Title:
Ableism's New Clothes: Achievements and Challenges for Disability Rights in Canada

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Abstract:
This paper offers a critical examination of disability rights in Canada in four policy domains: (1) the concept of disability, (2) non-discrimination and equality, (3) accessibility and inclusion, and (4) social support. The *Convention on the rights of Persons with Disabilities* and scholarship from disability legal studies and the applied philosophy of disability provide normative benchmarks for the inquiry. The paper identifies several shortcomings within political arrangements, policies, laws, and judicial decisions, and traces them back to outdated but enduring conceptions of disability, namely, the "medical model", the "charity model", as well as other impacts of an ableist ideology, such as the normalization and disenfranchisement of persons with disabilities.

Key Words:
Disability; Canada; Equality; CRPD; Medical Model; Charity; Deserving Poor

Ableism's New Clothes: Achievements and Challenges for Disability Rights in Canada[*]

1. Introduction

Disability law made great strides in Canada over the last two decades. Canada signed the *Convention on the Rights of Persons with Disabilities*[1] (CRPD) on March 30, 2007 and ratified it on March 11, 2010. Carla Qualtrough, a former Paralympic athlete, served as the first "Minister of Sports and Persons with Disabilities" under the Federal Government in 2015. In December 2018, Canada accessed to the *Optional Protocol to the CRPD*, which allows individuals to bring a complaint before the Committee on the Rights of Persons with Disabilities ("Committee") if their CRPD rights have been violated. The long-awaited *Accessible Canada Act* (ACA)[2] received royal assent in 2019. In the same year, Canada followed the Committee's recommendation of designating the Canadian Human Rights Commission as the independent monitoring mechanism under the Convention.[3] By now, half of the provinces and territories have passed accessibility legislation, while others are following on their heels.

Nonetheless, there remains formidable challenges to realizing disability justice, which is understood in this paper as the ideals embodied in the CRPD, namely: the self-determination and social inclusion of persons with disabilities ("PWD"), seen as subjects with fundamental freedoms and rights, including socio-economic ones, rather than objects of charity, medical treatment, and protective measures. Among such challenges, disability policies continue to be an unequal patchwork of legislation and programs across the country. Existing disability laws lack teeth, scope, effective monitoring, and intersectional or systemic reach. Judicial interpretations of disability rights are arguably narrow and defer to legislative and executive authorities which, in turn, sometimes keep disability needs hostage to the vagaries of budgetary constraints and political rhetoric.[4]

Additionally, for better and for worse, the disability community, policymakers, and legal/disability scholars must contend with Canadian federalism and dualist model of treaty implementation, according to which treaties signed by the authorized representative of the country do not have direct application in domestic law. While the federal Government must[5] and does[6] seek support and cooperation of provinces and territories before it commits Canada to perform obligations that fall under provincial heads of power, federal and provincial/territorial governments have a long history of disputing encroachments on the areas over which they have power, including areas of central relevance to the well-being of PWD, such as healthcare, transportation, and disability

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[*] This research was partly funded by the SSHRC. I thank [redacted for anonymous review].

[1] *Convention on the Rights of Persons with Disabilities,* 13 December 2006, UNGAOR, 61st Sess, A/RES/61/106 [*CRPD*].

[2] SC 2019, c 10 [*ACA*].

[3] Committee on the Rights of Persons with Disabilities, *Concluding Observations on Canada,* 2017, CRPD/C/CAN/CO/1 at para 58.

[4] See e.g. Canadian Civil Society Report Group, Parallel Report for Canada (27 February 2017) 32, online (pdf): <www.cad.ca/wp-content/uploads/2017/04/Canadian-Civil-Society-Parallel-Report-Canada-English.pdf>

[5] See *Canada (AG) v Ontario (AG),* [1937] UKPC 6, [1937] AC 326.

[6] See "Policy on Tabling of Treaties in Parliament" (*Government of Canada*) <www.treaty-accord.gc.ca/procedures.aspx?lang=eng>.

benefits.[7] The institutional roadblocks to collaborative forms of federalism that may provide a more effective path towards an inclusive Canada for PWD have deep cultural and historical roots.[8]

The time is therefore ripe to take stock of recent milestones and the challenges ahead. This paper offers a critical examination of disability rights in Canada in four policy domains: (1) the concept of disability, (2) non-discrimination and equality, (3) accessibility and inclusion and (4) social support. I survey some of the main legislative and executive measures taken by federal and provincial governments and key jurisprudence related to these areas to offer a general picture of Canada's compliance with the CRPD. I use CRPD and mainstream disability-focused literature as pragmatic normative benchmarks to determine what counts as an accomplishment or a shortcoming, and to explore the root causes of longstanding issues. I hypothesize that the gravest of these issues can be traced to the continuing influence of harmful and enduring conceptions of disability, namely, the "medical model" and the "charity model." I situate Canada's achievements and remaining challenges within their historical and ideological context, which continues to evolve alongside the effective interpretation and implementation of disability rights.

1.1 Scope, Objectives and Research Methods

While no benchmark is uncontroversial and other normative benchmarks (e.g., theories of well-being or of disability justice) could be used to reflect on a country's performance in terms of disability justice, the CRPD crystallizes a growing consensus within the international community about what disability rights should entail and how disability justice should be achieved. The brief survey in this paper must set aside controversies around the CRPD itself.[9] The CRPD's ideals also constitute a strategic lever for change since Canada has not only officially subscribed to them, but was also "one of the most progressive and engaged delegations involved in developing and negotiating the CRPD."[10]

Moreover, Article 33 of the CRPD sets out obligations for national implementation and monitoring of the Convention. It goes further than the general obligation in international law that States must honour the treaties they consent to, as reflected in the *Vienna Convention*, because it prescribes specific mechanisms of monitoring and implementation. As the 2009 Thematic Study

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[7] See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91–95, reprinted in RSC 1985, Appendix II, No 5.5

[8] See generally Michael Prince, 'Designing Disability Policy in Canada: The Nature and Impact of Federalism on Policy Development', in Alan H Puttee, ed, *Federalism, Democracy, and Disability Policy in Canada* (McGill-Queen's University Press 2002).

[9] Such as the meaning of the "human rights models of disability" that underlies it or the controversial scope of certain articles, such as the robustness of socio-economic rights, the demandingness of monitoring obligations, the interpretation of a universal right to legal capacity. Some insightful recent writings on these debates include: Anna Lawson & Angharad E Beckett, "The Social and Human Rights Models of Disability: Towards a Complementarity Thesis" (2021) 25:2 INTL JHR 348; Julia P Duffy, *The Indivisibility of Human Rights and Decision-Making by, with and for Adults with Cognitive Disabilities* (PhD Thesis, Queensland University of Technology, 2022).

[10] Council of Canadians with Disabilities & the Canadian Association for Community Living, "UN Convention on the Rights of Persons with Disabilities: Making Domestic Implementation Real and Meaningful" (2011) CCD – CACL Working Paper, online: <www.ccdonline.ca/en/international/un/canada/making-domestic-implementation-real-and-meaningful-feb2011> See also Canada, Parliamentary Information and Research Service, *The United Nations* Convention on the Rights of Persons with Disabilities: *An Overview*, by Julian Walker, Publication No. 2013-09-E (Ottawa: Legal and Legislative Affairs Division, 27 February 2013) at 5.

on Article 33 explains, Article 33 is almost "unprecedented in a human rights treaty."[11] The *travaux préparatoires* of the CRPD confirm that this exceptional measure was generally thought to be needed (1) to correct "the lack of effective implementation of the existing rights for persons with disabilities" and (2) to provide better monitoring provisions than older human rights treaties and potentially serve as an example for future treaties or for reforming older ones. Member States also generally supported (3) "the involvement and full participation of civil society, both persons with disabilities and their representative organizations."[12] The CRPD thus integrates the hard-earned wisdom of disability activism, reflected in the adage "nothing about us without us," that reporting, monitoring and redressing rights violations is most efficiently accomplished when the victims or their chosen representatives are involved in the process.

Within the CRPD's list of rights and obligations, I have chosen to focus on the four aforementioned areas of policymaking because they are likely to have a great impact on the well-being and inclusion of PWD within Canada's unique history of disability policymaking. Specifically, (1) disability policies have been historically entangled with *social support* and federal intervention in provincial matters, as Canada transitioned into an industrial economy, dealt with post-war reconstruction and established a national social insurance program reflecting Canada's New Deal,[13] including several constitutional amendments placing unemployment insurance[14], old age pensions[15], and survivor and disability benefits[16] under federal jurisdiction. To this day, poverty remains the grim companion of disability.[17] Approaching disability policies through (2) the lens of *equality rights* mirrors another historically important milestone in the history of disability policy in Canada: the gradual shift to viewing disability policies as a human rights matter rather than a medical matter. While equality rights have been the main terrain of social and legal contestation for PWD to challenge existing laws and gain equal access to social institutions, disability activists and scholars have long argued that (3) pro-active and systematically enforced *accessibility laws* would shift the burden of achieving a more inclusive society onto the State.[18] Whether recent accessibility legislation and bills will serve to meet the disability community's hopes remain to be determined. Finally, I focus on (4) the concept of disability because, far from mere rhetorical window-dressing, defining disability as a thick (both descriptive and evaluative) concept tends to encompass a bundle of positions on who qualifies under disability legislation; what kind of

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[11] UN General Assembly, 'Thematic Study by the Office of the United Nations High Commissioner for Human Rights on the Structure and Role of National Mechanisms for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities', A/HRC/13/29, para 15 [UNGA Thematic Study]. The only exception being an obligation to establish "one or several independent national preventive mechanisms for the prevention of torture at the domestic level" in the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA RES, UNGAOR, 57th Sess, A/RES/57/199 (2003), Art 17.

[12] Report of the Chairman, Ad hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 6th Sess, UN Doc A/60/266 (2003).

[13] Keith G Banting, *The Welfare State and Canadian Federalism* (2nd ed, McGill-Queen's University Press, 1987) at 48.

[14] *British North America Act, 1940*, 3-4 Geo. VI, c. 36 (UK).

[15] *British North America Act, 1951* 14-15 Geo. VI, c. 32 (UK).

[16] *British North America Act*, 1964, 12-13 Eliz. II, c. 73 (UK).

[17] 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 (Ottawa: Statistics Canada, 28 November 2018).

[18] See e.g. David Lepofsky, "What Should Canada's Promised New National Accessibility Law Include? A Discussion Paper" (2018) 38:1 NJCL 169.

problem disability entails; what kind of solution these problems call for; and who is responsible for providing these solutions. It also mirrors governments' ideological commitments, the analysis of which is connected to the second of the objectives pursued in this paper, as detailed below.

My critical examination of Canada's compliance with the CRPD in each of the aforementioned areas of disability policy has two specific objectives. The first objective is to provide a descriptive survey of some of the key accomplishments and shortcomings of Canada's performance under the CRPD. To accomplish this goal, I review some of the main legislative and executive measures taken by federal and provincial governments and key jurisprudence related to these areas to offer a general picture of Canada's compliance with the CRPD. My second objective is to hypothesize potential root causes of an ideological[19] nature for such policy shortcomings. The most plausible root causes, I suggest, are a narrow interpretation of equality rights that does not challenge the social structures from which inequality stems, the normative figure of the "deserving poor," and an ongoing reliance on medicalization and normalization of disability—all of which are manifestations of ableism, an oppressive ideology defined in section 2.

The descriptive component of both objectives relies on legal research and doctrinal analysis to identify legal rules. I use disability and legal scholarship, interpreted in the light of the CRPD, as well as statements from civil society made before the CRPD Committee to delineate what counts as potential policy successes or shortcomings. Using this normative benchmark seems not only pragmatically and legally relevant because of Canada's ratification of the CRPD and accession to the *Optional Protocol to the CRPD*,[20] but also ethically relevant as end-users' needs have long gone unsatisfactorily addressed. Implementing the CRPD in Canada is thus a novel political incentive presenting an opportunity for long awaited policy change.

The critical component of both objectives uses the methods of the philosophy of disability law, which is a specific kind of applied legal and political philosophy. Applied legal and political philosophy "aims to apply the insights gained by pure philosophy to specific, concrete political and legal issues [by] adopting philosophical methods to explore issues outside the narrow set of philosophical problems."[21] In this case, the philosophical lenses I use are: political and moral theories of disability; theories on the history, sociology, and ontology of disability (informing "disability models"); and disability legal studies, which is a field concerned, not with "disability

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[19] I use the concept of ideology in the traditional sense of an "action-oriented system of beliefs" that can underly or orientate public policies, and can do so covertly, because ideology operates within epistemic and motivational realms that can be, but are not necessarily, articulated as public reasons open for debates and justifications: Daniel Bell, The End of Ideology (Glencoe, Ill.: Free Press 1960), cited in Sypnowich, Christine, "Law and Ideology", in Edward N. Zalta, ed., The Stanford Encyclopedia of Philosophy (Metaphysics Research Lab, Stanford University 2019).

[20] Canada signed the CRPD on March 30, 2007 and ratified it on March 11, 2010. Canada also accessed to the *Optional Protocol to the CRPD* in December 2018. The *Protocol* allows individuals to make complaints ("communications") for rights violations before the Committee on the Rights of Persons with Disabilities. Canada complied through accession to the Protocol in December 2018.

