



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Principles for the Law as it Affects Persons with Disabilities

BACKGROUND PAPER

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ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Ontario law deans. It is situated at Osgoode Hall Law School, in the Ignat Kaneff Building at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government. It selects projects that are of interest to and reflective of the diverse communities in Ontario and is committed to engage in multi-disciplinary research and analysis and make holistic recommendations, as well as to collaborate with other bodies and consult with affected groups and the public more generally.

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I. INTRODUCTION

Early in its mandate, the Law Commission of Ontario (LCO) heard that while there are many laws, policies and programs that are, or are intended to be, of benefit to persons with disabilities, the overall legal framework within which persons with disabilities live is often complex and contradictory, and not infrequently counterproductive. As a result, in 2007 the LCO's Board of Governors approved a project to develop a coherent and principled approach to the law as it affects persons with disabilities. The intent of this project is not to recommend changes to any particular law relating to persons with disabilities, although law reform is certainly needed in many areas. Rather, the intent is to develop a holistic, coherent, principles-based approach to this area of the law as a whole, an approach that can be used in developing new laws, or evaluating and reforming existing ones.

It is intended that the Framework that is ultimately developed through this project will be applicable to laws, policies and practices which are developed or reformed by various levels of government, as well as policies and practices developed by private actors (such as service providers). It may also be of assistance to those who are responsible for interpreting and applying laws, policies and practices, such as judges. For convenience, this paper refers throughout to "the law", but the term should be understood in this broad sense.

At approximately the same time, the Board of Governors approved a sister project on the law as it affects older persons.¹ As the two projects have similar goals as well as some areas of intersection, they have proceeded in tandem and have informed each other.

Work on this project commenced in early 2009. Since that time, the LCO has conducted considerable research, both internally and by funding expert papers. It has also released two consultation papers, and conducted three stages of public consultation.² At this time, the LCO has released for comment a *Draft Framework for the Law as it Affects Persons with Disabilities: Advancing Equality Through Law, Policy and Practice*. Based on the responses to this *Draft Framework*, the LCO will undertake revisions and release a *Final Framework*. A full description of the development of the project may be found in the LCO's Background Paper, *Developing a Framework for the Law as it Affects Persons with Disabilities* (forthcoming).

This Background Paper is a companion to the *Draft Framework*. It provides a description and analysis of some of the key concepts on which the *Draft Framework* is based. The two documents have been developed together. As the theoretical understandings of the concepts laid out in this Paper have evolved, so has the LCO's approach to the *Framework*. Conversely, as the *Draft Framework* has clarified some of the practical implications of the concepts, the

definitions and approaches laid out in this Paper have been refined. Therefore, the two documents should be read in conjunction.

It is important to note that terminology related to the experience of disability is evolving and continues to be a subject of debate. The LCO recognizes that there are various views about the most appropriate language, and defers to persons with disabilities themselves as to the most appropriate language.

II. ADOPTING A PRINCIPLES-BASED APPROACH TO THE LAW AS IT AFFECTS PERSONS WITH DISABILITIES

The LCO determined at an early stage in this project that the ultimate framework would be based on a set of principles which would form the basis for evaluating new or existing laws, policies and practices.³

Principles are normative, and can act as a catalyst to change attitudes and awareness about persons with disabilities. They are also by their nature aspirational, and can help us to identify the goals which law and policy should seek to achieve with respect to persons with disabilities. A principles-based approach can assist in ensuring that the goals of the law are in harmony with the aspirations of persons with disabilities, while recognizing that those aspirations (and the law itself) are constantly evolving.

The law as it affects persons with disabilities is vast and complex.⁴ There are dozens of laws that directly target some or all persons with disabilities. Many of them, like special education and the Ontario Disabilities Support Program, involve extensive and complicated webs of policies and processes and significant bureaucracies. And of course, by definition, all laws of general application affect persons with disabilities, sometimes differently or disproportionately compared with persons who do not have disabilities. Not surprisingly, the law as it affects persons with disabilities is often fragmented and difficult to grasp, let alone navigate. A principles-based approach potentially provides a clear and consistent yet flexible means of assessing this wide range of laws.

As well, a principles-based approach builds on the extensive work that has been completed over the past few decades. Persons with disabilities, together with organizations that represent, serve or advocate for them, have worked to articulate principles that address their experiences and their aspirations, and to see them reflected in laws and public policy. The Canadian *Charter of Rights and Freedoms* and the Ontario *Human Rights Code* (together with the caselaw developed under them), statutes like the *Accessibility for Ontarians with Disabilities Act*, public policy documents like *In Unison* and international documents like the United Nations *Convention on the Rights of Persons with Disabilities* all reflect, to varying extents and according to their particular contexts, these fundamental principles. A principles-based approach therefore ensures that the work of the LCO builds on and complements all that has gone before, and can make a contribution to the ongoing evolution of this area.

Because principles are abstract, a principles-based framework must meet the significant challenge of grounding these abstract principles in lived experience, and ensuring that their

implications and interpretations are sufficiently concrete to permit practical application, a challenge that is discussed at greater length in Part VI of this Paper.

III. HOW WE IDENTIFIED PRINCIPLES FOR THE LAW AS IT AFFECTS PERSONS WITH DISABILITIES

A. Challenges and Contexts in Identifying the Principles

As described in our forthcoming Background Paper, *Developing a Framework for the Law as it Affects Persons with Disabilities*, the LCO has undertaken an extensive and broadly based process to identify principles for the law as it affects persons with disabilities that:

- meaningfully capture the aspirations and diverse experiences of persons with disabilities;
- can be usefully applied in the multiple contexts where laws, policies and practices operate; and
- can feasibly be operationalized in an evaluative framework.

This paper and the accompanying *Draft Framework* continue the process of identifying and refining the principles that will form the foundation of the *Final Framework*.

As noted above, the LCO's project builds on an extensive body of existing theoretical and policy work. Much of the LCO's preliminary research involved identifying, analyzing and attempting to synthesize this work, as well as considering how it might apply in Ontario's legal context. The breadth and complexity of this context posed a particular challenge for identifying and defining principles in a way that could be meaningfully applied.

The identification of the principles has not been a linear process. The various research projects and the multiple stages of consultation have informed each other. As new issues are identified, the LCO continues to re-examine the primary sources and earlier analyses.

Because the LCO's two "Framework" projects (this project on the law as it affects persons with disabilities and the sister project on the law and older adults) have proceeded concurrently, the two projects informed each other. There are significant commonalities in the principles identified in the two projects; however, there are crucial differences in the way those principles are defined, reflecting differences in contexts of the two groups and the barriers that they face in achieving their aspirations.

B. Sources for the Principles

The LCO looked to a broad range of sources to identify principles for the law and persons with disabilities. The description below outlines the key types of sources and the most foundational documents and processes. However, for reasons of length, not all sources considered can be identified or analyzed here.

1. Analyzing the Current Legal Framework

One cannot develop principles for an area of the law without first developing an understanding of that area – the issues that it does and does not address, the presuppositions on which it is based, and the approaches used to tackle issues. As a preliminary step therefore, the LCO undertook a review of all Ontario laws that directly reference persons with disabilities, as well as research on laws of general application that may affect persons with disabilities differently or disproportionately. This research formed one of the underpinnings of the LCO's *Preliminary Consultation Paper*.

This review identified a number of overarching issues that principles should either take into account or directly address. The following are examples:

- The lives of persons with disabilities are, for better and for worse, heavily regulated, so that the law is both broad and complex.
- Due to a tendency to develop laws that are focused on addressing specific issues, the law is fragmented and may be limited in its ability to address persons with disabilities in a holistic fashion; this issue is highlighted by the research that the LCO has undertaken on transition points for persons with disabilities and the law.
- There is a general tendency in designing laws to emphasize a functional model of disability.
- The law generally relies on persons with disabilities to navigate complex systems and advocate for themselves.
- Many laws that are crucial to the well-being of persons with disabilities lack monitoring and accountability mechanisms to ensure that they are operating effectively and as intended.

2. Public Consultations

As described in the forthcoming Background Paper, *Developing a Framework for the Law as it Affects Persons with Disabilities*, the LCO has carried out public consultations at a number of stages in this project. These public consultations, particularly the extensive community consultations undertaken in the spring and summer of 2010, were crucial to the development of the principles and of the *Draft Framework* in general. In particular, they assisted the LCO in the following ways:

- Understanding the lived experience of persons with disabilities with various laws, including identifying common challenges and positive practices within the law.
- Understanding how various groups of persons with disabilities may experience the law differently.
- Identifying the aspirations of persons with disabilities for their lives, and how the law may act as a barrier or a bridge to achieving these aspirations. And,
- Identifying how ableism may operate in both the substance and the implementation of the law.

In short, the consultations informed all aspects of this project.

