Speaking Notes for CCD Webinar

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Title: How CCD Has Influenced and Shaped Human Rights Law in Canada

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Objective of My Presentation: I want to tell you about the work of CCD and how it has played a significant role in obtaining far reaching human rights protections for people with disabilities living in Canada.

**Introduction**

I understand that the focus of these webinars is on the Convention of the Rights of Persons with Disabilities and how it can be used here in Canada. The Convention describes in a fair bit of detail the rights of people with disabilities that governments should be respecting and enforcing. Today, I am going to talk about how disability rights have evolved in Canada. The development of rights is an ongoing project and I hope that with the ratification of the Convention, it will become a helpful interpretive resource to Canadian courts.

I have been involved with CCD in one form or another for over 40 years. So I’m going to rely on my personal experience to tell you about how CCD has used both political and legal actions to change the law and demonstrate that people with disabilities have human rights that must be protected and respected. Because I am relying on my personal experience, I think I should give you a little background on my involvement with CCD. I have served as Council vice-chair, been a member and chair of the CCD Human Rights Committee and have served as in-house legal counsel on a number of files. Looking back, I am pleased to say that I had the privilege of participating in a number of important and historical CCD initiatives.

**1. The Dark Days**

When I first got involved with CCD (or COPOH as it was then known), (in the late 1970s) there was no such thing as human rights laws for people with disabilities. Yes, Canada was talking about human rights but mostly in the context of race and women’s rights. The idea of disability rights was a foreign concept. When we did raise this issue, there was often resistance and lack of awareness.

This is because in those days disability was often viewed as more of a charity issue or a problem to be fixed by the medical profession. The negative attitudes and stereotypes experienced by people with disabilities were not regarded as at all comparable to the harm caused by discrimination based on race or gender. I recall being told by government officials that people with disabilities weren’t really discriminated against. They just lacked public understanding and awareness.

As many of you may know, it was this kind of thinking that led to the development of a national disability rights movement in Canada. We wanted to shift the focus from the individual to the society and the way that it excluded people with disabilities from the mainstream.

The recognition of people with disabilities as rights holders didn’t come easily. However, as a result of various lobbying efforts, by the mid 1980s most of Canada’s human rights legislation provided some form of human rights protection and made it illegal to discriminate on the basis of disability.

**2. From Paternalism to Constitutionalism**

The 1980s was a time of significant rethinking about rights in Canada including people with disabilities. I think the main reason for this was the decision of Pierre Elliot Trudeau to bring Canada’s Constitution home from Britain. In addition to the patriation of our Constitution, he wanted to develop a constitutional charter that would establish a wide range of rights and freedoms for people residing in Canada.

Prime Minister Trudeau appointed a joint House of Commons committee to consult with the public, hold hearings and eventually determine what rights would be included in the Charter. One of the most notable sections being proposed was s. 15, the guarantee of equality. The original draft of this section guaranteed equality to all persons living in Canada and prohibited discrimination on a number of grounds such as age, religion, sex, colour, ancestry, etc. Missing from this list was the ground of disability.

This was 1980, a time when human rights recognition for people with disabilities was just beginning. CCD representatives therefore believed that inclusion of disability rights in Canada’s new Constitution was imperative. And so began a year of lobbying, meetings, letter writing, night telegrams and finally a protest on Parliament Hill. I have many memories of this time including arguing with politicians, , making signs for the protest, appearing before the House of Commons Committee with my colleagues Ron Kanary and Jim Derksen, and missing my sister’s wedding because I wanted to participate in the protest in Ottawa.

S. 15 underwent a couple of different drafts, each time omitting disability. There didn’t seem to be any definite reason for the omission. Just some speculations that some didn’t feel disability merited constitutional recognition, some worried it would be too costly and some thought human rights legislation was enough.

