alcohol and drug use by its employees [7]. A related area that has not been clearly defined by the courts or by common practice includes drug testing, which is much more widespread in the United States and is an issue under debate in Canada [57]. The economic and social consequences of decisions related to these differences will certainly affect a large number of people and provide fertile ground for future research.

In general, research suggests that people with disabilities are best served through effective legislation, regulations, and policies [69] and that firms need to understand what disabilities are, define their personnel policies, and assess their attitudes toward individuals with disabilities [70]. Many employees and most employers are currently unaware of the extent or impact of disabilities-rights legislation [5, 41, 71]. The fact that many disabilities are not visible masks the need for accommodation and makes it difficult for people to understand the effects that disabilities can have on a person's psyche and confidence. Heightened attention is perhaps the most effective short-term strategy, but in the long term,

responsibility for equity is shared among a variety of important stakeholders. Unions, the medical community, and insurers [72] need to work with employees, managers, industries, and governments in continued efforts to make the workplace a more equitable environment for individuals with disabilities.

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