3. International Documents

The international legal community has created numerous legal instruments that advance the rights of persons with disabilities.⁵ The most recent and encompassing is the *United Nations Convention on the Rights of the Persons with Disabilities* (CRPD).⁶

Most significantly, the CRPD codified the commitment of the international community to recognize the rights of persons with disabilities. The CRPD was ratified by Canada on March 11, 2010.⁷ The purpose of the CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”⁸ It reflects social and human rights models of disability and therefore highlights the need for society to adapt to the specific circumstances and realities of persons with disabilities in order to ensure respect and inclusion. The CRPD does not provide for “new” rights for persons with disabilities, since they are entitled to all the rights accruing to persons under other UN conventions, but recognizes that “without a legally binding treaty that spelled out their rights, persons with disabilities faced being legally ‘invisible’ in their societies and even in the international arena”.⁹

The CRPD details the rights that all persons with disabilities enjoy and outlines the obligations of States Parties to protect those rights. These specific rights include, among others, the right to life, liberty and security of the person; equal recognition before the law and legal capacity; freedom from exploitation, violence and abuse; respect for mental and physical integrity; to live in the community; to privacy; to expression of opinion; to education, health and work; to an adequate standard of living; and to participate in political, public and cultural life. The State's obligations are to "respect, protect and fulfill" the rights under the CRPD, concepts which are further described in Part VI of this Paper.¹⁰

The CRPD also sets out a number of general principles:

1. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
2. Non-discrimination;
3. Full and effective participation and inclusion in society;
4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
5. Equality of opportunity;
6. Accessibility;
7. Equality between men and women;
8. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 33 of the CRPD provides for "national implementation and monitoring". Furthermore, States Parties are to develop a framework (or strengthen existing ones) "to promote, protect and monitor implementation" of the CRPD that takes into account existing human rights regimes. Monitoring the CRPD is to involve civil society organizations, especially persons with disabilities.¹¹

4. *The Charter of Rights and Freedoms and Human Rights Law*

Any discussion of Canadian law and persons with disabilities must begin with a consideration of the rights enshrined in the *Charter of Rights and Freedoms* and their interpretation in the caselaw over the past 30 years. The *Charter* applies to provincial, federal, territorial and municipal governments and to organizations with a nexus with government, bodies that are performing government functions, such as hospitals. It applies to legislation, regulations, municipal by-laws, government action and the executive branch. It does not apply to the

private sector; however, the private sector may be influenced by the *Charter* when its actions are subject to legislation that is challenged under the *Charter*. The *Charter* rights most important to the identification of principles for the law as it affects persons with disabilities are those set out in sections 7 and 15.

Section 15(1) of the *Charter* provides for equality before and under the law, and for equal protection of the law without discrimination on the basis of a number of enumerated grounds, including mental or physical disability. Section 15(2) of the *Charter* shields laws, programs and activities that aim to ameliorate the conditions of disadvantaged groups or individuals, including those experiencing disadvantage due to their mental or physical disability. In interpreting section 15 and the right to equality, the Supreme Court has given central place to the principle of dignity.¹² The principle of dignity means that the affected individual or group feels self-respect and self-worth, and is concerned with physical and psychological integrity and empowerment.¹³

Section 7 of the *Charter* guarantees the life, liberty and security of the person, and the right not to be deprived of these except in accordance with the principles of fundamental justice. The right to liberty has been interpreted as including the right to make fundamental personal decisions, as well as freedom from physical constraint and interference with physical freedom. Liberty includes the right to an irreducible sphere of personal autonomy regarding matters that “can properly be characterized as fundamentally or inherently personal such that, by their very nature, they might implicate basic choices going to the core of what it means to enjoy individual dignity and independence.”¹⁴ Within that sphere, individual choices must be free from state interference. Security of the person has been interpreted by the Supreme Court of Canada as including an individual’s “psychological integrity”¹⁵ where the interference is sufficiently serious.

Human rights statutes (in Ontario, the *Human Rights Code*) also provide a foundation for the identification of principles for the law as it affects persons with disabilities. The purpose of the Ontario *Human Rights Code*, as expressed in its Preamble, is to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.¹⁶

The *Code* prohibits discrimination on the basis of disability, as well as of sex, sexual orientation, age, family and marital status, race, ethnicity, place of origin, and several other grounds. Where it is necessary in order to ensure equal treatment without discrimination on the basis of disability, individuals have the right to accommodation up to the point of undue hardship for

needs associated with their disability. These rights extend to the social areas of employment, housing, goods and services, professional and occupational associations, and contracts. Like the *Charter*, the *Code* permits special programs to alleviate hardship or economic disadvantage or that are designed to assist individuals or groups to attempt to achieve equal opportunity.¹⁷

The OHRC has broad powers to advance the purposes of the *Code* as expressed in the Preamble. These powers include the ability to develop statements of policy, interpreting the provisions of the *Code*. The OHRC has developed the *Policy and Guidelines on Disability and Duty to Accommodate* (2001). That document outlines three principles for consideration in providing equal treatment without discrimination for persons with disabilities:¹⁸

1. *Respect for dignity*: this includes individual self-respect and self-worth, as well as privacy, confidentiality, comfort, autonomy, individuality and self-esteem.
2. *Inclusion and participation*: this includes ensuring that persons with disabilities are able to access their environment and face the same duties and requirements as everyone else, with dignity and without impediment, and involves inclusive design and the removal of barriers.
3. *Individualization*: each person with a disability must be considered, assessed and accommodated individually, as each person is unique.

The disability-related case law arising under both the *Charter* and human rights law is rich and complex. Fundamental principles emerging from that case law include:

1. An equality analysis that focuses on recognition of the inherent dignity and worth of persons with disabilities.¹⁹
2. The recognition that laws and policies may reflect stigmas and negative assumptions related to particular disabilities.²⁰
3. The recognition that barriers in attitudes and the environment are a key component in the experience of disability, so that the focus of a disability rights analysis must be on dignity, respect and the right to equality rather than solely on biomedical impairments.²¹
4. The necessity of broadening the “mainstream” structures of society to include and respect the differences associated with disability.²²
5. An emphasis on the right of persons with disabilities to receive equal benefit of services, by design and from the outset, even where special measures are required to ensure this is the case.²³ Equal access includes consideration of the independence, comfort, dignity, safety and security of persons with disabilities.²⁴

6. The right of persons with disabilities to be assessed and accommodated based on their own personal characteristics, rather than assumptions related to their disability.²⁵

5. Domestic Policy Documents

Canada and various provinces have, over the years, adopted a number of important policy frameworks surrounding persons with disabilities.²⁶ In 1998, the federal, territorial and provincial ministers responsible for social services²⁷ developed *In Unison: A Canadian Approach to Disability Issues*²⁸ which out a blueprint for promoting the integration of persons with disabilities in Canada. This report was also aimed at creating a coordinated approach to delivering services and benefits to persons with disabilities and to promoting inclusion and participation. The report articulates a vision of full citizenship for persons with disabilities in Canada:

Persons with disabilities participate as full citizens in all aspects of Canadian society. The full participation of persons with disabilities requires the commitment of all segments of society. The realization of this vision will allow persons with disabilities to maximize their independence and enhance their well-being through access to required supports and the elimination of barriers that prevent their full participation.²⁹

In Unison aimed to achieve this vision of citizenship for persons with disabilities through the implementation of three building blocks: disability supports, employment and income. It endorsed principles of universal design “by focusing on policies that promote access to generic programs and services for all Canadians, including persons with disabilities.”³⁰ It emphasizes the values of equality, independence and inclusion.

In 2000, the federal, provincial and territorial ministers responsible for social services issued an updated version of *In Unison*, *In Unison 2000*. This Report compares the situation for persons with disabilities with that of persons without disabilities and provides examples of effective practices. It is more responsive to the distinct experiences and approaches of First Nations than the 1998 Report was. The Report indicates that the members of the disability community who participated in developing *In Unison 2000* believed that “‘an access and inclusion lens’ should be applied to all activities of governments, from human resources to the broad range of programs delivered”.³¹

IV. SUBSTANTIVE EQUALITY AS AN OVERARCHING VALUE

Equality is identified as a value or a principle in some of the documents discussed above. In particular, equality and non-discrimination are central to the *Charter* and to the *Human Rights Code*.

Rather than identifying equality as a discrete principle, the LCO has concluded that substantive equality is more appropriately described as “an underlying value” or a goal that observance of the principles will advance and that should influence the interpretation of the principles.

The interpretation of the concept of equality is subject to on-going debate and discussion and the case law relating to equality continues to evolve.

“Equality” is often linked with “non-discrimination” and in certain respects they are intended to achieve similar results. Anti-discrimination theory has become intertwined with the notion of equality, and as a result even the broader “equality” tends to carry with it the notion that particular groups (and not necessarily others) have been treated unequally and deserve to be treated equally. There is a major difference between the two, however. “Non-discrimination” requires a comparison with others who do not share distinctive characteristics with a person denied a benefit or opportunity, for example. There is an implicit assumption that the way the comparator group is treated or the opportunities available to the comparator group is the standard to meet. Both the claimant and the comparator group might be treated “badly”, but nonetheless equally and without discrimination, even though the way they are treated is at a low standard. Accordingly, governments required to extend benefits to a group previously excluded because the exclusion constitutes discrimination can decide not to provide the benefit rather than extend it.

The LCO’s approach to the concept of equality is substantive, rather than formal. The Supreme Court of Canada, in a recent case dealing with age-based criteria, stated that

Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or

negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.³²

Substantive equality requires government and private actors to take the steps necessary to advance access by all citizens to benefits, supports, programs, goods and services in a way that is responsive to their particular needs. Its goal might also be thought of as full “citizenship” in society. It incorporates but is not limited to non-discrimination, meaning that no distinctions are imposed upon disadvantaged persons that, in purpose or effect, withhold or restrict access to opportunities, benefits or protection from the law, or impose burdens, obligations, or disadvantages that are not imposed on others. It also means, however, that persons with disabilities are not defined by the barriers they face, but are recognized as members of society who are able to make contributions and have obligations, as do other members. Substantive equality is about intangible concepts such as dignity and worth, but also about concrete opportunities to participate, have needs taken into account and have society and its structures and organizations develop in a way that does not treat persons with disabilities as outside mainstream society.

V. PRINCIPLES FOR THE LAW AS IT AFFECTS PERSONS WITH DISABILITIES

Based on the above, the LCO has identified six principles for the law as it affects persons with disabilities:

1. Respecting the dignity and worth of persons with disabilities;
2. Responding to diversity in human abilities and in other characteristics;
3. Fostering autonomy and independence;
4. Promoting social inclusion and participation;
5. Facilitating the right to live in safety; and
6. Recognizing that we all live in society.