[21] Michelle Madden Dempsey & Matthew Lister, "Applied Political and Legal Philosophy" in Kasper Lippert-Rasmussen, Kimberley Brownlee & David Coady, eds, *A Companion to Applied Philosophy* (Chichester, UK: Wiley-Blackwell, 2016) 313 at 314.

law," but with "the constitutive role of law in the production of disability"[22] and the promotion of "inclusion, social cohesion, and social change."[23]

This paper may therefore inform both future activist[24] work and theoretical work. The former kind of work, such as shadow reports issued by civil society alongside countries' reports to the CRPD Committee, strategically focus on specific harmful outcomes and demands, whereas the latter scholarship does not necessarily serve political goals. By exploring potential root causes of current shortcomings, including judicial and legislative institutional commitments, interpretative methods, and cultural imaginaries, this paper establishes a bridge between abstract philosophical work and politically urgent goals, to draw attention on ideologies or values—especially ableist ones—that could explain longstanding political or social resistance to effectively making CRPD's ideals a reality.

I concede that the limited scope of this project is unavoidably contestable because it is impossible to make a definitive case that some rights are more important than others. I also concede that the root causes of ongoing problems I identify are speculative. My observations can nonetheless help policymakers and activists to orientate their efforts strategically, and I invite further doctrinal, conceptual, and empirical research to test the hypothetical components of this paper. Finally, I concede that certain cultural or ideological issues are notoriously difficult to correct and monitor using the policy tools available in liberal democracies. It remains crucial to publicize their impact and to invite activists and scholars to engage with them using more progressive or systemic kinds of remedies that have not been traditionally implemented, but that are very much part of the CRPD's programmatic outlook on disability justice. I invite other researchers to expand on it beyond what this present critical survey can accomplish.

2. The Concept of Disability, or the Spectre of the Medical Model

The definition of "disability" in the CRPD reads as follows:

> [D]isability is an evolving concept and […] results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others;[25]
>
> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[26]

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[22] Sagit Mor, "Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy" (2006) 18:1 Yale JL & Human 63 at 64.

[23] Arlene Kanter, "The Relationship between Disability Studies and Law" in AS Kanter & BA Ferri, eds, *Righting Educational Wrongs* (Syracuse, NY: Syracuse University Press, 2013) 1 at 27.

[24] Which includes policy-related work done by disability NGOs as well as more "activist" disability legal scholarship, "motivated by an ambition of having a certain causal effect on the world [though political engagement or education]." Kasper Lippert-Rasmussen, "The Nature of Applied Philosophy" in Kasper Lippert-Rasmussen, Kimberley Brownlee & David Coady, *supra* note 21 at 10).

[25] *CRPD*, *supra* note 1 at Preamble, para 5.

[26] *Ibid* at art 1, para 2.

Various disability NGOs in Canada have endorsed a combination of these elements in their bylaws and expressed the wish before the Committee that Canada adopt this definition in its (then) upcoming federal accessibility legislation.[27] The 2019 ACA[28] fulfilled this wish and even specified that it would include controversial situations (such as episodic or less visible/evident condition):

> [Disability] means any impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment — or a functional limitation — whether permanent, temporary or episodic in nature, or evident or not, that, in interaction with a barrier, hinders a person's full and equal participation in society.[29]

It also included the definition of "barrier" or obstacle as:

> anything — including anything physical, architectural, technological or attitudinal, anything that is based on information or communications or anything that is the result of a policy or a practice — that hinders the full and equal participation in society of persons with an impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment or a functional limitation[30]

Taken together, these elements provide a broadly inclusive understanding of disability, and makes room for what counts as "disability" to adapt alongside evolving (cultural, economic, attitudinal, etc.) barriers of all kinds.

In the rest of this section, I will explain why, despite occasionally endorsing a CRPD-compliant definition of disability in accessibility and anti-discrimination legislation, Canadian legislative and judicial interpretations of disability are still often embedded within the "medical model," which defines disability as a purely medical, physiological issue, to be assessed and treated through medical expertise.[31]

Disability is a polysemic concept which can be defined or modelized in various ways.[32] Disability has historically been medicalized, and equated to "impairments," that is, deviations from species-typical anatomy or physiological functions.[33] From the 1970s onward, the "social model" sought to politicize disability by equating it with the oppression of PWD, notably through exclusion and

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[27] Canadian Feminist Alliance for International Action (FAFIA) and the DisAbled Women's Action Network (DAWN Canada), *Women with Disabilities in Canada*: *Report to the Committee on the Rights of Persons with Disabilities on the Occasion of the Committee's Initial Review of Canada* (*FAFIA,* February 2017) at 2, online (pdf): <www.fafia-afai.org/wp-content/uploads/2017/02/FAFIA_DAWN_CRPD2017.pdf>
The disability NGOs that adopted this definition include the Council of Canadians with Disabilities, Disabled Women's Network of Canada (DAWN Canada), Alberta Network for Mental Health (ANMH) and Alberta Alliance on Mental Illness and Mental Illness and Mental Health (AAMIMH).

[28] ACA, *s*upra note 2.

[29] *Ibid* at s 2, para 5.

[30] *Ibid* at s 2, para 2.

[31] David Wasserman, "Disability: Definitions and Models" (14 April 2022), online: *Stanford Encyclopedia of Philosophy* <www.plato.stanford.edu/entries/disability/>

[32] [Redacted for anonymous review].

[33] See e.g. the World Health Organization's International Classification of Functioning, Disability and Health (ICF), WHA, 54th Sess, 9th Plenary Mtg, WHA54.21.

social barriers preventing them from fully participating in society.[34] This model attempted to emancipate PWD from the "role of the sick" and the implications of an undesirable state and an expectation of docility.[35] Although the social model of disability underwent various criticisms,[36] it remains the most fecund legacy that disability studies contributed to the political and legal world.

The CRPD heralded another paradigm shift in understanding "disability" from a human rights perspective, rather than from other "medical" or "social" perspectives. This explains why, for instance, the High Commissioner for Human Rights recommended that State parties avoid designating ministries of health, education, or welfare and labour, as governmental "focal points" to oversee the implementation of the CRPD. The Commissioner recommended designating ministries responsible for justice and human rights instead.[37]

The human rights model is characterized by treating disability claims as human rights claims. As such, it should notably imply that the human rights model of disability has a universal scope; that it draws its normative force from the concept of human dignity; that disability claims—even socio-economic and cultural ones—have a special robustness, that is, they cannot be summarily denied because of "non-urgent ordinary routine goals of political administration;"[38] and that the content of these claims can be theoretically debated in the way human rights often are, for instance, on the basis of a conception of human flourishing.[39] As such, this model of disability seems to hold "disability" hostage to the abundant disagreements on the content and foundation of human rights.

Its proponents have defined it in these terms:

> The human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics. It places the individual centre stage in all decisions affecting him/her and, most importantly, locates the main 'problem' outside the person and in society.[40]

It is not the first model of disability placing discrimination at the heart of the concept, and the extent to which it should supplant the influential social model of disability is controversial.[41] Advocates of the human rights model of disability claim that this model overcomes the shortcomings of the social model. For instance, Theresia Degener contends that the human rights model succeeds on at least six counts on which the social model does not perform (as) well:

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[34] Vic Finkelstein, *Attitudes and Disabled People: Issues for Discussion* (New York: World Rehabilitation Fund, 1980).

[35] Saad Z Nagi, "Some Conceptual Issues in Disability and Rehabilitation" in Marvin B Sussman, ed, *Sociology and Rehbailitation* (Washington, DC: American Sociological Association in Cooperation with the Vocational Rehabilitation Administration, US Dept of Health, Education and Welfare, 1965) at 104–5.

[36] See e.g. Tom Shakespeare & Nicholas Watson, "The Social Model of Disability: An Outdated Ideology?" in SN Barnatt & BM Altman, eds, *Exploring Theories and Expanding Methodologies: Where We Are and Where We Need To Go (Research in Social Science and Disability*) vol 2 (Bingley, UK: Emerald Group Publishing Ltd, 2001)

[37] UNGA Thematic Study, *supra* note 11 at para 27.

[38] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978) at 92.

[39] On the nature of human rights generally, consider Rowan S Cruft, Matthew Liao, & Massimo Renzo, eds, *Philosophical Foundations of Human Rights,* (Oxford, UK: Oxford University Press, 2015).

[40] See Gerard Quinn & Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (2002) UN HR/PUB/02/1.

[41] See Lawson & Beckett, *supra* note 9.

> First, the human rights model ensures that no person with a disability is denied legal capacity. Second, it goes beyond non-discrimination rights and includes first and second generation human rights. Third, it acknowledges that impairment matters in the life of persons with disabilities. Fourth, it recognizes that identity is composed of different layers. Fifth, it provides a roadmap for non-discriminatory preventative health policy. Sixth, the human rights model proves a roadmap for disability inclusive development and humanitarian aid.[42]

As I will further discuss in the next section of this paper, it is not difficult for Canadian politicians, legislators, and judges to conceptualize disability as *a* matter of human rights, since it has been so done in human rights codes since the 1970s. Nor is it a leap for them to connect PWD's rights to *equality* to the notion of dignity, itself said to be the "lodestar" of all *Charter* rights by the Canadian Supreme Court of Canada.[43] However, the same cannot be said of Canada's definitions of disability *outside* of the context of equality and anti-discrimination legislation.

Consider how disability was defined by the Supreme Court in 2000 in the context of *discrimination*. Justice L'Heureux-Dubé wrote for a unanimous court that disability was a socially and medically evolving concept that should be understood in a manner "consistent with the socio-political model":

> This is not to say that the biomedical basis of "handicap" should be ignored, but rather to point out that, for the purposes of the *Charter*, we must go beyond this single criterion. Instead, a multi-dimensional approach that includes a socio-political dimension is particularly appropriate. By placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a 'handicap'. In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes.[44]

As a result of this broad conception of disability, the Court recognized that the claimants could be considered as having a disability under a human rights code and ruled in their favour.

Just a few months later, in *Granovsky*,[45] the Court showed the limits of a dignity-based conception of disability rights when it was applied in the context of judicial interpretation of a legislative framework conferring disability benefits. Although the Court granted that the claimant was indeed disabled, it did not find that he was disabled in the way meant by a particular legislative provision intended to protect a special category of PWD, nor was the entire legislative framework impugned

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[42] Theresia Degener, "A New Human Rights Model of Disability" in Valentina Della Fina, Rachele Cera, & Giuseppe Palmisano, eds, *The United Nations Convention on the Rights of Persons with Disabilities* (Cham, Switzerland, 2017) 41 at 56.

[43] See *R v Kapp,* 2008 SCC 41 at para 21 [*Kapp*]. For a seminal claim to this effect, see: *R v Oakes*, [1986] 1 SCR 103 at 106, 26 DLR (4th) 200 [*Oakes,* cited to SCR].

[44] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27 at paras 76–7 [*Quebec (CDPJ) v Montreal*].

[45] *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 [*Granovsky*].

for omitting the specific disability-related needs of the claimant. Justice Binnie, writing for a unanimous Court, did not judge that the Court had a duty to intervene in addressing disability-related needs in this case.

I suggest the Court reached this conclusion in part by relying on a reductionist, medical conception of these needs. Justice Binnie expressed this conception through admonishing, "[t]he *Charter* is not a magic wand that can eliminate physical or mental impairments, nor is it expected to create the illusion of doing so. Nor can it alleviate or eliminate the functional limitations truly created by the impairment."[46] The appeal to notions of "true" impairments or limitations inevitably reintroduces the medical model of disability, and depoliticizes disability claims, thereby justifying rejecting them as *discrimination* claims. In this case, this engagement of the medical model supported the Court's holding that:

> the appellant has not demonstrated a convincing human rights dimension to his complaint. Assuming he can show an impairment and significant functional limitations, he fails to show that the government's response through the design of the Canada Pension Plan or its application demeans persons with temporary disabilities, or casts any doubt on their worthiness as human beings.[47]

An objection may be that it is appropriate to medicalize disability in the context of assessing eligibility for disability benefits reserved for grave disabilities. I respond that I only claim that medicalizing is a problem when it ousts important non-medical considerations. Second, I note that many scholars have criticized this issue directly or indirectly, but no one has defended the Supreme Court against such criticisms.[48] On the contrary, it is the Supreme Court that has yielded to several scholarly critiques (of the use of dignity or of comparator groups in a discrimination analysis) that could have been directed at the disability benefits case just discussed.[49] Finally, insisting on dealing with the macroscopic or systemic dimensions of a discrimination case in no way implies that "impairment" need be ignored under the human rights model.[50] On the contrary, sometimes, the physical or mental situation of someone can—and *should*—constitute the focus of a policy. Disability could be understood in a medical way in contexts in which this is judged to be necessary to respect individual rights, such as the right to autonomously choose medical care. For instance, Canada legalized medical assistance in dying in 2016. To qualify, patients must suffer from a "grievous and irremediable medical condition," defined as "a serious and incurable illness, disease or disability," characterized by "an advanced state of irreversible decline in capability" causing them "enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable."[51] Medical assessments of suffering are seen as central to disability-related needs in this context. However, some NGOs within the

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[46] *Ibid* at para 33.

[47] *Ibid* at para 70.

[48] See e.g. criticisms of the Court's use of comparator groups, discussed below at note 95.

[49] See e.g. *Kapp*, *supra* note 43; *Withler v Canada (AG),* 2011 SCC 12 [*Withler*]; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 [*Taypotat*].

[50] This would be the strongest case for "medicalizing" disability, since disregarding the physical harms of impairment has been one of the most common criticisms of the social model. See e.g. Shakespeare & Watson, *supra* note 36.

[51] *Criminal Code*, RSC, 1985, c C-46 at s 241.2(2).

disability community[52] and legal scholars[53] have been critical of the government's lack of attention to the socio-political dimensions of disability in the context of MAiD, such as the ones mentioned by the Special Rapporteur on the rights of persons with disabilities, the Special Rapporteur on extreme poverty and human rights, and the Independent Expert on the enjoyment of all human rights by older persons.[54] This controversial situation illustrates that one person's "disability" can be simultaneously understood from a medical perspective *and* from a socio-political one,[55] and that a medical understanding can arguably be beneficial or harmful, depending on the circumstances.