However, at the 11th hour a miracle occurred and the then Minister of Justice made an abrupt change and declared disability to be worthy of s. 15 protection. Again, no clear reason for the sudden change of mind. Maybe because of the very visible protest on the Hill, maybe because of our intense lobbying of various politicians, maybe because of the rumours that busloads of people with disabilities were about to descend on Parliament, or maybe because the international year of persons with disabilities was about to commence and excluding people with disabilities from Charter protection wouldn’t be a good way for Canada to begin a year with such an international profile.

**3. So Why Was It So Important to Be Included in s. 15 of the Charter?**

The Constitution and thereby the Charter, is the top law in Canada. As the supreme law in Canada, all governments and the actions they undertake must uphold and respect the requirements of the Charter. Governments include municipal governments, provincial/territorial governments and, of course, the federal government. The Charter also applies to agencies or authorities carrying out government work such as social services or healthcare. Government action means all laws, policies, programs or actions carried out by governments. The Charter does not apply to private entities such as stores, restaurants or movie theatres.

CCD believed that having Constitutional protection would give people with disabilities the hammer they needed to get rid of discrimination and prevent the creation of further barriers. Theoretically this idea is correct. However, laws and policies do not change overnight. While governments have made some attempts to be Charter compliant, most of the responsibility has been left up to individuals and groups to take governments to court to challenge actions that appear to be in contravention of the Charter.

Despite the slow uptake of governments, the inclusion of disability in Canada’s Constitutional Charter of Rights and Freedoms stands as a monumental achievement. It’s important to remember that just a few years prior, hardly anyone was thinking about or recognizing the human rights of people with disabilities. And yet by the end of 1980 we succeeded in achieving Constitutional recognition of our rights, an international first. This recognition also signaled the coming of age of the disability rights movement and its capacity to bring about social change.

**4. Defining Equality**

Once the Charter was proclaimed, the next step was to ensure that the courts gave the concept of equality a substantive and progressive interpretation. In other words, it wasn’t good enough just to say that everyone should be treated the same. We wanted the interpretation of equality to recognize the unique differences and barriers experienced by various equality-seeking groups such as people with disabilities. Equality-seekers worked together to develop a consistent proactive definition of equality that could be delivered to the court when making Charter challenges. Note the Andrews case. I think this was a real period of growth and development for CCD. We could no longer regard disability as some monolithic issue; rather it had to be understood as encompassing many dimensions such as race, gender, identity and so on. If you look back at the work of CCD at this time, you will note a number of collaborations among equality-seekers to ensure the broadest and most inclusive definition of equality.

As I’m sure you all know, going to court takes money. So CCD also collaborated with others to lobby the federal government to establish a fund that could be used by equality-seekers to challenge discriminatory government action and argue for inclusive equality. This resulted in the launching of the Court Challenges Program in 1985.

Over the last 35 years or so, people with disabilities have achieved and celebrated a number of legal victories, many of which have been spearheaded by CCD. In the remainder of my time, I’m going to highlight a few of these cases and the role they play in defining the rights of people with disabilities.

**5. The Judicial Enforcement of Our Rights**

CCD has been involved in at least 50 human rights and Charter rights cases. There are two ways in which CCD has brought a disability rights analysis before the court. First, in a handful of cases it has acted as the initiating party. Second, in most cases it has participated as an intervener in challenges brought by other parties.

*A) Same Treatment Can Be Discriminatory*

I will begin with a human rights case from Saskatchewan which did not involve CCD but which established a very important principle that significantly impacted disability rights law.

In the mid 80s, a movie theatre was held responsible for discriminating on the basis of disability because its seating arrangement could not accommodate Michael Huck, a man who used a motorized wheelchair. Because there was no room for a wheelchair, Mr. Huck was forced to sit in front of the front row of seats. Mr. Huck believed that the failure to accommodate his wheelchair was discriminatory.

The theatre argued that it did not intend to discriminate against Mr. Huck, and that it treated all patrons the same. This argument was rejected by the Saskatchewan Court of Appeal which said that treating everyone the same can still have negative consequences for people with disabilities. That is, Mr. Huck could not enjoy the movie like other patrons because of where he had to sit in his wheelchair.