The six principles are closely linked. They cannot be understood or successfully implemented in isolation. To a certain degree, the underlying concepts overlap. For clarity, they are outlined here separately, but the *Draft Framework* applies them holistically, reflecting their connectedness.

As noted above, the LCO's consultations assisted us in understanding what the principles might mean in practical terms. As well, the LCO funded six Commissioned Papers and carried out extensive internal research on the theme of transitions in the lives of persons with disabilities and the law as a means of identifying implications and possible interpretations of the principles.

A. Respecting the Dignity and Worth of Persons with Disabilities

Proposed definition: *This principle recognizes the inherent, equal and inalienable worth of every individual, including every person with a disability. All members of the human family are full persons, with the right to be valued, respected and considered and to have both one's contributions and needs recognized.*

1. The Principle and the Experiences of Persons with Disabilities

There is a long history in Canada of negative attitudes towards persons with disabilities. Manifestations of ableism include involuntary institutionalization, forced birth control and sterilization, segregation away from the mainstream of the population and denial of basic rights.³³ While attitudes towards disability have evolved, a recent Environics Research Group Report on Canadian attitudes towards disability-related issues found that while most people like to think of themselves as being open to the participation of persons with disabilities in their day-to-day activities, many expressed significant discomfort with some aspects of relating to persons with disabilities, particularly those whose disabilities affect their communications, or where the disability involved “disfigurement” or behaviour that was not considered “normal”.³⁴

There are specific stereotypes and stigmas associated with particular disabilities. For example, during the LCO’s consultations, many persons with mental health disabilities, particularly those who have been homeless, shared experiences which demonstrated that they had been subject to heavy judgment and negative assumptions when dealing with legal systems. These attitudes may contribute to the criminalization of persons with mental health disabilities, an issue of great concern to many participants.

As well, many participants talked about the suspicion and often contempt with which persons with disabilities are treated when seeking services and supports. Services which are designed to assist persons with disabilities in meeting their basic needs or improving their autonomy, independence and participation may in practice be implemented through an adversarial mindset, which assumes that those seeking services are attempting to game the system, or obtain benefits to which they are not entitled. This is particularly the case for persons with disabilities who are also poor.³⁵

Negative attitudes or stereotypes may affect the design of laws and policies and may be incorporated into their substance. For example, capacity and guardianship laws have been subjected to persistent criticism on the basis that they are founded in ableist notions about the abilities and worth of persons with intellectual disabilities.³⁶ As another example, until the relevant provisions were overturned through a court challenge, the *Ontario Disability Support Program Act* explicitly excluded from its supports and benefits those persons whose impairments and primary restrictions resulted from addictions to drugs or alcohol.³⁷ The Ontario Superior Court found that this exclusion was not in accordance with the purpose of the law; rather it was based on “assumed or unjustly attributed characteristics” regarding individuals with substance abuse disabilities, and that it resulted in the denial of the “essential human worth” of persons with these disabilities.³⁸

A lack of respect for the worth and abilities of persons with disabilities may also affect how laws are implemented by justice system workers, service providers and others. For example, parents with disabilities have expressed concerns that negative assumptions may lead to increased scrutiny and intervention by the child welfare system.³⁹ Similarly, during the LCO's spring 2010 public consultations, many persons with disabilities expressed concern about demeaning treatment or processes for obtaining benefits and supports under the Ontario Disability Supports Program. For example, one participant commented that,

To get funding, you have to strip yourself of any itty-bitty inkling of dignity that you have ... you need to sort-of strip yourself of all the dignity that you have and open your private spaces up absolutely, completely, risking legal ramifications even – I wonder, I wonder if that information could be used when there are issues of aggression and violence and abuse and all that kind of stuff, if that kind of information you end up documenting to get the support you need to save yourself from yourself, to gain your dignity and independence, may actually be used against you at some point.⁴⁰

2. Interpreting the Principle

The principle of respect for the dignity and worth of persons with disabilities is a direct challenge to stereotypes and negative attitudes towards persons with disabilities. It emphasizes that dignity is something that belongs to us because we exist: it is not something that we earn or receive, and it cannot be rightfully ignored or diminished. It does not depend upon our health status or our abilities. Every person is worth caring about and entitled to respectful treatment.

This means that those who make law and policy, or who implement it, must be sure that laws and policies, in their substance or implementation, are not tainted by negative or dismissive attitudes towards persons with disabilities, for example through demeaning processes or insulting treatment. Because barriers for persons with disabilities tend to push them towards the margins, socially and economically, there is a disproportionate incidence of low-income among persons with disabilities,⁴¹ and the particular set of negative attitudes towards low income individuals with disabilities deserve special scrutiny.

It also means that persons with disabilities should be understood as whole individuals – as employers as well as employees, parents and caregivers as well as recipients of care, volunteers and fully engaged citizens, and as sexual human beings, among other roles – rather than being reduced to the sum of their impairments, and as passive objects of charity. This requires us to

see persons with disabilities in their full social context, and as individuals with complex identities and evolving life courses.

B. Responding to Diversity in Human Abilities and Other Characteristics

Proposed definition: *This principle requires recognition of and responsiveness to the reality that all people exist along a continuum of abilities in many areas, that abilities will vary along the life-course, and that each person with a disability is unique in needs, circumstances and identities, as well as to the multiple and intersecting identities of persons with disabilities that may act to increase or diminish discrimination and disadvantage.*

1. The Principle and the Experiences of Persons with Disabilities

All humans vary in their abilities. “Disability” may be thought of as part of this normal variance. Social and environmental barriers may, at some points along this continuum of abilities, create disabling experiences for some individuals.⁴² Certain impairments may not constitute a disability in the sense that they affect a person’s daily life. The most obvious example is eyesight: many people who have poor eyesight are able to wear glasses that sufficiently compensate to enable them to function in most aspects of their life as if their eyesight were not impaired. Without corrective lenses, however, their eyesight might, in fact, constitute a disability. As well, some conditions commonly considered as impairments may have positive aspects that are often ignored: for example, some recent studies associate the learning disability of dyslexia, which results in challenges in learning to read and write, with stronger than average skills in other areas, such as spatial perception.⁴³ That is, the differences associated with disability may be positive as well as negative. Persons with disabilities are not “the other”, but are part of the range of human experience.

Persons with disabilities are commonly viewed as a homogenous group, mainly defined by their impairments. This obscures the enormous diversity of the disability community. The experience of disability will differ considerably depending on the nature of the impairment: while the experience of exclusion and marginalization may be common, needs and experiences may be unique.⁴⁴ The impact of a disability may also differ depending on whether an individual is living in an urban area where access to supports and services may be greater, or in a remote or rural area;⁴⁵ whether the individual has a supportive family and community surrounding him or her; his or her socio-economic status; and other factors. That is, individual lives, needs and

experiences will differ widely even among persons with the same impairments, although the law may have difficulty in effectively recognizing and addressing this diversity.

As is noted above, one of the circumstances of persons with disabilities that should be taken into account is the disproportionate experience of low income. Whether as a result of their environments, their impairments or in most cases a combination of the two, individuals with disabilities tend to have lower socio-economic status than their peers without disabilities. On average, persons with disabilities live with lower incomes,⁴⁶ have lower levels of education,⁴⁷ and have a greater exposure to violence and victimization than the average.⁴⁸ This is particularly true for certain groups of persons with disabilities, such as women and Aboriginal individuals.⁴⁹ The level and type of disadvantage also may differ depending on the type of disability. For example, persons with developmental disabilities report the lowest labour force participation rate of any group of persons with disabilities, with those with hearing or mobility disabilities faring relatively better in this respect.⁵⁰ Disadvantages may accumulate throughout life. For example, a person who experiences barriers in education due to a disability will have lower levels of literacy and of educational attainment throughout life, resulting in greater difficulty in entering and remaining in the workforce, and therefore in maintaining stable income levels and adequate housing.

As well, there has been considerable scholarship about how the experiences of disability may differ based on gender, racialization, sexual orientation or other aspects of a person's identity. Women with disabilities, for example, have special concerns regarding reproduction and parenting. Aboriginal persons with disabilities may have difficulty finding accessible support services that are sensitive to their culture and history. All of these forms of identity will help to shape the life courses of persons with disabilities.

Unfortunately, there is a tendency to carve off different pieces of our identities. So, you know, my experience has been that there's a lot disability organizations that don't speak to issues around social location or multiple identities. So, they don't look at issues for racialized communities, they don't look at issues for queer communities within the disability community. And then those organizations that really do have a level of expertise around the complexities within the LGBT community, within racialized communities, don't often think about people with disabilities coming into their services.⁵¹

2. Interpreting the Principle

One of the implications of an acknowledgement of the near universality of impairment is the need to widen the range of what is considered "normal" in the context of human abilities, and

to design social, political and physical structures more flexibly and inclusively.⁵² To put this principle into action, universal or inclusive design, with a concomitant commitment to accessibility, is a key strategy to ensure the maximum inclusion of all people with their infinitely varying abilities.⁵³ The CRPD imposes as a general obligation the promotion of universal design in standards and guidelines.⁵⁴

Inclusive design has been considered as part of the duty to accommodate.⁵⁵ Appropriate accommodations are required to ensure full recognition of the spectrum of variance in human abilities. As the Ontario Human Rights Commission (OHRC) has emphasized, “[a]ccommodation with dignity is part of a broader principle, namely, that our society should be structured and designed for inclusiveness”.⁵⁶

In Unison 2000 highlights the intersectional aspect of diversity:

The framework [developed *In Unison*] also acknowledges the importance of developing flexible policy solutions in order to meet individual needs. Each person with a disability is unique and their specific needs, aspirations and challenges are influenced by their type of disability, stage of life, family, community and cultural context, and other characteristics. Aboriginal persons with disabilities, for example, view disability issues within frameworks that reflect their own cultural principles.⁵⁷

Inclusive design and accommodation must take into account the multiple aspects of identity for persons with disabilities.

