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What about a Disability Rights Act for Canada? Practices and Lessons from America, Australia, and the United Kingdom

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Le gouvernement Harper et la plupart des partis fédéraux sont d'accord avec l'adoption d'une charte canadienne des droits des personnes handicapées en matière d'accès à différents services. L'objectif de cette étude était de tirer, de l'expérience d'autres pays ayant adopté ce type de lois, des leçons qui pourraient être utiles aux décideurs politiques canadiens. Pour ce faire, j'ai observé ce qui a été fait aux États-Unis, en Australie et au Royaume-Uni. Si de telles lois en matière de droits des personnes handicapées semblent très généralement considérées comme nécessaires pour permettre de lever les obstacles et éliminer l'exclusion, l'expérience montre qu'elles sont loin d'être suffisantes pour promouvoir l'accès des personnes handicapées à différents services. Parmi les autres outils de politiques publiques essentiels dans ce domaine, citons des programmes de soutien à l'emploi, des incitatifs fiscaux et la prestation de différentes formes directes de soutien.

Mots clés : incapacité, législation fédérale, droits, politique des mouvements sociaux

The Harper government and most national political parties are committed to a federal act for dealing with accessibility rights for persons with disabilities. The purpose of this article is to identify progressive lessons from countries with similar legislation for consideration by Canadian authorities. Countries surveyed are the United States, Australia, and the United Kingdom. While disability rights legislation is widely accepted to be a necessary policy initiative in light of ongoing barriers and exclusion, experience suggests that such laws are far from a sufficient response to promote access. Other policy instruments required include supportive employment programs, tax incentives, and the direct provision of basic supports.

Keywords: disability, federal legislation, rights, movement politics

INTRODUCTION

The Conservative Party of Canada has declared that as a federal government it will “introduce a national disability act to promote reasonable access to medical care, medical equipment, education,

employment, transportation, and housing for Canadians with disabilities” (Conservative Party of Canada 2005, 16). Numerous countries worldwide have introduced legislative measures on the rights and needs of persons with disabilities. A House of Commons committee recommended in

2008 “that the federal government, in consultation with provincial and territorial governments and stakeholders, continue to develop and implement a national disability act to promote and ensure the inclusion of people with disabilities in all aspects of Canadian society” (Standing Committee on Human Resources 2008, 3.17). Other federal parties made similar promises in the 2008 general election, and the minority governments of Stephen Harper have reaffirmed their party platform to introduce a disability law. Federal government officials are now working on such a law, although, to date, this has not resulted in federal legislation.

Activists and groups in the Canadian disability movement have responded to the idea of a federal disability act in three ways. One response is that such legislation is unnecessary and, more seriously, holds certain legal and political risks (McCallum 2006). Critical concerns are that rather than mainstream, such legislation may ghettoize disability as a social policy area; that the Conservative’s promise ignores jurisdictional issues of the division of responsibilities between federal and provincial orders of government; that such a law risks sidestepping Charter of Rights and human rights guarantees; that disability groups have higher priorities and this legislation reform process detracts from mobilizing efforts to achieve other concrete social program reforms; and that, since this legislation is limited to federal jurisdictions, it risks ignoring more pressing needs or objectives of certain groups in the disability community. For example, the Deaf community is seeking to have American Sign Language and Langue des Signes Québécoise included in the *Official Languages Act*.

A second response is a mix of mild support and mild concerns. Ambivalent supporters express a qualified yes to this reform option, seeing it as somewhat useful for people with disabilities although tangential to the core priorities of the disability movement (Gordon and Hecht 2006). They worry that government officials might regard such a legislative initiative as their major response to the needs

of Canadians with disabilities, letting the governing party off the hook for other needed initiatives and moving on to the claims of other social groups. On the other hand, if carefully designed, and in close consultation with disability groups across the country, a disability act could be a modest contribution to advancing access and inclusion. Not an end in itself, a federal disability act should be a beginning in federal leadership on a wider disability agenda. No doubt, negative sentiments toward the government proposing this reform influence adherents of both the first and second viewpoints.