In sum, disability is mostly operationalized as a robust human rights matter in the contexts of accessibility and of anti-discrimination and equality rights, that I will examine in the next two sections. Even within these contexts, and more so in the context of other disability-related public policies, the influence of the medical model of disability survives. I suggest that the influence of the medical model can be faulted both for constraining disability rights and for concealing this fault. This contention is hardly controversial: decades after having been debunked, aspects of the medical model are still unreflectively endorsed by various public and private actors and underlie disability policies in most states parties to the CRPD.[56] On the positive side, Canada's increasing uptake of a broad definition of disability across federal and provincial human rights and disability statutes at least mean that it will be increasingly difficult for courts or respondents to dismiss complaints on the basis that the plaintiff is not "disabled." The challenges awaiting persons duly recognized as having a "disability," however, remain considerable.

From the perspective of the human rights model, the problem is neither disability's unavoidable polysemy, nor its medical dimensions. The issue is not Canada's claim that "[b]ecause of its complexity, there is no single, harmonized 'operational' definition of disability across federal programs."[57] Indeed, the ACA requires not only the Canadian Human Rights Commission, but also other federal agencies[58] to intervene in their specialized areas. The problem, one may even suggest, is not that disability is still principally addressed and monitored within ministries of health and labour or education in most legal jurisdictions.[59] Instead, the management of "disability" by various experts in these ministries only becomes antithetical to the CRPD's

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[52] Inclusion Canada, "Bill C-7 Through a Disability Lens" (22 October 2022), online (pdf): *Inclusion Canada* <*www.inclusioncanada.ca/wp-content/uploads/2020/11/Bill-C-7-Through-a-Disability-Lens.pdf*> ; Factum of the Intervener Council of Canadians with Disabilities and the Canadian Association for Community Living in *Carter v Canada (AG)*, 2015 SCC 331.

[53] Derek Ross, *Assisted Death: Legal, Social and Ethical Issues After Carter* (LexisNexis Canada, 2018).

[54] Gerard Quinn, Claudier Mahler, & Olivier De Schutter, Mandates of the Special Rapporteur on the rights of persons with disabilities, the Independent Expert on the enjoyment of all human rights by older persons, and the Special Rapporteur on extreme poverty and human rights (delivered at the Palais des Nations, Geneva, 3 February 2021) OL CAN 2/2021.

[55] See, e.g. Advisors to the Vulnerable Persons Standard, "Failing People with Disabilities who Experience Systemic Suffering: Gaps in the Monitoring System for Medical Assistance in Dying" (October 2020), online (pdf): <www.static1.squarespace.com/static/56bb84cb01dbae77f988b71a/t/5f90666476d4f07d2c0233dc/1603298916667/MAiD+Monitoring+-+Failing+People+with+Disabilities+-+Final.pdf>.

[56] Degener, *supra* note 42 at 42; Wasserman, *supra* note 31 at s 1.1.

[57] Canada, Human Resources and Skills Development Canada, *Federal Disability Reference Guide*, Catalogue No HS64-17/2013E-PDF (Ottawa: Human Resources and Skills Development Canada, 2013).

[58] Such as the Canadian Radio-television and Telecommunications Commission, see *ACA*, *supra* note 2 at ss 42–59; the Canadian Transportation Agency, see *ACA*, *supra* note 2 at ss 60–68.

[59] UNGA Thematic Study, *supra* note 11 at para 27.

human rights model of disability when they deny that the disability issues they are managing are also human rights issues—whether explicitly and fundamentally or only implicitly. An endorsement of the human rights models across the board would notably constrain the use of ordinary budgetary and political considerations in denying PWD certain goods without also considering whether this denial meets the more demanding justificatory standards of human rights violations. Canada's law must also take socio-economic rights more seriously before it can substantially aspire to follow the CRPD's innovative integration of first and second generation rights.[60] The libertarian streak in Canada's human rights culture haunts the three policy areas examined in the following sections, often restrictive on "positive" interpretations of rights, although sometimes progressive with "negative" ones, as explained below.[61]

3. Non-Discrimination and Equality, or the Spectre of Normalization

The incorporation of "disability" in anti-discrimination statutes throughout Canada since the 1970s[62] has played an important part in making disability law a matter of equality, justice and human rights, rather than a medical matter. The recognition that "disability" should be a prohibited ground of discrimination corresponded to the increasing activism of the disability rights movement in Canada in the 1970s. The UN *Declaration on the Rights of Disabled Persons* in 1975[63] and the UN's Resolution proclaiming 1981 to be the "International Year for Disabled Persons"[64] bolstered this domestic effort. Even though such interventions often conveyed a medical understanding of disability, as most early policies did, they helped local groups to advocate for the inclusion of "disability" in the *Charter of Rights and Freedoms* in the *Constitution Act, 1982*. As years passed, judicial interpretations and legislative amendments of definitions of disability broadened and became more sophisticated, incorporating conceptions from disability scholarship and evolving international consensus, such as the World Health Organization's.[65]

Each province and territory has human rights legislation. These laws set up either a human rights commission that receives individual complaints or a human rights tribunal that adjudicates discrimination cases, or both. These human rights acts all contain a right to equality prohibiting discrimination on the basis of disability in specific, enumerated contexts.[66] For instance, the Ontario *Human Rights Code* stipulates that "[e]very person has a right to equal treatment […] without discrimination because of […] disability."[67] Every human rights code prohibits discrimination based on disability in most domains of private life, namely: services; goods and

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[60] Gauthier de Beco, The Indivisibility of Human Rights and the Convention on the Rights of Persons With Disabilities (2019) 68:1 ICLQ 141.

[61] See e.g. Peter J McCormick, *The End of the Charter Revolution: Looking Back from the New Normal* (Toronto: University of Toronto Press, 2014); Margot Young et al, eds*, Poverty, Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2008); Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 versus Section 15 Charter Showdown" (2013) 22:1 Const Forum Const 31.

[62] Early prohibition of disability discrimination in human rights legislation included the inclusion of "physical disability" in 1974 amendments to Nova Scotia's *Human Rights Act*, RS, c 214, s 1 and the 1977 *Canadian Human Rights Act*, RSC, 1985, c H-6)

[63] *Declaration on the Rights of Disabled Persons*, GA Res 3447 (XXX), UNGAOR, 13th Sess, UN Doc A/RES/3447 (XXX).

[64] See International Year of Disabled Persons, GA Res 123, UNGAOR, 31st Sess, UN Doc A/RES/31/123.

[65] See, e.g. references to such definitions of disability in *Quebec (CDPJ) v Montreal*, *supra* note 44.

[66] Quebec's *Charter of Human Rights and Freedoms*, CQLR c C-12, s 10 [*QC Charter*].

[67] Ontario *Human Rights Code*, RSO 1990, c H19 ss 1–3, 5–7.

facilities customarily available to the public; accommodation; contracts; workplace; and employment. The federal human rights legislation would apply in a similar way to discrimination against people who are employed by, or receive services from, the federal government, a federally regulated organization (e.g., banks; non-local transportation companies; telecommunication companies), or First Nations governments.

By contrast, the constitutional *Charter of Rights and Freedoms* applies to "law" rather than to private actors. "Law" has been interpreted to include governmental actions taken under both statutory and common law authority.[68] The *Charter* is thus meant to protect PWD from being reduced to second-class citizens by the state itself. The *Charter* right to equality before and under law and equal protection and benefit of law reads as follows:

> 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, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[69]

As a constitutional text, the *Charter* may be invoked to invalidate any laws inconsistent with it, which ensures that all federal, provincial and territorial laws treat PWD equally. This confers some uniformity across all provinces despite regional differences in legislation or their judicial interpretations. While private discrimination would be captured by human rights codes rather than by the constitutional *Charter*, individual complainants could eventually attack the constitutionality of a provincial government's actions or laws that would fail to adequately protect them against such private discrimination. This can potentially include legislative omissions, as was the case in *Vriend v. Alberta*,[70] in which the plaintiff successfully challenged the Alberta human rights legislation[71] for not including "sexual orientation" as a prohibited ground of discrimination. In another case,[72] the Supreme Court of Canada held that the Nova Scotia's *Workers' Compensation Act* violated equality rights under the *Canadian Charter* because it excluded chronic pain from the purview of the regular workers' compensation system. Human rights codes, which have a "quasi-constitutional" status,[73] can achieve a similar result. For instance, in *Ontario (Disability Support Program) v. Tranchemontagne*,[74] the Ontario Court of Appeal held that the *Ontario Disability Support Programs Act* was discriminatory under the Ontario *Human Rights Code* for rendering people whose disability is only due to a dependence on alcohol or drugs ineligible for income benefits.

The equality rights protected by anti-discrimination legislation and the Canadian *Charter* are not absolute. Governments can impose limits to the exercise of these rights insofar as these limits are reasonable and demonstrably justified in a free and democratic society.[75] Since the *Charter* was

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[68] Peter W Hogg, *Constitutional Law of Canada* (Thomson Reuters) at ss 55-11, 55.5(b), ch 37.

[69] *Canadian Charter of Rights and Freedoms*, s 15(1), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 1 [*Charter*].

[70] [1998] 1 SCR 493, 156 DLR (4th) 385.

[71] *Individual's Rights Protection Act*, RSA 1980, c I-2

[72] *Nova Scotia v Martin; Nova Scotia v Laseur*, 2003 SCC 54.

[73] *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145 at 158; 137 DLR (3d) 219.

[74] 2010 ONCA 593.

[75] *Charter*, *supra* note 69 at s 1.

entrenched in the Canadian Constitution, Courts have developed tests both to determine whether a violation of equality rights occurred[76] and whether this violation can be justified.[77] Human rights codes may impose similar limitations on rights.[78] Tests of proportionality and rationality of violations under the constitutional *Charter* verify that governments are not unreasonably, unnecessarily or disproportionately violating individual rights. By contrast, courts applying human rights codes mostly limit discrimination complaints by evaluating whether an employer or an entity offering services or goods customarily available to the public have met their "duty to accommodate" up to a standard of "undue hardship." The notions of "reasonable accommodation" and "undue hardship" have been developed in the case law and have sometimes been entrenched in human rights legislation.[79]

Taken together, these statutory and constitutional protections against discrimination mirror the CPRD's equality rights listed in article 5:

> 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
> 2. States Parties shall prohibit all discrimination on the basis of disability […]
> 3. […] States Parties shall take all appropriate steps to ensure that reasonable accommodation[80] is provided.[81]

Despite these legal protections on the books, the Canadian Civil Society Report Group told the Committee that "almost 50% of discrimination complaints filed in Canada involve persons with disabilities" and that Canada had not sufficiently developed measures to address intersectional discrimination against PWD, especially regarding indigenous people.[82] In its concluding observations, the Committee reiterated these concerns :

- The persisting gaps in the exercise and enjoyment of rights by persons with disabilities, such as the rights to education, work and employment and an adequate standard of living,

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[76] *Oakes*, *supra* note 43.

[77] See e.g. *Taypotat*, *supra* note 49.

[78] For instance, the Quebec *Charter of human rights and freedoms* has a provision (s 9.1) which allows the provincial government to limit by law the scope of the freedoms and rights, and limits to their exercise. This provision was found by the Supreme Court to "[correspond] to s. 1 of the Canadian Charter and that it was subject, in its application, to a similar test of rational connection and proportionality." *Ford v Quebec (AG)*, [1988] 2 SCR 712 at 769-770, 54 DLR (4th) 577.

[79] For instance, the Supreme Court of Canada has stated that the "goal of accommodation is to ensure that an employee who is able to work can do so. […] The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship." *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 at para 14 [*Hydro-Québec*].

[80] "Reasonable accommodation" is defined in article 2 as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms." See *CRPD*, *supra* note 1, art 2.

[81] *Ibid* at art 5.

[82] Canadian Civil Society Report Group, *supra* note 4 at 3.

due to, among other things, a lack of affordable housing and access to water and sanitation;
- The intersecting nature of discrimination against women and girls with disabilities, indigenous persons with disabilities and migrant persons with disabilities, who face heightened risks of gender-based violence, poverty, marginalization and barriers in access to mental health-care services.[83]

I suggest that one reason for the persistent failure of equality rights to address these issues is the continuing influence of "normalcy" on the design and interpretation of public policies. The conception of "normalcy" I refer to is the one subsuming the notion of ableism. Ableism has been defined as

> A network of beliefs, processes and practices that produces a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability then is cast as a diminished state of being human.[84]

The normal/abnormal, same/different, able-bodied/disabled dyads postulate non-disabled people as the desirable norm, and disabled people as undesirable deviancy. This conceptualization of disability obscures that "disabled bodies/minds" and "non-disabled bodies/minds" construct one another. It assigns otherness, difference or abnormality, to a group "even when 'difference' is a comparison, describing a relationship between people."[85] An ableist ideology is premised on the individualization and devaluation of what could instead be interpreted as a relational concept. Instead of a diverse population of people with various changing abilities, it depicts "the disabled" as "outliers," to be "exiled to the margin of society."[86]

This outlook severely limits public policies targeting disability. While "[a] 'successful disabled person' [is] understood as one who comes very close to the standard of normalcy,"[87] disability norms within this paradigm will endeavour to benefit PWD by normalizing or assimilating them into "normal" infrastructures of work, education, health care, and family life. This is further achieved by capping disability supports or measures of accommodations to levelling PWD up to the level of non-disabled persons (i.e., the "normal"). Altogether, this outlook ignores many of the pressing (relational) injustices characterizing the current situation of PWD claimants.[88]

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[83] Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Canada' CRPD/C/CAN/1 (2015) at 3.

[84] Fiona Kumari Campbell, Contours of Ableism: The Construction of Disability and Abledness (New York: Palgrave McMillan, 2009) at 5.