The principle of diversity in human abilities and other characteristics also reinforces the recognition that persons with disabilities are individuals first and foremost. For many individuals and in many circumstances, their disability is not the most important aspect of their identities. This recognition helps us to move beyond stereotypes and to combat ableism and paternalism.

C. Fostering Autonomy and Independence

Proposed definition: *This principle requires the creation of conditions to ensure that persons with disabilities are able to make choices that affect their lives and to do as much for themselves as possible or as they desire, with appropriate and adequate supports as required.*

1. The Principle and the Experiences of Persons with Disabilities

Responses to disability have often been marked by paternalism, the tendency to remove decision-making from persons with disabilities “for their own good”.⁵⁸ This has been particularly marked for persons with intellectual or psycho-social disabilities.

[M]any people with more significant intellectual, cognitive and psychosocial disabilities face substantial or total restrictions in making their own decisions. They often encounter others who presume they are unable to guide their own lives, are people who need to be ‘fixed’, or protected, and who limit or completely restrict the scope of their decision making. Many people are physically isolated or socially and economically excluded and therefore without meaningful choices or the opportunity to develop a vision and direction for their own lives, and to make their own decisions. Service provision in the disability and older adult sectors is often based on charity and protection models, and an assumption that because people need supports and care, others should make decisions on their behalf. Often service providers also require that they are provided decision making authority on behalf of those they are supporting so they can more efficiently manage the range of individual decisions related to care, medications, activities, etc.⁵⁹

The current legal regimes regarding decision-making for those who are determined to lack legal capacity in a particular area of life provide one of the most striking illustrations of paternalism.⁶⁰ In Ontario, the *Substitute Decisions Act*⁶¹ and the *Health Care Consent Act*⁶² create mechanisms for determining legal capacity and for identifying substitute decision-makers where legal capacity is found to be lacking. These approaches to diminished cognitive or intellectual abilities have been the subject of significant criticism from the intellectual disabilities community, and an alternative “supported decision-making” approach has been proposed and recognized in the CRPD.⁶³ Similarly, there is ongoing controversy regarding involuntary treatment of persons with psychiatric disabilities mental health law.⁶⁴

Related to the opportunity to *choose* for oneself is the opportunity to *do for* oneself – to support oneself financially, to live independently, and to have, to the degree possible, the life options available to persons without disabilities. In *Via Rail*, the Supreme Court of Canada considered the principle of independence central to the finding that Via Rail’s failure to accommodate users of personal wheelchairs infringed the rights of persons with mobility disabilities to exercise their independence.⁶⁵ In some cases, independence is difficult to achieve because of physical, social or institutional barriers. For example, a discrimination on the part of landlords and a dearth of accessible housing may make it difficult for persons with disabilities to live independently,⁶⁶ and limited accessible transportation services may reduce opportunities for employment or education.⁶⁷ In some cases, persons with disabilities may require supports in order to achieve independence. For example, supporting persons with disabilities with self-

advocacy tools can reduce the dependence of persons with disabilities on family members or service providers, and enhance skills and confidence.⁶⁸

2. Interpreting the Principle

The principle of fostering autonomy and independence includes the both the right to *choose* for oneself, and to *do* for oneself, and is a response to the various forms of paternalism that may affect persons with disabilities.

“Autonomy” has been defined by the World Health Organization (WHO) as “[t]he perceived ability to control, cope with and make personal decisions about how one lives on a daily basis, according to one’s own rules and preferences.”⁶⁹ In the context of s.7, the Supreme Court of Canada has articulated the principle of autonomy as including “decisions of fundamental personal importance” particularly with respect to bodily integrity.⁷⁰ Disability Rights Promotion International (DRPI) defines autonomy as

the right of an individual to make his or her own choices. Autonomy, or self-determination, means that the person is placed at the centre of all decisions affecting him or her and may choose forms of supported decision-making.⁷¹

In some circumstances, the autonomy of persons with disabilities may be perceived to be in tension with other principles. For example, in some cases limiting the choices of or enabling others to make choices on behalf of persons with disabilities has been seen as justified in order to achieve other ends, including the safety and security of persons with disabilities or of others in society. Also, some laws are put in place in recognition of the particular risks or vulnerabilities that persons with disabilities might experience because they lack appropriate supports. Although some limitation may be justified consistent with other principles, it is crucial that the focus remain on respecting the autonomy of persons with disabilities as much as possible and that limitations not be motivated by paternalism.

It is helpful to remember that autonomy is realized in the context of our relationships. This is not only true for persons with disabilities, but for all of us. Jennifer Nedelsky argues that it is relatedness which enables people to gain autonomy; the relationships between “parents, teachers, friends, loved ones” are what “provide the support and guidance necessary for the development and experience of autonomy”.⁷² This approach focuses on “structuring relationships so that they foster autonomy.”⁷³ Relational autonomy recognizes that none of us makes decisions on our own but we do so in consultation with others, and that the provision of

support to persons with disabilities in the context of decision-making does not undermine autonomy.

The WHO defines independence as “[t]he ability to perform an activity with no or little help from others, including having control over any assistance required rather than the physical capacity to do everything oneself.”⁷⁴ *In Unison 2000* stresses that the promotion of independence or “citizenship” and other LCO principles is linked to the goal of improving disability-related supports:

Disability supports are tools for inclusion. They are critical if people with disabilities are going to lead fulfilling lives and participate fully in their communities. Without them, many people with disabilities are not able to fulfill their social and economic potential.”⁷⁵

The principle of independence therefore requires that persons with disabilities are provided with appropriate levels of supports to do things for themselves to the greatest degree possible.

The principle of autonomy and independence applies to all areas of life for persons with disabilities. It includes within its scope fundamentally personal decisions and provides strong support for enhanced disability-related and income supports for persons with disabilities. Further, both autonomy and independence inform the duty to accommodate as requiring accommodations that maximize the ability of persons with disabilities to choose and do for themselves.

D. Promoting Social Inclusion and Participation

Proposed definition: *This principle refers to designing society in a way that promotes the ability of all persons with disabilities to be actively involved with their community by removing physical, social, attitudinal and systemic barriers to exercising the incidents of such citizenship and by facilitating their involvement.*

1. The Principle and the Experiences of Persons with Disabilities

It has been suggested that, given the persistent marginalization and exclusion of persons with disabilities from the public sphere, the disability rights movement might be conceived of as a “visibility project”:

To sum up, the relative or absolute invisibility of persons with disabilities has meant that the legal structures created to advance private freedom (protection against the abuse of power) and public freedom (participation in the mainstream) have either not been applied or have been applied with less rigour in the case of persons with disabilities.

This has produced a category of person who, while being dependent on the public sphere for survival, lacks access to or influence over public policy. Such persons are denied full admission to public power and full control over their individual destiny. They remain outside the mainstream of society. This lack of presence – or invisibility – serves to reinforce stereotypical assumption about persons with disabilities. It encourages a lack of respect for people with disabilities as rights holders on an equal footing with others.⁷⁶

That is, it is important for persons with disabilities, in all of their individuality and diversity, to be recognized as individuals whose experiences are important and whose perspectives are valued, and for them to be able to actively participate in the development of the law. Without that recognition and participation, laws that appear neutral or that are intended to benefit persons with disabilities may actually have a negative effect on their equality.

Well, the laws are written by able-bodied people. You know, they don't sort of vet them. I guess they have some sort of experts, but you know, I worked for the Ontario government for a long time and I saw the policy. I tried to point out where the barriers were, actually in the Cabinet Submissions process in the first place, it's like the tail wagging the dog. We're too small of a group to really take that seriously. You know, I think that it's just peppered throughout all the legislation, it's really coming from that perspective.⁷⁷

Participation is important at the individual level as well as at the broader societal one. For example, Mona Paré examined the ability of students with disabilities and their parents to have input in decisions that affect their ability to participate equally in the educational context, and found that, due to a range of barriers including lack of information, complex systems and power imbalances, such participation is minimal, despite laws and policies intended to facilitate it.⁷⁸

Participation is closely affiliated with the concept of inclusion. Persons with disabilities have often experienced physical or social exclusion or marginalization, whether arising from attitudinal, physical, social or institutional barriers. The long history of institutionalization of persons with disabilities is a particularly clear example of exclusion, but people with disabilities continue to be pushed to the margins in a variety of social areas, including employment, education and community life. The principle of inclusion aims to redress this exclusion, and make persons with disabilities full members of their communities and of society at large.

2. Interpreting the Principle

The principle of promoting social inclusion and participation has a variety of aspects. It includes ensuring the ability of persons with disabilities to participate in the community, and to be heard as equal citizens on issues that affects them. *In Unison 2000*, for example, equates this principle with the concept of citizenship, which involves “the ability of a person to be actively involved with their community. Full citizenship depends on equality, inclusion, rights and responsibilities, and empowerment and participation.”⁷⁹

As well, as Frédéric Mégret describes, participation as it is used in the CRPD constitutes “a broader demand, made not only to the state but also to society, to allow persons with disabilities to fully become members of society and the various communities of which they are a part.”⁸⁰ The principle of inclusion and participation therefore promotes respect for the integration of persons with disabilities in society as desired, and attempts to recognize, prevent and remove various barriers to that integration. Such barriers include stereotypes, false assumptions, stigmas and ableist attitudes about the abilities of persons with disabilities. This principle may also manifest in a way that demands particular respect for the cultures that have evolved within a disability community. Education and various methods of awareness-raising are often identified as means to apply this principle effectively.