*B) Government Benefits Must Be Inclusive*

The approach to discrimination applied in *Huck* was also used in the *Eldridge case;* a Charter challenge*.* In this case, the BC government denied deaf patients the use of sign language interpretation when obtaining health care. The Deaf patients argued that this denial was discriminatory and a breech of their equality rights. This matter went through several levels of court. All the lower courts said that the Deaf patients were treated just the same as other hearing patients and so no discrimination. The Supreme Court of Canada (SCC) strongly disagreed with this analysis. It said that when the government offers a benefit such as health care, it must do so in a manner that avoids reinforcing existing barriers and ensures that everyone can benefit equally from appropriate healthcare. It said that reasonable accommodation is the cornerstone of true equality.

*C) Transportation Standards Must Be Inclusive*

In the *VIA Rail* case, newly purchased train cars were not accessible to passengers with disabilities. CCD launched a complaint under the Canadian Transportation Agency (CTA) undue obstacles section. VIA Rail said not to worry. If people with disabilities could not access the rail cars, it would provide a separate mode of accessible transportation so there would be no discrimination. The Supreme Court of Canada said that the notion of separate modes of transportation was discriminatory. It said that people with disabilities are entitled to ride with other passengers and that the duty to accommodate people with disabilities means that there is a positive duty to remove barriers and develop standards that are inclusive.

*D) One Person One Fare*

Following on the heels of the VIA rail case came the one person one fare decision. Again CCD complained to the CTA that requiring people with disabilities to pay for additional seats because of their disability or need for an attendant was discriminatory in that they had to pay more for airline travel than nondisabled passengers. CCD argued that passengers who require more than one seat because of their disability should only have to pay for one fare. Of course the airlines argued that this would be too costly but the CTA disagreed and ruled that the one person one fare was a reasonable policy.

*E) Communication with Government*

The *Eldridge* and *VIA Rail* cases were pivotal influences in the *Jodhan* case decided by the Federal Court of Appeal. Jodhan sought a declaration that the federal government’s failure to develop, maintain, and enforce standards that would ensure all Government of Canada websites and online services are accessible for all individuals with visual impairments contravened the *Charter* guarantee of equality. The Court ruled that access to federal government information by way of the internet constituted a benefit of the law and that as such it must be available and accessible to all including persons with visual disabilities. Like the VIA case, the Court rejected the federal government’s idea that it could offer separate systems for providing information to blind persons.

*F) Proving Discrimination*

Jeffry Moore was a student with learning disabilities. The support services he received from the school division did not meet his disability needs and he was forced to attend a private school. He argued that this was discrimination. The school division objected and said that Jeffry received the same resources as other students with disabilities so no discrimination. But the SCC vigorously rejected this argument and said that comparing one disability group with another disability group runs the risk of undermining the duty to accommodate and could easily result in a race to the bottom. Rather than comparing two disadvantaged groups, the SCC said the school division must focus on accommodating students like Jeffry. It said that accommodating learning disabilities is no different than providing a ramp for accessibility.

*G) Expanding the Meaning of the Duty to Accommodate*

The cases I have described all share a common element. They all recognize that equality for people with disabilities often means taking positive action to remove barriers. In human rights law, this is called the duty to accommodate.

**Final Comments**

It is sometimes easy for us to fall into despair about the lack of progress in obtaining the full recognition of disability rights in Canada. Unfortunately turning rights into reality can be a long, slow and painful process. As my friend and colleague Laurie Beachell says it is like being given equality by centimetres. But I hope I have persuaded you that we have made some legal progress over the past 30 years and that it has been worth it.

The CRDP gives us another means for expressing our rights. It too promotes substantive equality and prohibits discrimination. It is not a freestanding law like the Charter or human rights legislation. Rather it is a powerful interpretive guide which can be used to help the courts clarify and enforce disability rights.