[85] Martha Minow, "Universal Design in Education: Remaking All the Difference" in Kanter & Ferri, *supra* note 23.

[86] Anita Silvers and Leslie Pickering Francis, "Justice through Trust: Disability and the "Outlier Problem" in Social Contract Theory" (2005) 116:1 Symposium on Disability 40 at 45.

[87] Tanya Titchkosky & Rod Michalko, *Rethinking Normalcy: A Disability Studies Reader* (Toronto: Canadian Scholars Press, 2009) at 5.

[88] See e.g. Anita Silvers, "No Talent? Beyond the Worst Off!: A Diverse Theory of Justice for Disability" in Kimberley Brownlee and Adam Cureton, eds., *Disability and Disadvantage* (Oxford: Oxford University Press, 2009) [Silvers, "No Talent?"]; Anita Silvers, David Wasserman, & Mary B Mahowald, eds, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Lanham, MD: Rownman & Littlefield, 1998).

Policymakers may also create “special” regimes for PWD who cannot be normalized, but such regimes generally do not address systemic or historical injustice. Instead, they are meant to provide minimum (not even capped to the “norm”) standards of living and are seen as exceptional budgetary expenditures, as though PWD were in the situation of any other lobbying groups asking for a handout. I come back to the roots of this problem in the last section.

Judicial interpretations of equality rights are not immune to the “fatal attraction”[89] of normalization and are susceptible to placing the non-disabled at the centre of their analysis. This may occur when PWD use equality rights to demand access to goods or opportunities *not* already available to non-disabled people under the law, and therefore have difficulty claiming that they are not treated the same as non-disabled people.[90] As Dianne Pothier explained in 2006, “[w]here comparison is made from an able-bodied reference point, inequality for the disabled is likely to go unrecognized. […] The needs related to a particular disability will often be unique, so no one else will be receiving anything like the benefit claimed.”[91] Alternatively, persons with disabilities X may not being granted access to special regimes designed for people with disabilities Y.[92] As a result, it has long been a challenge for PWD with needs that do not resemble the needs of non-disabled people to claim that a failure to meet *their* needs is a discriminatory omission.

Equality rights could be given a broader scope, but typically, they are not: discrimination is understood primarily as obstacles standing in the way of accessing what non-disabled people access under regimes designed for non-disabled people. This line of thought resembles the infamous “separate but equal” doctrine,[93] as Justice Louise Arbour, then at the Court of Appeal, perspicaciously noted in a decision that was reversed by the Supreme Court.[94] As I mentioned in the previous section, a commitment to *medicalizing* disability as a problem beyond the reach of the *Charter* dissimulates this troubling analogy. A *normalizing* approach to offering “equal treatment” to disability claimants further conceals the political dimension of the injustice at stake, namely, the fact that (i) PWD must jump through hoops to access goods and opportunities, granted under special regimes with specific eligibility criteria, that non-disabled people take for granted, or (ii) only obtain goods and opportunities designed by and for non-disabled people.

If a human rights model of disability were truly enforced by Canadian courts, it would enable judges to better detect the discriminatory dimensions of legislative lacunas and treat them as

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[89] To use Silvers’ expression: Anita Silvers, “A Fatal Attraction to Normalizing: Treating Disabilities as Deviation from “Species-Typical” Functioning” in P Erik, ed, *Enhancing Human Traits: Ethical and Social Implications* (Washington, DC: Georgetown University Press, 1998).

[90] Dianne Pothier, “Appendix: Legal Developments in the Supreme Court of Canada Regarding Disability” in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, and Law* (Vancouver: UBC Press, 2006) 305.

[91] *Ibid* at 314.

[92] See e.g. *Granovsky*, *supra* note 45. In another case, *Auton (Guardian ad litem of) v British Columbia (AG),* 2004 SCC 78 [*Auton*], as Dianne Pothier reports, claimants argued that “the health-care system disproportionately meets the needs of some, the non-disabled, thereby under-including the disabled”. The Supreme Court avoided this argument and focused instead on rejecting a different proposition that “no one argued in court”, namely that the healthcare scheme should “provide anyone with coverage for all medically necessary treatment.” Pothier, *supra* note 90 at 311.

[93] *Plessy v Ferguson*, 163 US 537 (1896)

[94] *Eaton v Brant County Board of Education*, 77 OAC 368, 22 OR (3d) 1), reversed in the SCC.

such.[95] More fundamentally, if the human rights model were taken more seriously in Canada, PWD would not need to translate their need-based claim into an *equality* claim. Human rights codes and constitutional rights would adequately protect these needs independently from a claim for equal treatment, may it be cast as a claim for access to education, health care, family life or, as was conceivably the case in *Granovsky*, a claim for an adequate standard of living, mirroring article 28 of the CRPD.

The Supreme Court has diverged from certain common law tests[96] or adjudicating methods that imposed difficult burdens on PWD.[97] However, even a decade after these changes, the divisions and tensions within the case law on equality rights, that have haunted the Supreme Court since the 1990s, have not disappeared[98] and it seems fair to think that interpretive changes (e.g., new common law tests) may not satisfactorily address underlying conceptions of disability and equality rights in Canadian legal culture.

PWD face additional obstacles under anti-discrimination statutes. For instance, human rights codes may contribute to what one may call the "privatization" and the "medicalization" of the social problem of disability exclusion. The "privatization" of disability justice occurs when the burden of creating more inclusive environments is placed on specific private actors who must accommodate employees with disabilities up to a standard of "undue hardship." Courts analyzing whether employers and service providers discharged their duty to accommodate PWD must take into account the individual resources of particular entities, which may then not suffice to integrate some PWD. Rendering these entities accessible also depends on whether a specific employer or service provider is "caught" by an individual complainant, and it places the burden of denunciating the equality rights violation onto victims, who often lack time, energy, and resources to launch a human rights complaint.[99] It thus individualizes the issue of disability in the way the medical model traditionally has. It is also "medical" in the sense that medical experts generally continue acting as

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[95] On interpretative obstacles to this within Canadian caselaw, see Diane Pothier, "Charter Challenges to Underinclusive Legislation: The Complexities of Sins of Omission" (1993) 19:1 Queen's LJ 261.

[96] For instance, the notion of equality has long been associated to the concept of dignity, so that judges may deny that the state violated someone's right to equality if a harmful differential treatment did not amount to *demeaning* the claimant's *dignity* (*Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497, 170 DLR (4th) 1). The Court recognized in *Kapp*, *supra* note 43 at para 22 that" human dignity is an abstract and subjective notion that […] cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be."

[97] Such as the use of "comparator groups," which may lead to compare a claimant's treatment under the law with the treatment of, for example, "more" disabled people than them, or to other PWD who are equally unfairly treated. This notion has been criticized in legal scholarship. See e.g. Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 JL & Equality 81; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?"in Sheila McIntyre and Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (LexisNexis Canada, 2006), 135. In *Withler*, *supra* note 49 at para 60, the Court recognized that "a mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply."

[98] As both judges and legal scholars recognize: Jennifer Koshan & Jonette Hamilton, "Equality Rights and Pay Equity: Déjqà Vu in the Supreme Court of Canada" (2019) 15:1 JL & Equality 1; Chief Justice Beverly McLachlin, "Equality: The Most Difficult Right" (2001) 14 SCLR 17.

[99] Carrie Griffin Basas, "Advocacy Fatigue: Self-Care, Disability Discrimination, and Legal Attrition" (Paper delivered at the Law & Disability Conference at the UC Berkeley School of Law, 5 December 2014) [unpublished]; Lepofsky, *supra* note 18.

gatekeepers to access accommodations or redress.[100] In sum, the structure of statutory human rights law has historically kept disability justice partially hostage to serendipity.

These problems also reflect the more fundamental issue that courts are more comfortable interpreting equality rights as "negative rights" than as "positive rights." "Negative rights" protect individuals' freedom from interference by the state and other third parties (e.g., a right to seek abortion or to buy private health insurance), whereas "positive rights" impose a duty on others to provide particular supports to the right bearer (e.g., a right to housing or to medical care). This is in part because courts try to be deferential to the other branches of government and their authority to manage public funds. Courts may also consider that they lack expertise to balance the numerous considerations that go into designing complex legislative schemes. As a result, courts have been very reluctant to attack the validity of public policies concerning social support of various kinds.[101] This institutional deference to other branches of government and this seemingly libertarian interpretation of equality rights are part of the legal narratives that prevent courts from properly responding to systemic injustice.[102]

Constitutional equality rights can much more easily be used to redress egregiously discriminatory behaviours, and "reasonable accommodations" may be used as a tool for limited adjustments, meant to normalize the PWD who can be normalized, without reimagining concepts like productivity, work, or dependency for those who cannot.[103] This trend points to a lack of judicial or political aspiration to create truly accessible and inclusive social environments.

The Court's use of an array of analytic concepts (e.g., "dignity"), doctrines (e.g., use of "comparator groups"), and principles (e.g., deference to the legislative branch) to turn down PWD's claims to justice are not occasional aberrations. As Mary Eberts argues, "the Court's narrow approach to technical remedies questions proceeds from a narrow view of the substance of [equality rights]."[104] Equality rights will not suffice if courts lack the political imagination to

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[100] See e.g. Ashley McAllister, "Gatekeeping Disability Income Support— A Conceptual model" (2019) 54:3 Social Policy & Administration 327 [McAllister, "Gatekeeping"].

[101] Consider e.g. *Auton*, *supra* note 92 at para 41: "This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner." And *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para 16: "the legislature is still free to target social programs to those who, as a matter of public policy, it wishes to benefit, provided such targeting is not done in a discriminatory manner."

[102] For instance, a human rights tribunal who undertook a more systemic series of remedies was thus rebuked by the Supreme Court: "While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether [a student with a disability] had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether [the student] was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission." *Moore v British Columbia (Education),* 2012 SCC 61 at para 64.

[103] For instance, the Supreme Court stated: "The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work." *Hydro-Québec*, *supra* note 79 at para 16.

[104] Mary Eberts, "Section 15 Remedies for Systemic Inequality: You Can't Get There From Here" in Sandra Rogers & Sheila McIntyre, eds, *Diminishing Returns – Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Butterworths, 2006) at 390.

understand the inequality of PWD as a matter of social exclusion embedded in the foundations of social institutions.[105] This could begin, for instance, by incorporating the notions of "ableism" and "dis-citizenship" in judicial understandings of harms, wrongs, and inequality.[106]

One can hope that the CRPD's impact, alongside activism, and a greater social and political awareness of disability, will contribute to incremental changes to judicial interpretations of equality. However, since legal culture is a relatively slippery or evanescent object of specific change, one understands why the disability community has long advocated for disability-focused statutes that would take a more systemic and pro-active approach to achieve the social inclusion of PWD.[107] The next subsection examines the most promising category of such statutes.

4. Accessibility, or Dismantling the Master's House with the Master's Tools

Despite its limitations, the previously described equality rights frameworks contributed to a shift towards a human rights model of disability in Canada. Some have even remarked that what I called the "privatization" of disability justice had its silver lining. Namely, an "outsourcing" of disability recourses to private citizens has the potential to empower PWD by giving them control over disability-related recourses.[108] This is plausible, insofar as the alternative is worse: being at the mercy of support programs designed through processes that do not sufficiently involve their end-users. However, to be significantly empowering, recourses under human rights codes would have to be more accessible, rewarding, and easier to navigate than other paternalistic measures of protection. Unfortunately, human rights recourses remain burdensome and piecemeal. This partly explains why "[t]he purpose of the social movement toward accessibility standards legislation was to establish a distinct, proactive means of realizing equality for people with disabilities."[109]

While a comprehensive review of all the statutes, regulations, and programs related to disability in Canada is outside the scope of this paper, this section will focus on accessibility statutes at the federal and provincial levels. Along with anti-discrimination legislation and disability support programs, they are the most developed legislative efforts that Canada has put forward to fulfill its obligations under the CRPD.

The idea of a national disability act was first mentioned in 1981, during the International Year of Disabled Persons, by the Canadian Special Committee on the Disabled and the Handicapped.[110] It took four decades of activism and often ineffectual political rhetoric for Canada to officially pass

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[105] [Redacted for anonymous review.]

[106] See e.g. Richard Devlin & Dianne Pothier, "Dis-citizenship" in Law Commission of Canada, *Law and Citizenship*, (Vancouver: UBC Press, 2007) 144. See text accompanying note 214 below, for a discussion of "dis-citizenship".

[107] See e.g. Lepofsky, *supra* note 18; M David Lepofsky & Randal NM Graham, "Universal Design in Legislation: Eliminating Barriers for People with Disabilities" (2009) 30:2 Stat L Rev 97.

[108] R Daniel Kelemen & Lisa Vanhala, "The Shift to the Rights Model of Disability in the EU and Canada" (2010) 20:1 Regional and Federal Studies 1 at 9.

[109] Laverne Jacobs, "The Interplay Between Human Rights and Accessibility Laws: Lessons Learned and Considerations for the Planned Federal Accessibility Legislation" (6 February 2018) at 15 [Jacobs, "Lessons Learned"].