Barriers to participation may affect different subgroups differently. For example, persons with intellectual, cognitive or psychosocial disabilities may be restricted from participation in decisions affecting their daily living if found to lack legal capacity. Persons with mobility disabilities may find it difficult to access social and recreational programs or to vote if buildings are not physically accessible. Participation, therefore, can require different considerations for different people depending on their particular experience of disability.

It is important to note that this principle may mean different things for different subgroups within the disability community. Those who are culturally Deaf, for example, believe that inclusion means that respect and space is made for the continuity of that particular linguistic and cultural community.⁸¹ Other subgroups within the disability community, such as the intellectual and learning disabilities communities, may consider the principle of inclusion to encompass the integration of persons with disabilities into all aspects of mainstream society.⁸² These positions are not necessarily mutually exclusive; however, the means of achieving inclusion might differ for various subgroups of persons with disabilities based on their particular vision of inclusion.

E. Facilitating the Right to Live in Safety

Proposed definition: *This principle refers to the right of persons with disabilities to live without fear of abuse or exploitation and where appropriate to receive support in making decisions that could have an impact on safety.*

1. The Principle and the Experiences of Persons with Disabilities

Persons with disabilities are at greater risk of violence and abuse, whether by strangers or in the context of a trust relationship. Those who are most at risk are persons with disabilities who are living in an institutional setting, have severe disabilities, or have mental disorders.⁸³ Low income among persons with disabilities exacerbates the risk of violent victimization.⁸⁴

*People with mental health issues are forced to live in poverty. In social work, there's something called Maslow's hierarchy of needs. Maslow was a gentleman who determined that there's a hierarchy of needs that we need in order to be happy and healthy and mentally well, and it's a pyramid and if you don't have the things at the bottom of the pyramid, all of the things at the top aren't going to do any good. You won't be well. You need the things at the bottom. And at the very bottom of the pyramid is safety and security. If you're living in poverty, you cannot be safe and secure. Poverty makes us crazy, it doesn't keep us crazy, it makes us crazy in the first place. Unless we deal with poverty, people dealing with mental health issues, the numbers are going to go up, and soon it won't be one in five, it will be one in two.*⁸⁵

Despite the increased risk of victimization, the 2006 Statistics Canada Victims Services Survey reported that only 24 per cent of victim services agencies in Canada were able to provide services to persons with disabilities.⁸⁶ DAWN Canada reported to the LCO that,

It is important to note that women with disabilities (physical, mental, sensory, chronic illness) experience a much higher rate of abuse of all types, than their nondisabled counterparts and more abuse than men who have disabilities. This is important to keep in mind, as it is often very difficult for women with disabilities to even leave the abusive situation in which they find themselves, let alone take legal action against their abusers. Often, women's shelters and transition houses are not accessible to women with disabilities. Therefore, it would appear that it would be even more difficult for women with disabilities to access any legal help, especially if they could not find a safe haven first.⁸⁷

As well, public institutions may not be sufficiently equipped to respect and protect the safety of the persons with disabilities they serve. For example, persons with disabilities are less satisfied with the police response to their complaints than others, and have a less favourable view of the criminal justice system.⁸⁸

I was at one time, about 10 years ago, put on a Form 1, which means that you can be danger to yourself or others. I wasn't a danger to anybody else, so I was obviously a danger to myself. When the police came to arrest me, he ordered me to kneel down in front and put my hands behind my back, then he proceeded to cuff me, after he cuffed me, he went over to my eyes and sprayed me with pepper spray for about 3 seconds. With pepper spray, it's like riding a bull, every second seems like an eternity. They want to play judge and jury and executioner in the field. I don't know what stimulates them to abuse and take advantage of vulnerable disabled people, I don't really understand where it comes from.⁸⁹

The LCO reviewed the results of the Coroner's Inquests into the deaths of persons with disabilities between 1989 and 2010. The Office of the Chief Coroner identified 121 of such deaths. The review identified the magnified risks to safety faced by some of the most vulnerable individuals with disabilities, including inappropriate or excessive use of restraints, lack of appropriate supervision or safety procedures in institutional settings, and inadequate discharge planning for those individuals with psychiatric disabilities transitioning from institutional settings to the community.⁹⁰

Persons with disabilities may not feel empowered to address institutional abuse or exploitation. There is often a significant power imbalance between the individual with a disability and the person or organization administering the law or program. For example, ARCH points out that persons with intellectual disabilities may rely on developmental services and supports for many activities of daily living, such as eating, dressing, bathing, toileting, managing finances, or navigating social assistance bureaucracies, and states that:

This dependence leaves people with disabilities vulnerable; they must work hard to maintain good relationships with support workers, family members and others on whom they rely in order to ensure that they continue to receive support and their basic needs are met. Making a complaint about a support worker or raising a concern about services may threaten or sever those relationships, and this can have disastrous impacts for the person with a disability.⁹¹

Not surprisingly, persons with disabilities revealed lower than average perceptions of their personal safety and security.⁹²

2. Interpreting the Principle

This principle has its roots in the provisions of the CRPD that affirm the rights to liberty and security of the person; to freedom from torture or cruel, inhuman or degrading treatment; to freedom from exploitation, violence and abuse; as well as protections related to adequate standards of living and social protection and the attainment of the highest achievable standard

of health.⁹³ The CRPD more specifically identifies one particular concern about the abuse and exploitation of women and girls with disabilities.⁹⁴ The right under section 7 of the *Charter* to security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice is also applicable. The principle affirming a right to live in safety requires consideration of the socio-economic barriers faced by persons with disabilities, as well as the higher than average rates of abuse and exploitation experienced by persons with disabilities,⁹⁵ and the challenges faced by persons with disabilities who experience abuse and exploitation in seeking services and supports.⁹⁶

The history of the way in which the lives of persons with disabilities have often been curtailed as a result of both well-meaning and less well-meaning interventions by others make this principle contentious. There is a risk that a principle of entitlement to live in safety may be interpreted in a manner that would encourage paternalistic interventions in the lives of persons with disabilities. Nevertheless, it is crucial that law and policy be designed and private actions be conducted in a way that the security of persons with disabilities not be threatened. Protection against abuse of this principle can be found in the application of the other principles, such as the principle of fostering autonomy and independence. Where the principle of facilitating the right to live in safety exists in tension with other principles, Part VI of this Paper suggests a means of approach.

F. Recognizing That We All Live in Society

Proposed definition: *This principle acknowledges that persons with disabilities are members of society, with entitlements and responsibilities, and that other members of society also have entitlements and responsibilities.*

1. The Principle and the Experiences of Persons with Disabilities

All of us have multiple identities, ties, and communities; for those with disabilities, their experiences as persons with disabilities are only one part of that. To extend this point, persons with disabilities are members of the broader community, with which they have a wide range of ties, as well as reciprocal rights and obligations. The well-being of persons with disabilities – as citizens, as parents and family members, as workers and volunteers, as taxpayers and recipients of services – is closely connected to the wellbeing of the broader society. The reverse is, of course, true as well. Persons with disabilities, and the law as it affects them, cannot be considered as separate from this larger context.

2. Interpreting the Principle

The CRPD includes in its Preamble the realization that “the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights”.⁹⁷ *In Unison* defined citizenship as including “rights and responsibilities. It implies participation in and contribution to the systems and the 'core' services in which all Canadians can participate and to which most Canadians have access”.⁹⁸

A principle that recognizes the various communities to which persons with disabilities belong may strengthen the recognition of difference and diversity and add further dimensions to the right to participation and inclusion. It may also provide a helpful means of articulating and analyzing tensions that may arise between the rights of persons with disabilities and those of other members of the community.

This principle also recognizes that many demands are made on governments and private actors and it is not always possible to satisfy them. Many of these demands also relate to goals of inclusion in society, for example. This principle is not intended to subordinate the claims of persons with disabilities to the claims of others; rather, it is to recognize that the claims and entitlements of persons with disabilities sometimes affect others in society, just as the claims and entitlements of others affect persons with disabilities. In assessing these various claims, it will be important to refer to the other principles to ensure that the needs of persons with disabilities are not treated as lesser in importance than other claims and to see when they are of greater importance.

VI. FROM ASPIRATION TO APPLICATION: ADDRESSING CHALLENGES IN APPLYING THE PRINCIPLES

As noted in Part II, because the principles are, by their nature, abstract and aspirational, challenges arising in translating them into a framework that can provide specific, practical assistance to law and policy makers. This section outlines some of the approaches that the LCO has adopted to meet the various challenges of application.

A. Incorporating Lived Experience

As important as it is to identify principles for the law as it affects persons with disabilities, these principles, without more, are an insufficient basis for an evaluative framework for this area of the law. They must be grounded in a close attention to the lived experiences of persons with disabilities. Applications of the principles which do not incorporate and reflect the lives of persons with disabilities will lead to ineffective programs, policies and laws. The LCO's Background Paper, *Applying the Framework to Transition Points in the Lives of Persons with Disabilities* (forthcoming) provides some illustrations of how close attention to the experiences of persons with disabilities can inform and illuminate the application of the principles.

