

**The Law as it Affects People with Disabilities:
A Case Study Paper on Rights to Supports**
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SUMMARY

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This paper addresses the establishment and recognition of positive obligations on government to provide disability-related supports. It does not address the issue of eligibility for those supports or of quality assurance.

Meaning of Equality for Persons with Disability

The paper explores the differences between formal and substantive equality and identifies three models used to define disability:

- i. Bio-medical definition: views disability as the result of impairment
- ii. Social model: views disability as a result of socially-constructed barriers
- iii. Human rights approach: views disability as a result of the interaction between the person's impairments and socially constructed barriers

The difference between positive and negative rights is articulated: positive rights require the government to take action and negative rights require the government not to curtail rights not do not require the government to take any actual action beyond this.

Charter of Rights and Freedoms:

While the *Charter* may appear to be an obvious place to start to assert a positive right to disability-related supports, after a careful review of relevant case law, the authors conclude there is little hope to be found in sections 7 or 15.

- Courts take the theoretical position that section 7 (the right to life, liberty and security of the person) can be used to impose positive obligations on government, but are unwilling to turn that theoretical position into reality
- The equality rights promised in section 15 are likewise apparently largely theoretical when it comes to asserting a right to positive obligations on government
- The frameworks developed by the courts for adjudicating cases under these sections do not preclude the possibility of the imposition of positive obligation on government
- A recent Supreme Court of Canada decision (*R v Kapp*) opens the possibility that the formalistic approach taken in much equality jurisprudence may be evolving into an approach that focuses on

substantive equality, which means claimants would be more likely to be successful in imposing a positive obligation on government to provide disability-related supports, since substantive equality is intrinsically connected with the provision of disability-related supports. However, the *Kapp* decision is too recent to see how it will be applied and upheld in new cases

Cases outside the *Charter*

Claimants have had some success in seeking disability-related supports where they can frame their claim as a gap in an existing program. In other words, if the claimant can establish that the government has chosen to provide a service or benefits but is providing that service or benefit in a way that discriminates against a certain class of people, she may be able to have a court rule that the discrimination needs to be ended and the service or benefit provided to her.

However, there are two significant concerns about using this approach:

- If a program is ameliorative, it is protected from discrimination claims under both the *Charter* and human rights legislation
- The government can choose to cancel the program rather than extend it to a larger group of individuals

The Matter of Remedies

Even where successful, claimants are not always given the remedy they sought or that will end the substantive inequality.

Pathways to the Recognition of Rights to Supports

The authors use the term “pathways” to describe legislative approaching that can work towards establishing secure access to necessary disability-related supports.

As noted above, claimants have had some success when they can frame their claims as a gap in an existing program. In these cases, the discrimination can be overcome without the need for new legislation or the creation of a new program.

Essentially, the courts are saying that once the government has provided a benefit, it has a constitutional obligation to do so in a non-discriminatory manner.

To increase the likelihood of success, claimants should, where possible, frame their claims to supports as a gap in an existing program or service.

Approaches Taken by Other Jurisdictions

The paper reviews how other jurisdictions have addressed this issue and then assesses how applicable those other approaches are to Ontario.

Conclusion

The authors conclude that a principled, analytic framework is required to deal with the complexity of the legal issue affecting people with disabilities.

The major obstacles to judicial enforcement of disability-related supports are the reluctance to impose positive obligations on government; a formal approach to equality; deference to government allocation of scarce resources; difficulties with challenging ameliorative programs and the limits to remedies that will be ordered.

Canadian courts at this time are largely unwilling to impose positive obligations on government under either the *Charter* or human rights legislation.

Law reform initiatives can be a significant pathway to achieving substantive equality. In particular, the authors recommend:

- The legislature should explicitly recognize the importance of substantive equality rather than formal equality in the interpretation of all Ontario statutes, particularly the *Human Rights Code*
- The importance of rights to supports for people with disabilities should be explicitly acknowledged in benefit-conferring legislation
- Legislation that is specifically geared to persons with disabilities should use the language that facilitates the inclusion and participation of people with disabilities
- If necessary, a broad recognition of a right to disability-related supports could recognize fiscal limitations to their provision
- Government should consider universal design when enacting new programs and policies, and/or when reviewing existing ones.

Key cases reviewed in this paper:

New Brunswick (Minister of Health and Community Services) v G (J.)

Gosselin v Quebec (Attorney General)

Wynberg v Ontario

Flora v Ontario (Health Insurance Plan, General Manager)

Chaoulli v Quebec (Attorney General)

Victoria (City) v Adams

Law v Canada (Minister of Employment and Immigration)

R v Kapp

Auton (Guardian ad litem of) v British Columbia (Attorney General)

Eldridge v British Columbia (Attorney General)

Cameron v Nova Scotia (Attorney General)

Nova Scotia (Workers' Compensation Board) v Martin

Ball v Ontario (Community and Social Services)