[110] House of Commons, *Obstacles: Report of the Special Committee on the Disabled and the Handicapped* (February 1981).

the *Accessible Canada Act* (ACA).[111] Several provinces, as indicated below, have also enacted disability-focussed statutes. Provinces and territories that do not have a unique disability law spread their disability policies across a patchwork of legislation and programs.[112] While it is possible to create disability standards of access and participation across various laws, disability-focussed legislation provide provincial and federal governments with a unified opportunity to work out the purpose, content and monitoring structure of disability inclusion. Various NGOs within the disability community hoped that the federal government would encourage all provinces to pass disability accessibility legislation.[113]

Table 1. Accessibility / Disability Legislation in Canada

Jurisdiction	**Legislation Title**
Federal	Accessible Canada Act, 2019
Newfoundland and Labrador	An Act Respecting Accessibility in the Province, 2021
Prince Edward Island	None
Nova Scotia	An Act Respecting Accessibility in Nova Scotia, 2017
Quebec	Act to secure handicapped persons in the exercise of their rights with a view to achieving social, school and workplace integration, 2004
Ontario	The Accessibility for Ontarians with Disabilities Act, 2005
	Ontarians with Disabilities Act, 2001
Manitoba	The Accessibility for Manitobans Act, 2013
Saskatchewan	In development
Alberta	In development
British Columbia	Accessible British Columbia, 2021
Yukon	None
Northwest Territories	None
Nunavut	None

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[111] *ACA, supra* note 2.

[112] Mary Ann McColl et al., have usefully compounded all disability-related policies in Canada: "A Review of Disability Policy in Canada" (December 2017), online (pdf): *Disability Policy Alliance – Alliance Canadienne concernant les politiques reliées au handicap* <www.disabilitypolicyalliance.ca/wp-content/uploads/2018/01/A-Review-of-Disability-Policy-in-Canada-3rd-edition-Final-1-1.pdf>

[113] See e.g. "Our Principles", online: *Barrier Free Canada-Sans Barrière Canada* <www.barrierfreecanada.org/principles/>

The legislative purpose of these accessibility laws is to identify and remove barriers to access to employment opportunities, built environments, information and communication, transportation, and other services.[114] Each statute designates a minister to be responsible for the disability legislation, which includes a relatively holistic approach to accessibility. For instance, under the ACA, the cabinet minister in charge of disability matters is given powers to:

- "provide information, advice and assistance in relation to matters relating to accessibility;"
- "promote, support and conduct research into the identification and removal of barriers and the prevention of new barriers;"
- "intervene in all matters relating to accessibility over which Parliament has jurisdiction and that are not by law assigned to any other Minister or [public actor within] the Government of Canada;"
- "initiate, recommend, implement and promote policies, programs and projects in relation to matters relating to accessibility;"
- "make grants and contributions in support of the Minister's programs and projects in relation to matters relating to accessibility;"
- "collect, analyse, interpret, publish and distribute information in relation to matters relating to accessibility;"
- "make every reasonable effort to collaborate with provincial or territorial authorities with a view to coordinating efforts in relation to matters relating to accessibility."[115]

Disability statutes will accomplish their goal of creating a more inclusive society by relying on governmental entities created to propose and monitor accessibility standards. In the case of the *Accessible Canada Act* (ACA), the Act created the Canadian Accessibility Standards Development Organization (currently called Accessibility Standards Canada, ASC). ASC is a corporation that will develop accessibility standards that it will recommend to the Minister. It will "promot[e], support and conduct research into the identification and removal of barriers and the prevention of new barriers," best practices, and it will disseminate this information.[116]

Disability statutes generally include a timeline for the creation of accessibility standards or for the removal of barriers. For instance, the ACA has the goal of making Canada fully accessible by 2040. Some legislation, such as the *Accessibility for Manitobans Act* (AMA) and the Nova Scotia *Accessibility Act* (NSAA) include the goal of proper monitoring within the very purpose of the law.[117]

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[114] See e.g. *ACA, supra* note 2 at s 5; *Accessibility for Ontarians with Disabilities Act*, 2005, S.O. 2005, c. 11, s 1; *Act to secure handicapped persons in the exercise of their rights with a view to achieving social, school and workplace integration*, 2004, RSQ, chapter E-20.1, art 1.1 and 1.2.

[115] *ACA, supra* note 2 at s 11-15.

[116] *Ibid* at s 17-36.

[117] Nova Scotia's Accessibility Act, SNS 2017 ch 2, s 2(d).

Most accessibility legislation applies both to the government and to the areas of the private sector falling under the constitutional jurisdiction of the legislating provincial or federal government. A notable exception is Quebec's statute, which only applies to the public sector, as the earlier (2001) *Ontarians with Disability Act* did. The disability community in Ontario kept pushing for an act that would include the private sector, which they obtained in 2005. The disability community has not been similarly successful in Quebec so far.[118]

Many of the aforementioned goals that underlie accessibility legislation are in keeping with the CRPD's obligation on States Parties to "ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas."[119] However, accessibility legislation has been criticized for several shortcomings to which I now turn.

4.1 Weak Enforcement of Accessibility Standards

While accessibility standards are deemed binding under the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA), compliance and enforcement of standards has proven to be weak.[120] In particular, inspection orders are at the discretion of the government, and do not appear to have been a high priority.[121] The AMA has relatively strong standard development processes, but like Ontario, its enforcement scheme has shortcomings.[122] The scheme is based around voluntary compliance followed by government inspections or penalties. Similar to Ontario, it relies heavily on governmental discretion and will to delegate inspectors to investigate issues, to order administrative penalties, and to undertake public reporting of contraventions. According to Laverne Jacobs, the experience in Ontario has shown that "lack of political will to enforce accessibility standards can effectively obstruct the philosophical and social goals of accessibility standards statute."[123] Manitoba could be susceptible to this shortcoming as well. The NSAA addresses the shortcomings in Ontario and Manitoba. By allowing for complaints submitted by members of the disability community to trigger inspections of noncompliant entities, the scheme does not rely entirely on the discretion of the government to propel enforcement.[124]

The federal ACA gives broad discretion to the Minister as to how to carry out its mandate.[125] Under the ACA, the ASC is not independent from the Minister. It makes recommendations to the

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[118] Mélanie Bénard, "Promouvoir l'accessibility à l'aide de la loi : un appel à une réforme législative au Québec" (2017) 6:2 Canadian J Disability Studies 78 at 79. See also "Did you know that Quebec was one of the first provinces in Canada to adopt a law promoting the inclusion of people with disabilities?", online: Quebec Accessible: <www.quebec-accessible.ca/en/index.php/resources/laws/canada/quebec/>.

[119] *CRPD*, *supra* note 1 at art 9.

[120] Laverne Jacobs, "'Humanizing' Disability Law: Citizen Participation in the Development of Accessibility Regulations in Canada" (2016) 3 IMODEV 93 at 105 [Jacobs, "'Humanizing' Disability Law"].

[121] For instance, 70 per cent of Ontario companies—comprising 36,000 business—did not file a report two years after the first filing due date, and have not been audited by the government. See *ibid* at 105.

[122] Laverne Jacobs, Britney De Costa & Victoria Cino, "The Accessibility for Manitobans Act: Ambitions and Achievements in Antidiscrimination and Citizen Participation" (2016) 5:4 Canadian J Disability Studies 1.

[123] *Ibid* at 23.

[124] Jacobs, "Lessons Learned", *supra* note 107 at 17.

[125] *ACA, supra* note 2 at s 16.

Minister, who retains discretion to use and publicize these recommendations, and the power to issue general directions to ASC.[126]

Mélanie Bénard writes that Quebec's *Loi assurant l'exercice des droits des personnes handicapées* lacks teeth when it comes to enforcement. While the act was amended in 2004—now called the *Act to secure handicapped persons in the exercise of their rights with a view to achieving social, school and workplace integration*—and seemed more promising, the legislation remains relatively empty. Both iterations of the act, from its origination in 1978 to its renewal in 2004, especially fall short when it comes to having a vigorous enforcement mechanism.[127] When it was first passed in 1978, the Quebec Government framed the goal of the legislation as facilitating the "exercise of rights of disabled persons," as opposed to "protecting disabled persons."[128] Indeed, today, one of the only legal means of taking recourse against disability discrimination is filing a claim at the *Commission des droits de la personne et des droits de la jeunesse* (CDPDJ).[129] However, there are significant delays at the CDPDJ, which presents serious challenges for fulfilling the promise of the *Loi*, considering the nature of the claims at stake.[130] Moreover, while the 1978 act added "disability" as one of the grounds of discrimination in Article 10 of the Quebec's *Charter of rights and freedoms*, it also limited the scope of claims that could be brought. For instance, the 1978 act required public transportation bodies to create a development plan for improving accessibility. If the transport body conformed to its own development plan, a disabled person could not seek recourse via the *Quebec Charter*.[131] The same logic applied to all implicated sectors, such as the accessibility of public buildings and telephone services. The amendments in 2004 allowed the *l'Office des personnes handicapées* (OPHQ) to give recommendations to these development plans; however, there is no penalty for bodies that do not respect these recommendations.[132]

The issue of weak enforcement of disability standards is connected to another issue: that of inadequate timeframes to implement these standards. The Accessibility for Ontarians with Disabilities Act Alliance has expressed concern about the efficiency of the ACA. Accessibility Standards Canada, the organization that makes recommendations on which accessibility standards should be enacted, has been holding online consultations regarding its central mission. The Alliance wrote that debates on such preliminary issues—when action is needed now—is concerning.[133] When the ACA was being debated before Parliament, disability activist groups argued that not setting timelines to implement standards would prove challenging. The Federal Government did not amend the ACA to follow such a suggestion, and, given the current consultation on preliminary issues, it shows that the groups were right to believe that this would be a setback.

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[126] *Ibid* at s 21.
[127] Bénard, *supra* note 118.
[128] *Ibid* at 85.
[129] *Ibid* at 81.
[130] *Ibid* at 82.
[131] *Ibid* at 88.
[132] *Ibid* at 95.
[133] "AODA Alliance submits A Brief to Accessibility Standards Canada Listing the Federal Accessibility Standards We Need the Federal Government to Now Develop and Enact" (29 September 2020), online: *AODA Alliance* <www.aodaalliance.org/whats-new/aoda-alliance-submits-a-brief-to-accessibility-standards-canada-listing-the-federal-accessibility-standards-we-need-the-federal-government-to-now-develop-and-enact/>

4.2 Inadequate Consultation Process

Public consultations play a role in the development and review of standards, which Laverne Jacobs notes "are useful for actualizing the philosophical and social goals inherent to the [legislation]." Consultations present an opportunity to make connections between disability discrimination and its intersection with other forms of discrimination, which is a shortcoming of the social model of disability, discussed below.[134] Ontario faced criticism of its *Ontarians with Disability Act, 2001* (ODA) that were significantly attended to in the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA). The AODA has more enforcement potential, particularly as the content of its regulations must be agreed upon and presented by committees composed of key stakeholders, including PWD, industry, and government.[135] Committee decisions must reach consensus, which is defined as "substantial agreement of members, without persistent opposition, but a process taking into account the views of all members in the resolution of disputes."[136] As such, decisions do not require unanimity. Laverne Jacobs maintains that the use of such "soft consensus" in developing standards may prove challenging.[137]

Ontario's consultation model was adopted by Manitoba for the AMA. The AMA aims to hold consultations primarily with persons with disabilities for years after its adoption, which ensures that those who benefit from the legislation have an ongoing opportunity to voice their concerns.[138] The development of standards pursuant to the AMA involves both committees and public consultations. Committees are representative of the various stakeholders who will be affected by the standard. Like the scheme in Ontario, the AMA subscribes to a notion of consensus that is based on less than full unanimity. Unlike Ontario, however, the AMA allows for committee members to submit private recommendations where a consensus cannot be achieved.[139] In any system with a stakeholder committee, Jacobs notes that outcomes can depend on the composition and dynamic of the group.[140] The AMA does not specify the representative makeup of the committees, and instead the Accessibility Advisory Council (AAC)—which must be composed of six to twelve members of the disability community and stakeholder sectors—determines committee representation.

Bénard maintains that Quebec's disability act lacked proper consultation with the disability community when it was first passed in 1978. For instance, the act established OPHQ, which is a government body that coordinates disability services. During the legislative debates leading up to the adoption of the act, *l'Association du Québec pour les déficients mentaux* noted that the OPHQ was nothing more than a bureaucratic organization that would present yet another obstacle to the population it seeks to help.[141] Nevertheless, this criticism was not considered by l'Assemblée Nationale, and without properly consulting disability organizations, the act was ratified in 1978.

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[134] Jacobs, De Costa & Cino, *supra* note 122 at 17.

[135] Jacobs, "'Humanizing' Disability Law" *supra* note 120 at 93–94.

[136] *Ibid* at 106–07, citing AODA Customer Service Accessibility Standards Development Committee, Terms of Reference.

[137] *Ibid* at 107.

[138] Jacobs, De Costa & Cino, *supra* note 122 at 17.

[139] *Ibid* at 13.

[140] *Ibid*.

[141] Bénard, *supra* note 118 at 84–85.

4.3 Vulnerable to Critiques of the Social and Medical Models of Disability

Jacobs notes that the Accessibility for Manitobans Act (AMA) presents a strong set of philosophical and social goals, but that it "illustrates some of the fault lines in the theoretical literature regarding the social model of disability."[142]

The philosophical goals of the AMA are twofold: to remove barriers to ensure equality, and to improve the health, independence and well-being of persons with disabilities. As for the social goals, the authors point out four principles that provide a foundation for barrier removal that are expressed in the AMA: access, equality, universal design, and systemic responsibility. In light of these goals and the language of the Act, Jacobs concludes that the AMA is based on the social model of disability—that is, that disability comes from societal obstacles rather from an individual's impairments. Therefore, the AMA is susceptible to common critiques of the social model of disability. She points to two important critiques of the social model. First, that this model does not pay sufficient attention to the role impairment actually plays in the lives of disabled persons. This can be especially problematic for persons who experience episodic disabilities that require unique accommodation plans in the context of employment, for instance. Jacobs notes that, similarly, the AODA *Employment Regulations* offer a relatively robust process for accommodating persons with long-term or short-term stable disabilities, but falls short for people with episodic disabilities.[143]

Second, that the social model lacks an appreciation of an intersectional approach to disability. Jacobs notes that the lived experiences of disability are inextricably linked to a person's gender, race, sexual orientation, class, etc., and legislation that claims to improve accessibility should integrate these notions into its language. She maintains that "the AMA scarcely acknowledges the existence of discrimination based on intersectional difference and therefore offers little description as to how the accessibility standards may be able to counteract this discrimination."[144] It could explicitly make connections between, for instance, women with disabilities and poverty, and disability, race, and poverty, to name two examples. Various Disability NGOs commenting on Canada's performance under the CRPD similarly deplored the ACA's failure to "address the unique barriers experienced by Indigenous PWD, and the interaction of the ACA with areas that fall within the jurisdiction of First Nations governments,"[145] something the Committee repeated in its concluding observations.[146]

Disability legislation is also liable to perpetuate the medicalization of disability, whenever they individualize it or rely on the medical profession to act as gatekeepers for accessing legislative protections or benefits. Tim Ross argues that the language of the AODA discretely conceptualizes disability as a biomedical problem, equating it to bodily impairment, which obfuscates the social

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[142] Jacobs, De Costa & Cino, *supra* note 122 at 2.