This attention must include an understanding of how the experiences of persons with disabilities are influenced by their life courses. For all of us, how we encounter each stage of life is profoundly influenced by the resources and perspectives we have developed to that point. Barriers or opportunities experienced at one stage will reverberate throughout the course of life. For example, disability-related barriers in accessing adequate education may have life-long effects on employment prospects, and therefore on the socio-economic status of persons with disabilities, which will in turn have wide-ranging consequences for health, access to housing, ability to access the law, and many other aspects of life.

Laws are generally developed on an issue-by-issue basis, as particular problems arise or are identified. People do not, of course, experience their lives as a set of separate issues, or segregate aspects of their identities. For example, an individual may be a mother **and** a person with a disability: she does not cease to be a mother when she seeks disability-related services, or to have a disability when she seeks childcare or recreation programs for her children. The person with a disability seeking education is not a separate person from the one later seeking

employment; these are two stages in a single experience. The categories through which we understand law – family, employment, housing, income supports, human rights for example – do not necessarily reflect the ways in which persons with disabilities experience the law. It is therefore useful to take a **person-centred** approach in understanding the law and applying the principles, and to see the law holistically, rather than as a series of separate systems.

B. The “Implementation Gap” – Taking a Broad View of “the Law”

There are laws whose provisions are problematic in terms of their effects on persons with disabilities, whether because they incorporate ableist attitudes into their substance or because they fail to take into account the realities of existence for persons with disabilities. In many cases, however, the law is sound on paper, but problematic in practice. Laws, policies and practices that are in theory neutral or even intended to benefit persons with disabilities may fall short of their goal or have unintended negative consequences. There are many reasons for this, including negative attitudes on the part of those charged with implementing the law or policy, failure to provide disability-related accommodations for accessing programs or services, adversarial approaches to program implementation, resource limitations, or lack of accountability, monitoring and transparency.

This points us to the importance of adopting a broad understanding of “the law” when applying the principles. A close analysis of the language of statutes and policies is important, but it is equally important to develop a strong understanding of the effects of the law as implemented. For this reason, the LCO has adopted a broad definition of “the law” for the *Framework*, as including not only statutes and regulations, but also the policies through which they are applied, and the strategies and practices through which they are implemented.

Of course, to understand the effects of the law, we must hear directly from those affected by it – both those charged with implementing it, and the persons with disabilities whose lives are shaped by it. In this way, the necessity of addressing the “implementation gap” points us again to the importance of including and respecting persons with disabilities in the process of developing and reforming the law.

C. Relationships Between Principles

As the brief discussions of the principles in Part V indicate, the principles cannot be neatly separated from each other, and are interrelated in complex ways. The principles of dignity and

independence, for example, cannot be achieved without respect for the principle of safety. The principle of safety is based on respect for the inherent worth and dignity of persons with disabilities.

However, there may also be tensions between the principles. For example, two principles may be in tension in relation to the same individual. A frequently raised issue is the involuntary treatment of persons with psychiatric disabilities. The ability to make choices about one's own medical treatment is fundamental to autonomy and physical integrity. On the other hand, some have argued for a "right to be well", and that allowing persons with psychiatric disabilities to refuse treatment may undermine their achievement of the other principles, such as living in safety and social inclusion. Such tensions are not necessarily amenable to simple solutions, but it is important to acknowledge and address them.

Tensions between principles may also arise in relation to two different persons or two different communities. For example, members of the Deaf community may prefer as an educational option schools specifically for the Deaf community, where instruction is provided in ASL, to ensure the continuation of their language and culture, whereas the intellectual disabilities community may prefer integration of students with intellectual disabilities into mainstream schools. Here the principles of respect for difference and diversity, as well as differing visions of inclusion and participation, come into tension.

In assessing tensions between principles, it is essential to be sensitive to the contexts in which those tensions arise.⁹⁹ What specific rights or outcomes are at issue in that particular situation? Who might be affected? How might a reduced implementation of one principle affect the achievement of other principles? That is, the tensions must be examined in a nuanced and holistic manner.

As well, an examination of tensions, particularly between the principles of security and of independence and autonomy, should be sensitive to the larger social context in which such tensions may exist. In the example cited above regarding involuntary treatment, one of the factors at play may be the policy and resourcing decisions that continue to result in a lack of other types of supports for persons with psychiatric disabilities. In such a case, the real issue may not be a tension between the principles of autonomy and security, but the impact on both principles of the limited available appropriate resources to maximize both. That is, we should not be too quick to reduce a challenge or difficulty to an instance of tensions between the principles.

One potential pathway to resolving tensions that arise between principles is to create a hierarchy among the principles in order to determine which principle should prevail in the event of a tension with another principle. One advantage of such an approach is that it is predictable, as well as simple, to apply. However, the mechanical nature of such an approach ignores the complexity of the issues where such tensions arise.¹⁰⁰ It also ignores the interrelatedness of the principles. To elevate the principle of dignity, for example, above all other principles ignores the potential that restrictions in the fulfillment of other principles, such as autonomy or participation, might contribute to an overall lessening of respect for the dignity of persons with disabilities. Hierarchical approaches have generally been rejected in the area of rights for this reason: for example, the preamble of the *Convention on the Rights of Persons with Disabilities* reaffirms “the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms”.

The concepts of “reconciling” or “balancing”, which have been explored in the context of competing rights, might be useful to consider in this context.¹⁰¹ Reconciliation is an approach that attempts to give proper recognition of both principles to the greatest degree possible.¹⁰² Balancing, may involve the weighing of one principle against the other. Using a balancing approach may have the disadvantage of creating the impression that the principles are actually competing and need to be considered hierarchically.¹⁰³

An important element of addressing tensions that may arise between principles is to recollect that the principles themselves have been developed as a means of responding to the marginalization, exclusion and oppression of persons with disabilities. That is, in considering how to resolve tensions between principles, one might consider the particular types of barriers that the principles were intended to address, and how any specific approach to resolving the tensions might impact on the achievement of the broader goals of an anti-ableist approach to the law.¹⁰⁴

It is also important to realize that the principles in tension should not be viewed in isolation: in trying to resolve tensions, it is often helpful to ask how the other principles that might not be so obviously implicated help inform an appropriate resolution.

D. Addressing Evolving Realities and Recognizing Constraints

The application of the principles cannot be static. The circumstances of persons with disabilities will continue to change as laws, attitudes, demographics and other aspects of the broader

environment change. As well, understandings of disability continue to evolve, and new perspectives are heard. What might be considered conducive to attainment of the principles at one time may appear unhelpful or inadequate at a later date.

As well, even where one aspires to implement these principles to the fullest extent possible, there may be constraints in doing so, such as resource limitations or competing needs or policy priorities.

Therefore, a **progressive realization** to the principles should be adopted. Efforts to improve the law should be continually undertaken as understandings about the experience of disability evolve, or as resources or circumstances make progress possible. Where constraints exist, principles should be realized to the greatest extent possible at the current time, and concrete steps for future improvements continually identified and planned.

In the realm of international human rights law, the framework of “**protect, respect, fulfill**” is used to analyze and promote the implementation of human rights obligations. In this analysis, states must address their human rights obligations in three ways:¹⁰⁵

1. The obligation to respect – Governments must refrain from interfering with the enjoyment of rights. For example, governments must not exclude individuals from access to employment or education on the basis of their disabilities.
2. The obligation to protect – Governments must prevent violations of these rights by third parties. For example, States must require private employers to refrain from discriminating in employment because of disability.
3. The obligation to fulfil– Governments must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights. For example, governments might create special programs to provide supports for persons with disabilities who face particular barriers to transitioning into employment following the end of their education.

This approach can be useful in analyzing and promoting the realization of the principles in the law as it affects persons with disabilities, or indeed any group. At minimum, governments must not violate the principles (i.e., they must respect and protect them), but complete fulfillment of the principles may be progressively realized as understandings and resources.

VII. NEXT STEPS

The LCO is seeking feedback on this document and the companion *Draft Framework for the Law as it Affects Persons with Disabilities*, and welcomes your comments or suggestions on both documents.

You can share your feedback, either by providing us with a submission, or by contacting us to arrange a meeting in person or by telephone.

Contact us:

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The deadline for feedback is **Wednesday May 2, 2012**.

Further information on how to participate may be found in the accompanying document, 'Share Your Feedback'.

In mid-2012, the LCO will release the *Final Framework* and a set of accompanying Background Papers.

ENDNOTES

¹ Information about this project can be found on the LCO's website at www.lco-cdo.org/en/content/older-adults. The LCO has released an *Interim Report with Framework for that Project*, and the Final Report and Framework will be released in mid-2012.

² All of the LCO's public documents for this project are available online: www.lco-cdo.org/en/content/persons-disabilities.

³ This discussion of the merits and limitations of a principles-based approach is indebted to the thoughtful submissions to the LCO's 2009 Preliminary Consultation from the Ontario Bar Association and ARCH Disability Law Centre.

⁴ An overview and classification of the types of laws affecting persons with disabilities may be found in the LCO's *Preliminary Consultation Paper: Approaches to Defining Disability* (June 2009), available online at <http://www.lco-cdo.org/en/disabilities-threshold-paper>.