[143] *Ibid* at 8–9.

[144] *Ibid* at 10.

[145] ARCH disability law centre, Final Report, Legal analysis of Bill C-81, p.49.

[146] Committee on the Rights of Persons with Disabilities, *supra* note 83 at 3. The failure of accessibility laws to capture intersectionality is directly connected to the failure of conceptualizing how disability intersects with other identities; see text linked to notes 81 and 82.

goals of the legislation.[147] For instance, whereas Manitoba's legislation promotes universal design, the AODA frames accessibility as an issue related only to persons with disabilities.[148] Ross maintains that framing accessibility as something that is universally beneficial would foster better implementation of standards.[149]

4.5 Standards of Universal Design may not Challenge Systemic Ableism

Barriers Free Canada expressed the view that a national disability statute should be "based on principles of universal design"[150]. The importance of designing accessibility policies to achieve universal design is encapsulated in the CRPD,[151] which defines "universal design" as "the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design." The Convention also specifies that the universal usefulness of "universal design" should be interpreted to "exclude assistive devices for particular groups of persons with disabilities."[152]

Canadian accessibility legislation does occasionally acknowledge the importance of universal design. For instance, the ACA emphasizes the ideal of making social environments accessible for everyone, rather than only the ideal of respecting the equality rights of an oppressed minority of Canadians. Its preamble stipulates:

> Whereas barriers to accessibility can impact all persons in Canada, in particular those with disabilities and their families, and can prevent persons with disabilities from achieving their full and equal participation in society;
>
> And whereas Parliament considers that it is essential to ensure the economic, social and civic participation of all persons in Canada, regardless of their disabilities, and to allow them to fully exercise their rights and responsibilities in a barrier-free Canada;

Yet, unpacking the assumptions embedded in such universalist ideals reveals their limitations. Universalist approaches to disability conceptualize disability as a universal phenomenon of human variation of bodies, minds, and abilities within changing social contexts.[153] People thought of as "non-disabled" would be those whose physical and mental abilities would be part of a statistical range that policymakers use to build institutions. People called "disabled" would only be different from "non-disabled" people because they happen to fall outside of this range, but can still participate in institutions following minor changes to said institutions. People called "truly" disabled—a consideration raised by the Supreme Court's incorporation of the questionable notion of "true" disability in its caselaw—would simply and only denote human beings who happen to

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[147] Tim Ross, "Advancing Ontario's Accessibility: A Study of Linguistic, Discursive, and Conceptual Barriers" (2013) 22:1 Canadian J Urban Research 126.

[148] *Ibid* at 138.

[149] *Ibid* at 139.

[150] See Barrier Free Canada –Sans Barrière Canada, *supra* note 113.

[151] *CRPD*, *supra* note 1 at arts 4(f), 9.

[152] *Ibid* at art 2.

[153] See e.g. Jerome E Bickenbach, "Minority Rights or Universal Participation: The Politics of Disablement" in M Jones & LA Basser Marks, eds, *Disability, Divers-ability, and Legal Change* (London: Brill, Nijhoff, 1999) 101.

differ from the aforementioned statistical range so significantly that they cannot be "normalized," that is, fitted in existing institutions.

Keeping this in mind, when policymakers try to make work or education environments "universally accessible," we need to ask *what* exactly is made universally accessible. Disability legal scholarship has long criticized Canadian legislators and courts for failing to see that *education* itself, *work* itself, *healthcare, play, etc.*, themselves are all too often fundamentally created, understood, and maintained to mirror conceptions of the good life that best mirror the needs, aspirations and capacities of people falling within the aforementioned statistical range. When this occurs, asking whether a student with disability should not be segregated from a "normal" classroom, meant to pursue the "normal" goals of education, falls short of the ideals of universal design, which would instead seek to ask how education could be conceived of differently at its foundation. For instance, if education was not (only) aiming at developing examination-taking skills and psychological tolerance to stress, but at developing communal kinds of learning or social skills, one may not question at all the place of someone with severe intellectual disabilities in a classroom.[154] Similarly, as an early proponent of a universalist model of disability claimed "[p]lacing disability in a wider context of the entire work force creates the possibility of wider interventions of public policy, with emphasis also shifting from the worker to the work place and the general nature of work."[155]

Disability communities have long advocated the adage of "nothing about us without us" in the face of disability laws and programs developed and monitored with insufficient consultations with end-users. The issues with accessibility laws listed above all mirror the history of medicalizing disability in a way that gives control over it to medical experts and the state rather than to PWD. More fundamentally, the failure to render social spaces accessible to PWD reflects the long history of not counting PWD as part of the "public." Through physical and cognitive barriers, and through poverty, as examined in the next section, PWD are "forced into privacy."[156] Iris Marion Young thus "promote[s] a politics of inclusion [through] the ideal of a heterogenous public, in which persons stand forth with their differences acknowledged and respected, though perhaps not completely understood by others."[157]

Put differently, the poor representativeness, efficiency and monitoring of accessibility laws may result from the fact that universal access is unavoidably regulated and implemented within a society long animated by ableist structures and beliefs, hence the title of this sub-section referring to Audrey Lorde's famous talk, "The Master's Tools Will Never Dismantle the Master's House." The "master's tools" serve as a metaphor for the rights rhetoric with which politicians have been paving the road to *status quo* since the 1980s, and for the moral licencing of bad behaviours (e.g., poor implementation of accessibility laws) on account of past good behaviours (e.g., creating said laws; ratifying the CRPD; appointing a disability-focused minister).

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[154] See e.g. Dianne Pothier, "*Eaton v. Brant County Board of Education*" (2008) 18:1 CJWL 121.

[155] Irving Kenneth Zola, "Toward the Necessary Universalizing of a Disability Policy" (2005) 83:4 Milbank Q 1 at 19. By contrast, see *Hydro-Québec*, *supra* note 79.

[156] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990) at 120.

[157] *Ibid* at 119.

The slowness of the progress of accessibility norms may also be compared to an elastic being *gradually* stretched, so that the "norm" can absorb "difference" at a palatable pace—and it is quite a stretch from the era of institutionalization to successful universal design. Rather than true universal design or true representativeness of PWD, accessibility policies may be understood as "gentler" and "more permeable" normalization strategies—what disability theorist Anne Waldshmidt calls *flexible normalism*. "In expanding, in moving outwardly toward abnormality, the band that binds the normal center with the boundary zones must not break. Any threat that the entire normal field could dissolve would spark a backlash, a return to strategies that emphasize narrow normality zones and fixed boundaries."[158] I will expand on the field of "normalcy" and its corollary expectations in the domain of work in the next section.

A disability-friendly re-imagining of core liberal values and institutions may seem utopian, but a concrete first step would be to improve consultative processes before new laws and programs are enacted or periodically reviewed, and before Canada submits its reports to the Committee. Current consultations have been criticized for being insufficient and ineffective.[159] Ideals of universal design will never come to fruition if accessibility standards only enable *everyone* to access goods and services designed to meet the needs of *non-disabled people*. The disability community must not only be consulted in designing measures of access to certain goods and institutions but also in ensuring that said goods and institutions were themselves constructed and proposed to serve everyone in the first place.

5. Disability Income Support, or the Spectre of the Charity Model

While anti-discrimination and accessibility legislation favour inclusion, notably in the workforce, other social programs aim at supplementing individual income. In this section, I briefly present redistributive shortcomings in Canadian policies, and I suggest interpreting them as a symptom of a deeper failure to recognize PWD as full citizens.

In 2016, Statistics Canada reported that the rate of unemployment is much higher amongst PWD than it is amongst non-disabled people. 80% of Canadians without disabilities have employment. In contrast, 59% of PWD are employed, and the percentage of employment decreases as the severity of disability increases.[160] In 2017, 10% of people without disabilities were living below Canada's official poverty line, whereas 28% of those with more severe disabilities and 14% of those with milder disabilities found themselves in this situation.[161] Although the situation somewhat improved in 2020,[162] disability and poverty will continue to walk hand in hand unless Canada monitors poverty levels and addresses its root causes. The Income Security Advocacy Centre reported before the Committee in 2017 that "Canada does not have standards of accountability to ensure that people with disabilities have access to adequate income support

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[158] Anne Waldschmidt, Who is normal, who is deviant, p.196.

[159] See e.g. Canadian Civil Society Report Group, *supra* note 4 at 7; Lepofsky, *supra* note 18.

[160] 76% of persons with mild disabilities people have a job; only 31% of people with very severe disabilities work. See Statistics Canada, *supra* note 16.

[161] Statistics Canada, *Canadian Survey on Disability, 2017*, (28 November 2018) online (pdf): *StatsCan* <www150.statcan.gc.ca/n1/en/daily-quotidien/181128/dq181128a-eng.pdf?st=bM51vIPn>

[162] Statistics Canada, *Income Survey, 2020,* (20 March 2022) online (pdf): *StatsCan* <www150.statcan.gc.ca/n1/en/daily-quotidien/220323/dq220323a-eng.pdf?st=bwqA_7bu>

programs."[163] The precarious economic situation in which a great number of PWD find themselves would violate their right to an adequate standard of living and social protection guaranteed by the CRPD.[164]

Income support policies can be a "lesser evil" and symptomize society's failure to give PWD access to sources of sufficient income, through education and work for instance. While they are crucially needed to prevent PWD to suffer from poverty, their design can therefore be part of the problem of social exclusion. Deborah Stone explains why the problematic features of income support I will present below have deep historical roots in her theory of disability *qua* "formal administrative category" accomplishing the "specific policy purposes" of "determin[ing] the rights and privileges" of a category of people who do not fit the primary system of distribution of resources a given society uses.[165] "All societies have at least two distributive systems, one based on work and one on need," Stone explains. If one agrees that work is mostly viewed instrumentally, that is, as something that people would avoid if they could attain what they want otherwise,[166] one way of solving the tension between the two distributive modes is to keep the work-based system of distribution as the primary one, and to identify a "validating device" that would give access to a special category of people to the secondary, need-based, system of distribution.[167] To be socially and politically acceptable, as well as economically workable, the validating device would serve to identify people who can truly not work.[168] So the socially constructed, legal, category of "disability"[169] would be enmeshed with the modern conception of the "welfare state", as an exceptional and categorical exemption from the labor market.[170] Contemporary criticisms of disability support programs for disincentivizing PWD from working[171] or for failing to help persons with episodic disabilities who are not "categorically" excluded from the labor market[172] are therefore not just addressing immediate problems, but also challenging foundational political and economic conceptions of disability.

The most impactful illustration of how a "validating device" operates in Canadian law to bring some people under a need-based paradigm of distribution is how definitions of disability are designed and applied in the process through which applicants qualify for income support. I will consider definitions in both provincial and federal regimes.

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[163] Income Security Advocacy Centre, *2017–2018 Annual Report* (18 January 2019) at 1.

[164] *CRPD*, *supra* note 1 at art 28.

[165] Deborah Stone, *The Disabled State* (Philadelphia, PA: Temple University Press, 1984) at 27.

[166] *Ibid* at 16.

[167] *Ibid* at 21–22.

[168] *Ibid* at ch 1–2, 6.

[169] *Ibid* at 26–27.

[170] *Ibid* at 21.

[171] For instance, by capping the hours they can work while receiving income support or by not including expectations they will (try to) work again in programs.

[172] See e.g. Feed Ontario, *Social Assistance Changes in Ontario Forecasting the Impact of the Government of Ontario's Proposed Reforms* (24 April 2019) online (pdf): *Feed Ontario* <www.feedontario.ca/wp-content/uploads/2019/04/Feed-Ontario-Report-Social-Assistance-Changes-2019.pdf> .

There are two main federal sources of social support that Canada provides for PWD who are not able to secure employment. One is the *Canada Pension Plan* (CPP),[173] which provides long-term disability benefits to eligible applicants. Applicants must notably be under 65, have contributed enough to the Canada Pension Plan, have a mental or physical disability that regularly stops them from doing any type of substantially gainful work, and have a disability that is long-term and of indefinite duration, or is likely to result in death.[174] Another is the *Employment Insurance Sickness Benefits*, which provides temporary financial assistance to individuals who cannot work for medical reasons.[175]

Each province also has welfare income programs, some targeting PWD, some targeting unemployed people. The Ontario Disability Support Program (ODSP), for instance, deems that only people with a "substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more"[176] can qualify for income support. The beneficiary's activities of daily living must also be substantially restricted by "the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace."[177] All these criteria (the impairment, its likely duration and the restrictions it poses) must also be verified by the applicant's doctor or health care professionals.[178] The applicant must also find themselves in a situation of financial need, which includes owning limited assets.[179]

Income support programs have been criticized by legal scholars, policy analysts and social workers. Writing about the federal income support programs, Freya Kodar has noted that PWD "seeking to access these income support programs confront a range of issues, including eligibility requirements that are challenging, application processes that are onerous and, for those able to qualify, benefit levels that do not provide an adequate standard of living".[180] Writing about the ODSP, social workers have also pointed to the problems of "insufficient benefits, increasingly restrictive eligibility criteria […], and a host of rules regulating individuals' lives."[181] Michael Prince notes that "[b]ecause of the complexities of disability benefit systems, people with disabilities struggle in having their conditions recognized, in navigating programs, and in facing the effects of welfare state restructuring."[182] Empirical research has suggested that income support programs "shape and perpetuate fear and distrust through poorly communicating information about

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[173] *Canada Pension Plan*, RSC 1985 c C-8 [*CPP*]. Note that Quebec has opted out of this plan and developed its own Pension Plan, under which a similar disability pension is being offered, as authorized by article 94A of the *Constitution Act, 1867, supra* note 7 and s 3 of the *CPP*, *supra* note 173.

[174] *CPP*, *supra* note 173 at s 42(2).

[175] *Employment Insurance Act*, SC 1996, c 23.

[176] *Ontario Disability Support Program Act,* 1997, SO 1997, c 25, Sched B at s 4(1)a).

[177] *Ibid* at s 4(1)b).

[178] *Ibid* at s 4(1).

[179] *Ibid* at s 5.

[180] Freya Kodar, "Federal Income Support: Canada Pension Plan Disability and Employment Insurance Sickness Benefits" in Jacobs et al, eds, *Law and Disability in Canada* (LexisNexis Canada, 2021) at 100.

[181] Smith-Carrier et al, "Vestiges of the Medical Model: A Critical Exploration of the Ontario Disability Support Program in Ontario, Canada" (2017) 32:10 Disability & Society 1570 at 1571. See also Vera Chouinard & Valorie Crooks, "'Because They Have All the Power and I Have None': State Restructuring of Income and Employment Supports and Disabled Women's Lives in Ontario, Canada." (2005) 20:1 Disability & Society 19.

[182] Michael Prince, "Entrenched Residualism: Social Assistance and People with Disabilities" in Daniel Béland and Pierre-Marc Daigneault, eds, *Welfare Reform in Canada* (Toronto: University of Toronto Press, 2015) at 289.

the system, a chaotic state of constant change and complexity, a lack of attention to building trusting relationships between caseworkers and recipients, ongoing system errors, and excessive reporting requirements."[183] Regarding compliance with the CRPD, as the ARCH Disability Law Centre has noted in relation to the *Accessibility Canada Act*, examined above, "[g]overnments may invoke the concept of progressive realization to cloak their noncompliance and explain why they have not made sufficient progress toward full realization of rights."[184] Here too, social neglect can be connected to a tradition in Canadian legal culture of enforcing negative rights more stringently than positive ones.

I suggest that these issues have been longstanding, and are difficult to change, because they are deeply embedded in understandings of disability that are incompatible with the human rights model of disability proposed by the CRPD. They are, namely, the result of the continuing influence of the medical model and the charity model of disability. Solving these issues with regards to disability income support may be even more daunting than solving them in the contexts regulated by accessibility and anti-discrimination legislation, because the latter frameworks can, at least in principle, avoid conceptualizing disability as medically proven impairment or as an articulation of charitable status. In contrast, short of challenging distributive paradigms or the meaning of work and community entitlements, the very rationale of disability income support is taken to *rely* on medical and charity models of disability.[185] I explain below why that is the case.

The reliance of medical expertise to ascertain the existence of an impairment and/or of a disability is an answer to the problem of determining who *legitimately* qualified for disability support. The problem of determining who can legitimately enter the need-based distributive system can be traced back to 14th century laws on the regulations of vagrancy. The "genuine vagrant" or "honest beggar," like the "genuinely disabled person" were those who had not chosen those roles.[186] In the 19th century, the medical profession took control of the process of certifying legitimate disability claimants and, by the 20th century, administrative branches in charge of social security had "faith that medical science was capable of objective determination of disability and that medical examination could distinguish the genuinely disabled from the malingerers."[187] Distrust has long been procedurally embedded in validating processes because of the basic assumption that individuals are "motivated to escape from the work-based distributive system" and therefore have "incentives to misrepresent information about themselves."[188] To this day, disability income support guidelines "expressly use the traditional medical model of disability to distinguish biologically driven impairments in the body that render individuals employable or unemployable."[189]

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[183] RE Gewurtz et al, "Fear and Distrust Within the Canadian Welfare System: Experiences of People With Mental Illness" (2018) 29:4 J Disability Policy Studies216.

[184] ARCH Disability Law Centre, *Final Report: Legal Analysis of Bill C-81: An Act to Ensure a Barrier Free Canada* (1 October 2018) online (pdf): *ARCH Disability Law Centre* <www.archdisabilitylaw.ca/wp-content/uploads/2018/10/ARCH-Final-Report-FINAL-Oct-1-2018-accessible.pdf>

[185] See e.g. Smith-Carrier et al, *supra* note 181 at 1577: "In contrast to [other policy domains …], Ontario's social assistance policy appears firmly entrenched in the medical model of disability in both policy and practice."

[186] Stone, *supra* note 165 at 29

[187] *Ibid* at 79.

[188] *Ibid* at 23. See also McAllister, "Gatekeeping", *supra* note 100 at 335.

[189] Smith-Carrier et al, *supra* note 181 at 1573.

The main issue with relying too closely on medical assessment is that it may not reflect the actual needs of PWD. Many have noted that a same medical condition "can have vastly different impacts on different people, impacts that will change with time and circumstances. Individuals, moreover, may have very different personal resources to deploy to address disability impacts, independent of potential public subsidy. None of these factors are captured by medical diagnosis."[190] Medicalizing guidelines have also been criticized for imposing binary criteria of evaluation (disabled or not; able to function in x ways or not) that prevent many PWD, such as people with episodic disability, from qualifying for disability income support.[191]

When this happens, PWDs must rely on general welfare support open to everyone.[192] This raises the spectre of another longstanding model of disability: the charity model, according to which disability is an individual misfortune to be pitied and responded to with compassion. Not being caused by society, nor by the individual herself, disability *qua* object of charity simultaneously frees PWD from blame and excuses the state from having robust obligations of justice to redress socially engineered kinds of exclusion. This view would cast income support, not as a corollary duty to a right, but as a supererogatory obligation, subject to budgetary constraints in times of austerity[193] or during political cycles in which neglecting specific vulnerable populations would have limited impact on re-election.[194] Along with the charity model, it thus becomes adequate to analyse disability income policy as relying on the cultural figure of the "deserving poor": the truly incapable to work due to no fault of their own.

The "deserving poor," under a charity paradigm, will reap a meagre compensation, that sometimes still leave them in a state of poverty,[195] but is still higher than general welfare granted to the "undeserving poor."[196] However, as Michael Prince explains, "for many Canadians with disabilities, provincial assistance [for non-disabled, unemployed persons] is effectively a first-resort program rather than a safety net."[197] This places many PWD in an extremely precarious

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[190] Rick August, "Paved with Good Intentions: The Failure of Passive Disability Policy in Canada" (April 2009) at 4, online (pdf): <www.maytree.com/wp-content/uploads/763ENG.pdf>

[191] Ernie Lightman et al, "'Not Disabled Enough': Episodic Disabilities and the Ontario Disability Support Program" (2009) 29:3 Disability Studies Quarterly at 20: "The gulf between the lived experience of episodic disability and its legislative construal within ODSP guidelines is wide. Bodies that agitate binary organization remain politically unthinkable because in residing on the fluctuating borders of ability and disability, they do not properly fit within one category or another. Ultimately, attempts to unsettle intransigent categories paradoxically translates into persons with episodic disabilities being identified as "not disabled enough," an interpretive code used to disqualify some individuals from accessing vital income support."

[192] Feed Ontario, *supra* note 172.

[193] See e.g. Prince, *supra* note 182 at 295, reporting how even the "worthy poor's" benefits have dwindled over the years.

[194] This claim has empirically support : "Many influencing factors noted by the [disability adjudicators] were related to the political party in power (e.g., ideology, poli- tics, and public perception), suggesting that factors that help achieve political objectives of the government (e.g., re- election) may have the most significant influence on the final definition of disability." McAllister, "Gatekeeping", *supra* note 100 at 333.

[195] Feed Ontario, *supra* note 172.

[196] Smith-Carrier et al, *supra* note 181 at 1578.

[197] Prince, *supra* note 182 at 289.

situation, since living with a disability often includes significant additional costs to meet basic needs, let alone to flourish,[198] leaving many PWD facing physical isolation and food insecurity.[199]

The medical and the charity models of disability are therefore intertwined within disability income policies through the figure of the "deserving" PWD.[200] Such a figure is particularly problematic if its cultural, rather than legal, definition encompasses ableist tropes and finds its way into any of the social actors involved in the process of designing, revising, interpreting and applying criteria of eligibility, may they be adjudicators (civil servants applying income guidelines to specific claimants), judges (hearing appeals and interpreting the scope of laws and regulations) or health care professionals entrusted with medical assessments.

In a series of recent papers based on empirical research with "gatekeepers" (to disability support) in various jurisdictions, including Canada, Ashley McAllister and her colleagues found that the "main," "formal" gatekeepers, known as the Disability Adjudication Unit in Ontario,[201] are sometimes skeptical of medical evidence,[202] struggle with the broad scope of what "severe disability" means,[203] make judgements based on beliefs and values,[204] and rely on "heuristic devices" such as an "ideal type" of disability.[205] McAllister categorized this last "heuristic device" as a "tool to help gatekeeper"[206] rather than an "obstacle" to good gatekeeping, because her method (constructivist grounded theory), builds her conceptual categories based on interviewees' feedback. Similarly, adjudicators presented judicial intervention to ensure that disability programs do not violate equality rights, for example by including addictions, as "obstacles."[207]

This heuristic device would be based on an ideal type of disability including the following features: "visible, clear proof, permanent, easily recognizable as a medical illness, and externally caused."[208] Although formally illicit, since the ODSP excludes nonmedical factors,[209] it is how

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[198] Sherri Torjman, "Primer on a New Disability Income Benefit" (November 2020), online (pdf): *IRIS – Institute for Research and Development on Inclusion and Society* <www.irisinstitute.ca/wp-content/uploads/sites/2/2020/11/Primer-on-a-New-Disability-Income-Benefit-Nov-2020.pdf>

[199] See Valerie A Crooks, "Income Assistance (the ODSP) and Disabled Women in Ontario, Canada: Limited Program Information, Restrictive Incomes and the Impacts Upon Socio-Spatial Life" (2004) 24:3 Disability Studies Quarterly; Feed Ontario, *supra* note 172; Lightman et al, *supra* note 191.

[200] See e.g. Lightman et al, *supra* note 191 at 4: "the legacy of medical model discourse that sustains biologically driven representations of bodies as *either* able (and employable) or disabled (and unemployable) […] This characterization mirrors the segregation of the poor into 'deserving/ undeserving' categories associated with the Elizabethan Poor Laws, a set of principles about 'deservedness' for benefits that dates from the early 1600's in England and remains the basis of much social welfare policy today."

[201] McAllister, "Gatekeeping", *supra* note 100 at 333.

[202] A McAllister & SR Leeder, "Distrusting Doctors' Evidence: A Qualitative Study of Disability Income Support Policy Makers" (2018) 42:4 Australian Health Rev 475.

[203] Ashley McAllister, "Mental Illnesses are not an 'Ideal Type' of Disability for Disability Income Support: Perceptions of Policymakers in Australia and Canada" (2019) 48:4 Scandinavian J Public Health 452 [McAllister, "Mental Illnesses"].

[204] McAllister, "Gatekeeping", *supra* note 100 at 336.

[205] McAllister, "Mental Illnesses", *supra* note 203.

[206] McAllister, "Gatekeeping", *supra* note 100 at 335.

[207] *Ibid* at 336.

[208] *Ibid* at 338

[209] *Ibid.*

adjudicators sometimes palliate information deficit and distrust of doctors and claimants.[210] Invisible disabilities, such as mental disorders, which make up for most disability income claims,[211] are therefore seen as "imperfect disability," along with conditions that are temporary, medically ill-defined, caused by the applicant, or harder to clearly "prove."[212] The use of such heuristic device, which then becomes part of the apparatus the welfare state puts in place to validate disability claims, is quite problematic, since it is often explicitly ableist, for instance, by relying on a highly controversial hierarchy of blameworthiness, and disability cultural tropes, prioritizing physical problems, putting mental health problems in second place, and, in third place, the "really poor cousin" being the "drug and alcohol problems because everyone figures it is their fault anyway."[213] This creates a hierarchy of deservingness that is compatible with the charity model of disability, itself relying on ableist tropes, but not with the human rights model.

These problems—the unique strength of the medical model in the context of disability income support and the medical model's alliance with the charity model—overlap with a third problem: the making of "dis-citizens." Dianne Pothier and Richard Devlin argued that, "despite having their equality rights enshrined in the *Charter*, persons with disabilities in Canada are denied full citizenship status; they are treated as "partial citizens" and, as such, they experience a "cheap and shoddy imitation" of citizenship, a regime of dis-citizenship."[214] There are many ways of approaching dis-citizenship. Specifically, in the context of disability income support, the process of partial disenfranchisement can be traced back to various contemporary democracies' primary commitment to a work-based system of distribution, so that need-based policies may not "conflict with or undermine the work-based system."[215] This does not only explain why rationales for disability income support would be subordinated to rationales for fostering a work-based distributive system. It also sheds light on the salience of the charity model in the context of disability income support in the following way: casting a need-based system of distribution through a charity model of disability could serve to belittle the citizenship status of beneficiaries, notably by replacing a logic of rights by a logic of deservingness. Indeed, although, in principle, validating devices aim at preserving the full citizenship of participants to need-based systems of distribution, states have historically made use of disenfranchisement to deter access to welfare.[216] From this perspective, the ways in which disability social assistance would "infringe upon the dignity of applicants and clients"[217] would not be an accidental administrative shortcoming, but part of a set of cultural and ideological norms valorizing work-based systems of distribution by rewarding their participants and penalizing the rest. [218]

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[210] McAllister, "Mental Illnesses", *supra* note 203; McAllister & Leeder, *supra* note 202.