⁵ International policy and legal instruments aimed at advancing the rights of persons with disabilities include: the *Declaration of the Rights of Mentally Retarded Persons*, GA Res. 2856 (XXVI), UN GAOR, 26th Sess., Supp. No. 29, UN Doc. A/8429 (1971) 93; the *Declaration on the Rights of Disabled Persons*, GA Res. 3447 (XXX), UN GAOR, 30th Sess., Supp. No. 34, UN Doc. A/10034 (1975) 88; the *World Programme of Action concerning Disabled Persons*, GA Res. 37/52, UN GAOR, 37th Sess., Supp. No. 51, UN Doc. A/37/51 (1982); *International Labour Organization Convention 159 concerning Vocational Rehabilitation and Employment (Disabled Persons)*, 69th Sess. (1983); the *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights "Protocol of San Salvador"*, OAS Doc. A-52, 18th Sess. (1988); the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, GA Res. 46/119, UN GAOR, 46th Sess., Supp. No. 49, UN Doc. A/46/49 (1991) 189; the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res. 48/96, 48th Sess. (1993); the *Declaration of Managua* (December 1993); the *Vienna Declaration and Programme of Action*, adopted by the UN World Conference on Human Rights, UN Doc. A/Conf 157/23 (1993); "Situation of Persons with Disabilities in the American Hemisphere", GA Res. 1249 (XXIII-O/93), 9th Sess.; "Panama Commitment to Persons with Disabilities in the American Hemisphere", GA Res. 1369 (XXVI-O/96), 6th Sess.; *International Year of Disabled Persons*, UN Doc. A/RES/36/77 (1981); and the *Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities*, GA Res. 1608, OAS GAOR, 29th Sess. (1999).

⁶ United Nations, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, G.A. Res. 61/106 [CRPD].

⁷ Canada has not signed the Optional Protocol.

⁸ CRPD, Art. 1 note 6.

A. ⁹ *Secretariat of the Convention on the Rights of Persons with Disabilities, United Nations Enable, "Backgrounder: Disability Treaty Closes a Gap in Protecting Human Rights" (United Nations Department of Public Information, May 2008)*, online: <http://www.un.org/disabilities/default.asp?id=476> [Secretariat].

¹⁰ *Secretariat*, note above, ch.2, online: <http://www.un.org/disabilities/default.asp?id=225>.

1. ¹¹ *Canadian Human Rights Commission, "Background Paper on the Convention on the Rights of Persons with Disabilities Article 33"*. Online: http://www.chrc-ccdp.ca/unconvention_conventionnu/page1-eng.aspx.

¹² *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12. It is important to note that, although the concept of dignity was seen as a central principle in the equality analysis under section 15 in *R. v. Kapp*, [2008] S.C.J. No. 42, the Court has identified problems with the extreme emphasis on dignity in section 15 as making it more difficult for claimants to prove their claims (para.22). As a result, the principle of dignity will remain part of the analysis in section 15, but may not take on such a predominant role.

¹³ *Law v. Canada (Minister of Employment and Immigration)* note above at para. 51-53.

¹⁴ *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; see also *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

¹⁵ *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46.

¹⁶ *Ontario Human Rights Code*, R.S.O. 1990, c. H-19, s. 1 [Code].

¹⁷ *Code*, note above, s. 14.

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- ¹⁸ Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: November, 2000) [Policy] at section 4.1. Online: <http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2>.
- ¹⁹ *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 78 [Granovsky] at paras. 56-58. It is important to note that human dignity underlies many *Charter* guarantees, and that it does not constitute a particular “test” which section 15 applicants must meet: *R. v. Kapp*, [2008] S.C.J. No. 42.
- ²⁰ *Battleford and District Cooperative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566 [Battleford] dealt with the history of stigma and marginalization affecting persons with mental health disabilities: see paras. 30-31; see also *R. v. Swain*, [1991] 1 S.C.R. 933 [Swain] at 994 on this same issue.
- ²¹ *Québec (Commission des droits de la personne et des droits de la jeunesse v. Montréal (City))*, [2000] 1 S.C.R. 665, 2000 SCC 27 [Québec] at paras. 77-83.
- ²² *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [Eaton] at para. 67.
- ²³ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [Eldridge].
- ²⁴ *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* [2007] 1 S.C.R. 650, 2007 SCC 15 [Via Rail] at para. 162.
- ²⁵ *British Columbia (Superintendent of Motor Vehicles) v. B.C. (Council of Human Rights)*, [1999] 3 S.C.R. 868 [BC Council of Human Rights] at paras. 38 - 40, following *B.C. (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3 [BCGSEU].
- ²⁶ The Government of Canada also releases regular reports on “Advancing the Inclusion of People with Disabilities”. Online: http://www.rhdcc-hrsdc.gc.ca/eng/disability_issues/reports/fdr/2009/page00.shtml. As well, some provinces, such as Saskatchewan and Manitoba have moved towards comprehensive policy frameworks for disability issues.
- ²⁷ All provinces participated with the exception of Quebec.
- ²⁸ Social Union, *In Unison: A Canadian Approach to Disability Issues* (Human Resources Development Canada, 1998) [In Unison]. Online: http://www.socialunion.gc.ca/pwd/unison/unison_e.html.
- ²⁹ *In Unison*, note 28 at 3.
- ³⁰ *In Unison*, note 28 at 4.
- ³¹ *In Unison 2000: Persons with Disabilities in Canada* (Human Resources Development Canada, 2000) [In Unison 2000]. Online: www.socialunion.gc.ca/pwd/unison/unison_e.html.
- ³² *Withler v. Canada (Attorney General)*, 2011 SCC 12. at para. 39.
- ³³ For a brief history of the treatment of persons with intellectual disabilities in Ontario, see K. Joffe, ARCH Disability Law Centre, “Enforcing the Rights of Persons with Disabilities in Ontario’s Development Services System” (Law Commission of Ontario: June 30, 2010) [Joffe] at ss. 12 – 20. Online: www.lco-cdo.org.
- ³⁴ Environics Research Group, “Canadian Attitudes Towards Disability Issues, A Qualitative Study: Final Report” (Government of Canada Office of Disability Issues: 2004) at s 9, 32-34.
- ³⁵ This point is made in a the research paper prepared by the Income Security Advocacy Centre, “Denial by Design: the Ontario Disability Support Program” (Toronto, 2003). Online: <http://www.odspaction.ca/sites/odspaction.ca/files/denialbydesign.pdf>.
- ³⁶ M. Bach and L. Kerzner, “A New Paradigm for Autonomy and the Right to Legal Capacity” (Law Commission of Ontario: November 2010) [Bach and Kerzner] at 32. Online: www.lco-cdo.org/en/persons-disabilities.
- ³⁷ *Ontario Disability Support Programs Act, 1997*, S.O. 1997, c. 25, Sched. B, s. 5(2).
- ³⁸ In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14, the Supreme Court of Canada ruled that the Social Benefits Tribunal had the power to declare a provision of the ODSPA inapplicable on the basis that the provision was discriminatory, and remitted to the Social Benefits Tribunal for a ruling on the applicability of s.5(2) of the ODSPA. In *Ontario (Director, Disability Support Program) v. Tranchemontagne*, 2009 CanLii 18295 (Ont. S.C.J.), the Court upheld the finding of the Social Benefits Tribunal that the exclusion of persons disabled solely by addiction from the Ontario Disability Support Program was inconsistent with the Ontario *Human Rights Code*.
- ³⁹ This issue arose during the LCO’s public consultations. One individual interviewee, a mother with a disability, told the LCO that,
- “There was this fear of the health care profession calling CAS due to misperceptions and a lack of understanding of the independent living model... I planned the birth of my daughter around this fear.”

Initially, I had a fear of being in hospital with the baby and them calling CAS. .. CAS is a real threat – the fears of parents with disabilities are real. Two months before I gave birth, at the same hospital a newborn baby was taken away right at birth from a blind mother. The perception of what a parent is creates that fear in our society.”

⁴⁰ LCO Focus Group, May 11, 2010, Toronto, (Organizations).

⁴¹ Some of the dynamics and statistics around this issue are briefly highlighted in Law Commission of Ontario “Consultation Paper: The Law as it Affects Persons with Disabilities” (September 2011) at 9, Online at www.lco-cdo.org/en/content/persons-disabilities.

⁴² Joffe, note 33 at 39.

⁴³ A. Mitchell, “The Gift of Dyslexia”, *The Globe and Mail* (26 July 2003).

⁴⁴ Government of Canada, “*Advancing the Inclusion of People with Disabilities*” (Ottawa: Human Resources Development Canada, December 2002) at 5.

⁴⁵ During the LCO’s consultations, much was said about the difficulties of accessing services, supports and accommodations outside of major urban centres. For example, it was the LCO’s experience that arranging for real-time captioning and American Sign Language interpretation in northern Ontario was extremely challenging, even with considerable lead time.

⁴⁶ Persons with disabilities are disproportionately likely to live in poverty. For example, within the age cohort 25 to 34, a Canadian without a disability can expect to earn an income on average of \$33,078, while a Canadian with a disability within the same age cohort can expect an income of a third less, \$23,087. And while Canadians without disabilities can expect to increase their incomes until the age of 55, the incomes of persons with disabilities actually decrease on average after the age of 35. Canadians living without a disability in the age cohort 35 to 44, report an average income of \$36,553, while Canadians living with a disability in the same age cohort have an average income of \$22,447, almost a \$15,000 discrepancy in reported income: Statistics Canada, Participation and Activity Limitation Survey, [PALS] 2006, Tables Part V (Ottawa: Statistics Canada, 2006) at 8-10.

⁴⁷ According to 2001 data collected by Statistics Canada, 36.5% of Ontarians with disabilities between the ages of 15 and 64 had less than a high school education, while 11.5% of that group had completed university. By comparison, only 23.7% of Ontarians without disabilities between the ages of 15 and 64 had less than a high school education, and 22.2% had completed university – a striking differential with lifelong implications for employment, income and well-being: Statistics Canada, “Education, Employment and Income of Individuals With and Without Disabilities”, PALS 2001 (Ottawa: Statistics Canada, 2003) at 19 and 35. These are overall figures; breaking them down on the basis of certain factors (such as Aboriginal status) would show lower average levels for some groups than for others.