[211] 56.5% in Ontario in 2014: Smith-Carrier et al, *supra* note 181 at 1580.

[212] McAllister, "Mental Illnesses", *supra* note 203 at 455.

[213] As reported by an interviewed policymaker, McAllister, "Mental Illnesses", *supra* note 203 at 456.

[214] Devlin & Pothier, *supra* note 106.

[215] Stone, *supra* note 165 at 25.

[216] See e.g. *ibid* 24: "Under the old Poor Laws in Britain, virtually anyone could enter the need-based system, becoming a pauper, but in lieu of restrictions on entry, there were penalties meant to act as deterrents. Paupers lost some of their citizenship rights, such as the right to travel out of the parish, the right to live with their families (in the workhouse), and—notably—the right to vote."

[217] Prince, *supra* note 182 at 289. For an illustration of dignity infringements, see paragraph connected to footnotes 142 (Kodar) to 146 (ARCH Canada, Legal analysis of Bill C-81, final Report 2018).

[218] I can only present, rather than defend, this hypothesis here. A way to defend it would probably make use of scholarship on power, oppression and possibly the methods of discursive institutionalism. See Colin Hay,

Aesthetics never follows far behind oppressive ideologies, and are relevant to consider in a context where adjudicators—among other actors interpreting eligibility criteria to access income support—are influenced by "ideal types" of disabilities. Some have suggested that negative emotions, such as disgust, have been deployed in welfare reform political discourses in order to "mark out, separate and exclude a particular class of disabled citizens to redefine them as 'undeserving.'"[219] Understanding cultural prejudices becomes crucial when it is the "public imaginary of disability," rather than actual needs, human rights, or even medical assessments, that lead to assessing "some bodies as not really disabled enough to deserve disability entitlements."[220] The very metaphor of gatekeeping, while usually justified by "the need for budget restraints, and the need for justice in distributing care" evokes "gluttonous patients who storm the gates of the health care fortress" and assigns gatekeepers the function of "restraining people from overusing health care" rather than "ushering in the under demanding and underserved."[221]

Disability policy analysts not only criticize disability income programs for creating poverty, but also for sustaining it. For instance, Michael Prince reminds us to ask "[w]hat assumptions are made about the work capacity of people with disabilities, and what supports are made available for employment?"[222] Rick August criticizes what he calls "passive disability policy" because it "simply aims to backfill a presumed deficiency in some citizens' lives – in this case, with money to replace presumed shortages in earnings capacity," instead of responding to PWD's actual need to generate their own income and gain "personal satisfaction and standing in the community from the effort."[223] August argues that income support policy in Canada relies on a conception of PWD "as inherently dependent, as "pensioners" who can never work and who are not expected to do, even if they can." [224] Such criticisms invite policymakers to (1) challenge the assumption that disability claimants would rather not work and are malingering when they seek disability support and (2) to redouble their efforts to render work and other environments more universally accessible.[225]

This is neither to claim that gatekeeping policies and validating devices are necessarily always an ableist assault on citizenship,[226] nor that individuals applying to any social programs never act opportunistically or deceivingly. I only rely on analytical and empirical disability scholarship to claim that such policies are at times nefarious to PWD's citizenship, rights, and well-being.[227]

"Constructivist Institutionalism" in Sarah A Binder, R A W Rhodes, & Bert A Rockman, eds, *The Oxford Handbook of Political Institutions* (Oxford: Oxford University Press, 2008).

[219] Karen Soldatic & Barbara Pini, "The Three Ds of Welfare Reform: Disability, Disgust and Deservingness" (2009) 15:1 Austl J H R 77 at 89.

[220] *Ibid.*

[221] D Willems, "Balancing Rationalities: Gatekeeping in Health Care" (2001) 27:1 J Med Ethics 25 at 25.

[222] Prince, *supra* note 182 at 289.

[223] August, *supra* note 190 at 3.

[224] *Ibid* at 2.

[225] See Smith-Carrier et al, *supra* note 181.

[226] Some may make this bolder claim in the context of disability support by referring to ideals of universal design and the position in which PWD find themselves, facing onerous obstacles and hoops to obtain goods that non-disabled people take for granted. However, I do not make this claim here.

[227] See e.g. Ashley McAllister et al, "Physicians' Attitudes to Disability Pension — Impact of Diagnosis: An Experimental Study" (2021) 21:122 BMC Health Services Research; Lightman et al, *supra* note 191; Smith-Carrier et al, *supra* note 181.

Lastly, "disability income claimants," historically categorically exempted and excluded from the labour force,[228] and understood via the lens of the charity model of disability, are susceptible to internalizing the role of the "deserving poor." Indeed, the classification system invites them to constitute themselves as "disabled" in the sense of being severely dependent and incapable in various ways. [229] Performances of helplessness, sincere or not, may have harmful effects on self-esteem and dignity. Some have used social role theory to explain that "once people are categorized as disabled, they become socialized to the role […] the longer people do not work, the less likely it is that they will return to work. Dependence creates dependence […] Programs tend to make their own clients, Pygmalion-like."[230] The role of the sick, seminally theorized by Talcott Parsons in 1951, implied expectations of docility on the part of the patient.[231] It is surprising that this historic theory would be used to explain to some extent the degrading passivity and compliance expected of recipients of care or beneficiaries of disabilities alike. Yet, McAllister briefly refers to it, in 2020, as part of her analysis of how adjudicators could detect the "truly" disabled,[232] and it plausibly echoes the powerless state in which disability income programs place PWD.[233] These programs would therefore contribute to the ableist construction of the status of dis-citizenship and would further socialize PWD into this inflexible status. Cementing PWD into their dis-citizens status compounds the harms done to PWD through apparently well-meaning social programs.

The previous criticisms imply that Governments should design disability policies that foster and utilize the *talents* of PWD, which would simultaneously elevate their social status and secure their full citizenship, rather than perpetuate a compensatory kind of justice to improve—but simultaneously construct and cement—the fate of the "worst off."[234] Concrete steps towards this ideological reorientation would include empowering PWD, by proactively facilitating the application process and ensuring the benefits enable PWD to live in a dignified manner, by taking their specific needs into consideration. The overall process should convey respect rather than distrust. There needs to be, minimally, a monitoring of individual "basic income," or "income floor," "an income guarantee below which a person cannot reasonably be expected to live," which would take into account the special costs that PWD have to incur because of their disability.[235] A successfully passed *Disability Benefit Bill* may have served to supplement the grave shortcomings highlighted by the above criticisms by ensuring a basic income for all PWD across the country.[236]

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[228] Stone, *supra* note 165 at 21–22.

[229] Margrit Shildrick & Janet Price, "Breaking the Boundaries of the Broken Body" (1996) 2:4 Body & Society 93.

[230] Stone, *supra* note 165 at 190.

[231] Talcott Parsons, *The Social System* (Glencoe, IL: The Free Press, 1951). For its use in the context of disability by early sociologists of disability, see Nagi, *supra* note 35.

[232] McAllister, "Mental Illnesses", *supra* note 203 at 452.

[233] Chouinard & Crook, *supra* note 181.

[234] See e.g. Silvers, "No Talent?", *supra* note 88.

[235] Torjman, *supra* note 198 at 4–5.

[236] Bill C-35, *An Act to reduce poverty and to support the financial security of persons with disabilities by establishing the Canada disability benefit and making a consequential amendment to the Income Tax Act*, 2nd Sess, 43rd Parl, 2021. Reintroduced as Bill C-22, *An Act to reduce poverty and to support the financial security of persons with disabilities by establishing the Canada disability benefit and making a consequential amendment to the Income Tax Act*, 1st Sess, 44th Parl, 2022, after pushes from the NDP party (see Peter Zimonjic, "NDP Motion Calling on Liberals to Reintroduce Disability Benefit Legislation Passes House Unanimously" (10 May 2022), online: *CBC News* <www.cbc.ca/news/politics/disability-benefit-legislation-reintroduce-1.6447597>); the Canadian Labour Congress (see "Canada's Unions Call for Fast-Tracking of Canada Disability Benefit" (28 May 2022), online:

The federal government could transfer money to provinces through other means, notably by using its spending powers and contribute to provincial supports of disability like it does for health care. As Michael Prince points out, the federal government has three options: (1) create a new transfer for specific disability issues; (2) earmark a portion of an already existing transfer such as the CST or the CHT for specific disability issues, or (3) develop other kinds of multilateral frameworks.[237] Although the Committee did not specifically mention such possibilities, it could follow the lead of other UN Committees in doing so. The Committee on the Elimination of Discrimination against Women, for instance, recommended that Canada use its spending powers to meet its Convention obligations.[238]

6. Conclusion

The *Emperor's New Clothes* is a well-known folktale about a vain emperor interested above all in new, expensive clothes. One day, two swindlers offer to weave magnificent clothes for the Emperor, made of fabrics so fine and wonderful that they cannot be seen by less intelligent people and by people unfit to occupy their station.[239] The swindlers pretend to deliver an invisible garment to the Emperor, who then parades nearly naked in front of his subjects. Everyone, except a candid child, pretends they see the clothes, less they be considered unfit or less intelligent.

It would not be fair to compare contemporary disability policies to a collective, embarrassing, lie, considering the progress Canada has made over the last decades. Yet, this paper explored how Canadian policies are still intertwined with a long history of understanding disability as a medical tragedy, deserving of charity, rather than as a matter of justice and human rights, as the CRPD ideally prescribes. In practice, disability policies and rights may themselves have insufficient scope, be insufficiently monitored, or unwittingly rely on expectations of normalizing or medicalizing PWDs. However, even policies and rights that seem more promising on the books can be the subject of interpretation and application by judicial and administrative actors steeped in outdated conceptualizations of what kind of issues "disability" raises. The resemblance to the *Emperor's New Clothes* is not so much the residual failures, but how various social actors cloak them with a rhetoric of new disability paradigms. The task of disability scholars therefore becomes (1) to poke holes in this rhetoric by pointing out specific shortcoming that could be legislatively amended and (2) by proposing how ableist vectors and outdated models and narratives of "disability justice" are still operating within new, facially egalitarian, well-meaning, paradigms. That is the dual task I have undertaken in this paper, by using the CRDP as a promising, albeit imperfect, normative cornerstone.

Canadian Labour Congress <www.canadianlabour.ca/canadas-unions-call-for-fast-tracking-of-canada-disability-benefit/>); and a petition presented to the House of Commons by MP Mike Morrice after being initiated by Michelle Hewitt, co-chair of Disability without Poverty (see Petition No. 441-00175 (10 February 2022), online: *Parliament of Canada* <www.petitions.ourcommons.ca/en/Petition/Details?Petition=e-3656> .
70-71 Elizabeth II, 2021-2022

[237] Prince, *supra* note 182 at 105–106.

[238] Committee on the Elimination of Discrimination against Women (CEDAW), Concluding observations of the combined eighth and ninth periodic reports of Canada, 18 November 2016, UN Doc CEDAW/C/CAN/CO/8-9 at paras 10–11.

[239] Hans Christan Andersen, "The Emperor's New Clothes" translated by Jean Hersholt (19 September 2019) online: *HC Andersen Centret* <www.andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes_e.html>

A key takeaway is that the policy's shortcomings examined in this paper could and should be understood not just as a threat to citizens, but as a threat to citizenship. "The citizenship concept is important to disability policy because it speaks to the nature of the relationship between the individual and society, and how that relationship is affected by a particular public policy intervention."[240] The added value of my analysis is to weave abstract theory with concrete legal and political problems, and to bring disability scholarship and political theory in conversation with legal scholars and activists. This may help the latter articulate their unease or revolt in terms of the injustice, indecency, or indignity of being stripped of the "right to have rights" by various judicial, legislative and bureaucratic actors who simultaneously assert that PWDs are still clothed with rights. A sense of frustration is palpable amongst social justice scholars who look carefully and closely into these problematic arguments and respond that policymakers are "not getting it,"[241] "still not getting it,"[242] and still not getting that they're not getting it. Analyzing current day shortcomings in the light of disability theory and history helps to understand *why* things have not profoundly changed since the early day of social welfare policy, since, today still, the rights of citizenship are "reframed as obligations" and made "conditional on paid work, including the embodiment of the venerable employed […], 'contributing', and 'productive' citizen."[243] Those who cannot emulate this ideal continue to be "subject to ridicule, disgust, marginalization, and social exclusion."[244] Disability justice does not only require that our state uses its current legal and social tools to respond to the needs of a discrete minority. It requires the dismantling of the multifaceted ableist ideology that pervades the very tools (e.g., legal precedents, tests and evaluative assumptions) used to achieve justice, and disguises policy shortcomings as unavoidable economic or biological necessities. As Canadian culture becomes more disability-friendly, it will become clearer to policymakers that fine-tuning legal frameworks to achieve universal inclusion is not only a matter of need-based redistribution of shared resources to help the worst off, but also and more fundamentally a robust demand for recognition of one's equal importance as a citizen.

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[240] August, *supra* note 190 at 2.

[241] Dianne Pothier, "On Not Getting It" (1995) 33:4 Alta L Rev 817.

[242] Koshan, *supra* note 61.

[243] Smith-Carrier et al, *supra* note 181 at 572.

[244] *Ibid*.