⁴⁸ Information from Statistics Canada’s General Social Survey confirms that persons with disabilities are at greater risk for violence and victimization. Persons with activity limitations are victims of both physical assault and sexual assault about twice as often as persons without limitations. Those who are most at risk are persons with disabilities who are living in an institutional setting, have severe disabilities, or have mental disorders: S. Perreault, “Criminal Victimization and Health: A Profile of Victimization Among Persons with Activity Limitations or Other Health Problems” (Canadian Centre for Justice Statistics: Ottawa, May 2009) [Perreault] at 8.

⁴⁹ See *PALS 2006: Tables Part V*, note 45 at 11.

⁵⁰ See *PALS 2006: Labour Force Participation of People with Disabilities in Canada* (Ottawa: Statistics Canada, 2006) at 9-10.

⁵¹ LCO Focus Group, May 11, 2010, Toronto (Organizations).

⁵² R.. Scotch and K. Schriener, “Disability as Human Variation: Implications for Policy” (1997) 549 *Annals of the American Academy of Political and Social Science* 148 at 154 [Scotch and Schriener]; D. Surtees, “What Can Elder Law Learn from Disability Law?” in I. Doron, ed., *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Heidelberg, Germany: Springer, 2009); Zola, “Toward the Necessary Universalizing of a Disability Policy” (1989) 67 *The Milbank Quarterly* 401 at 410 [“Toward the Universalizing of Disability Policy”] 93 at 99 citing M. Stein, “Disability Human Rights” (2007) 95 *Cal. L. Rev.* 75 at 75 and 86.

⁵³ Scotch and Schriener, above note 52 at 158; J. Bickenbach, S. Chatterji, E.M. Bradley, T.B. Usten, "Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps" (1999) 48 *Social Science & Medicine* 1173 at 1183.

⁵⁴ CRPD, note 6, Art. 1(f). Article 2 states that "'Universal design' means 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"; however, universal design "shall not exclude assistive devices for particular groups of persons with disabilities where this is needed."

⁵⁵ See the *Policy*, note 18, at section 4.1.

⁵⁶ *Policy*, note 18.

⁵⁷ *In Unison 2000*, note 31.

⁵⁸ Paternalism has been defined as follows: "When [rules, policies and actions] are justified solely on the grounds that the person affected would be better off, or would be less harmed as a result of the rule, policy etc., and the person in question would prefer not to be treated this way, we have an instance of paternalism". G> Dworkin, "Paternalism" in Edward Zalta, ed., *The Stanford Encyclopedia of Philosophy* (Summer 2009) online: <http://plato.stanford.edu/archives/sum2009/entries/paternalism>.

⁵⁹ Bach and Kerzner, note 36, at 6. Also see Joffe, note 33, at 28.

⁶⁰ The Board of Governors of the LCO has approved a project to re-examine Ontario law regarding capacity and decision-making. Work on this project will commence in 2012, following the completion of the LCO's projects on the law as it affects persons with disabilities and the law as it affects older adults, and will employ the frameworks developed through these projects.

⁶¹ *Substitute Decisions Act, 1992*, S.O. 1992, c.30

⁶² *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A.

⁶³ CRPD, note 6, at Art. 12.

⁶⁴ Meeting of LCO staff with representatives of the Coalition Against Psychiatric Assault, January 9, 2011.

⁶⁵ *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] S.C.J. No. 15 at para. 162.

⁶⁶ See Ontario Human Rights Commission, "Right at Home: Report on the Consultation on Human Rights and Rental Housing in Ontario (Toronto: Ontario Human Rights Commission, 2010) at pages 18- 21 and 54-55. Online: http://www.ohrc.on.ca/en/resources/discussion_consultation/housingconsultationreport.

⁶⁷ O. Reg. 191/11 under the *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11 deals extensively with removal of barriers to accessible public transportation, an issue which has been of concern for some time: see for example, Ontario Human Rights Commission, Consultation Report: Human Rights and Public Transit in Ontario (Toronto: 2002). Online: http://www.ohrc.on.ca/en/resources/discussion_consultation/ConsultPubTransit2.

⁶⁸ For a fuller discussion of self-advocacy and the principle of independence, see Joffe, note 33 at 58 and following.

⁶⁹ World Health Organisation, *A glossary of terms for community health care and services for older persons* (Kobe, Japan: WHO, 2004) at 10 (Technical Report Vol. 5 WHO Centre for Health Development Ageing and Health. WHO/WKC/Tech.Ser./04.2). Online: http://whqlibdoc.who.int/wkc/2004/WHO_WKC_Tech.Ser._04.2.pdf.

⁷⁰ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*].

⁷¹ Paula Pinto, ed., "National Law and Policy Monitoring Template: Extended Version" (Toronto: Disability Rights Promotion International, 2008) at 4.

⁷² Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts, and Possibilities" (1989) 1:7 *Yale J. Int'l L.* 7 at 12.

⁷³ Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 *Rev. Const. Stud.* 1, at 8.

⁷⁴ World Health Organization, "Active Ageing: A Policy Framework", *A Contribution of the World Health Organization to the Second United Nations World Assembly on Ageing* (April 2002) at 12-13, at 34. Online: <http://www.who.int/ageing/publications/active/en/index.html>.

⁷⁵ *In Unison 2000*, note 31.

⁷⁶ G. Quinn and T. Degener, "The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform" in G. Quinn and T. Degener, eds., *Human Rights and Disability: The Current Use and Future Potential of United National Human Rights Instruments in the Context of Disability* (New York: United Nations Publication, 2002) 9 at 17.

⁷⁷ LCO Focus Group, Toronto, May 12, 2010 (Organizations)

⁷⁸ M. Paré, “La Participation des personnes handicapées dans les décisions qui les concernent: L’exemple de l’éducation”, (Law Commission of Ontario: July 2010). Online: www.lco-cdo.org.

⁷⁹ *In Unison 2000*, note 31 at 10.

⁸⁰ F. Mégret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?” (2008) 30 *Human Rights Quarterly* 494 at 509.

⁸¹ G. Malkowski, Audism Workshop, Canadian Hearing Society and Toronto Association of the Deaf (3 June 2010).

⁸² *Eaton*, note 22, the Council of Canadians with Disabilities (CCD), the Canadian Association for Community Living (CACL), People First, and the Confédération des Organismes de Personnes Handicapées du Québec (COPHAN) advocated for a presumption towards integration in the educational setting for students with disabilities: see Sarah Armstrong, “Disability Advocacy in the Charter Era” (2003) 2 *J.L. & Equality* 33 at para. 53.

⁸³ Perreault, note 48, at 8.

⁸⁴ Perreault, note 48, at 8-9.

⁸⁵ LCO Focus Group, June 11, 2010, Toronto (Individuals with Mental Health Disabilities).

⁸⁶ Perreault, note 48, at 11.

⁸⁷ DAWN – RAFH Canada, “Response to the Law as it Affects Older Adults Consultation Paper” (Law Commission of Ontario: July 7, 2008) [DAWN] at 1.

⁸⁸ Perreault, note 48, at 10 and 13.

⁸⁹ LCO Focus Group, Thunder Bay, June 16, 2010 (Aboriginal Organizations)

⁹⁰ C. Evans and D. Bassili, “Review of Coroners Inquests Involving Persons with Disabilities: 1989 – 2010” (Law Commission of Ontario: April 2011) [unpublished].

⁹¹ Joffe, note 33, at 31. The author notes that stakeholders have described situations where persons with disabilities who made complaints were reprimanded or harmed by their support worker, or were the subject of threats, for instance to cut off ODSP benefits.

⁹² Perreault, note 48, at 13.

⁹³ CRPD, note 6, articles 14, 15, 16, 28 and 25.

⁹⁴ CRPD, note 6, Preamble: “Recognizing that women and girls with disabilities are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation”.

⁹⁵ Perreault, note 48, at 8.

⁹⁶ Perreault, note 48 at 11. Also see DAWN, note 85, at 1.

⁹⁷ CRPD, note 6, Preamble.

⁹⁸ *Unison*, note 28.

⁹⁹ The Honourable Justice Frank Iacobucci, “‘Reconciling Rights’ The Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) *S.C.L.R.* (2d) 137 at 158; see also Nedelsky, “Rights as Relationship” at 10; [Iacobucci] and see also BJ Wray, “Balancing Conflicting Rights: Towards an Analytical Framework” online: OHRC <http://www.ohrc.on.ca/en/resources/discussion_consultation/balancingrights/pdf> at 17.

¹⁰⁰ See Iacobucci, note above., at 158, the Honourable Justice Frank Iacobucci argues that the first and potentially most important aspect of reconciling tensions between principles is sensitivity to context; see also Nedelsky, “Rights as Relationship”, note 71 at 10; and see also Wray, note above.

¹⁰¹ For a variety of perspectives on these issues, see the compendium, Association for Canadian Studies, 8 *Canadian Diversity: Balancing Competing Human Rights* 3 (Summer 2010).

¹⁰² Iacobucci, note 99 at 162, 167.

¹⁰³ P. Hughes, *Legal Frameworks: The Reconciliation Model, Balancing Competing Human Rights* (Ottawa: Ontario Human Rights Commission, 2010).

¹⁰⁴ It has been noted that “Human rights discourse in the absence of a clear focus and understanding of differential access to power and resources loses sight of the principle of equality of citizenship. In other words, the policy framework must have integrated within it a component of access to justice.” (L. Foster and L. Jacobs, “Shared Citizenship as the Context for Competing Human Rights Claims” (Summer 2010), 8 *Canadian Diversity: Balancing Competing Rights Claims* 3 at 13).

¹⁰⁵ M. Green, “What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement” 23 *Human Rights Quarterly* 1062 at 1062-1097.