A third response is favourable, even enthusiastic in some parts of the movement, with strong commitment to the idea of a federal disability act. Here, people positively identify with the idea of disability legislation, believing it can energize the movement, raise public awareness, and help forge alliances through an inclusive policy development process, as illustrated by legislative and political experiences in Ontario during the early 2000s (Lepofsky 2004). Enthusiastic supporters may also see a federal disability act as an opportunity to formulate a modern definition of disability informed by a social model, thereby supplementing the Canadian Charter of Rights and Freedoms as well as federal and provincial human rights codes.

These differing reactions to a federal disability law pose challenges for the disability movement in building a consensus, bringing various groups together to communicate a message to government officials, and in raising public understanding of disability issues. Accordingly, this article reviews international experiences on the role and nature of such legislative measures for meeting the needs of people with disabilities. A qualitative, comparative policy analysis, the research examines the experiences of Australia, the United States, and the United Kingdom. Through a selective and integrative literature review of the three countries, the analysis summarizes existing research, highlights issues of policy and practice, and draws lessons for Canada from international experiences. Literature from four

fields is examined: disability studies, law and human rights, political science, and public and social policy. The basic question under consideration is: What is the impact of disability rights legislation on accessibility for persons with disabilities to a range of services addressed by such laws? Given the significance of federalism for what could be in a Canadian statute on the rights of persons with disabilities, the question of intergovernmental relations is also considered.

Canada shares with Australia, the United States, and the United Kingdom the fundamental features of being a liberal democracy with a market economy and a liberal welfare-state regime. In brief, prevailing policy-making emphasizes individual and family responsibilities along with modest levels of public provisions to persons with disabilities, supplemented by private and charitable services. In all four countries, the history of disability is a chronicle of stigma, pity, and fear toward people with various impairments, disfigurements, or functional limitations. Disability programs have developed as add-ons to other general programs, over the course of many decades, with the consequence that disability is inconsistently defined, and frequently ill-defined, in various areas of public policy. One result of this lengthy and ad hoc development in programming is the often tense interplay between medical, economic, and social approaches to disability. In all four countries as well there are active disability movements at local and national levels, often deploying a rights discourse in framing issues of disablement and advancing claims for social change (Barnes 2000; Cooper 1999; Goggin and Newell 2005; Goodland and Riddell 2005; Percy 2001b; Torjman 2001).

Canada further shares with Australia and the United States being a political federation with two orders of sovereign government and the associated elaborate systems of intergovernmental relations (Cameron and Valentine 2001; Prince 2001). And, while the United Kingdom is not a federal system, it does share with the other three countries, certainly

in the disability policy domain, complex relationships along interdepartmental (e.g., health and social services), intersectoral (public, private, and community), and interbranch (judicial, executive, and legislative) lines—relationships that confound public accessibility, service provision, accountability, and policy coherence and innovation (Prince 2004).

THE AMERICANS WITH DISABILITIES ACT OF 1990 AND ADA AMENDMENTS ACT OF 2008

When enacted in 1990, the *Americans with Disabilities Act (ADA)* was hailed as “a national civil rights bill for people with disabilities.” As one American disability scholar observed: “This was the first legal provision to impose an affirmative obligation upon members of the dominant majority in order to bestow equal rights on a disadvantaged group” (Hahn 2002, 171). The *ADA* built on earlier civil rights measures for women and minorities by the American federal government, and on laws more specifically for people with disabilities such as the *Rehabilitation Act, 1973*, the *Civil Rights Restoration Act, 1988*, and *Fair Housing Act, 1988* as well as two decades of state laws and administrative rules on disabilities (McGuire 1994; Percy 2001a). The *ADA*’s stated aim is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, including people with physical, mental, and intellectual disabilities.

The scope of this law includes both the public sector (federal, state, and local governments) and the private sector (businesses with 15 or more employees). The *ADA* contains four mandate areas: employment protection (Title I); public service, including public transportation (Title II); accessibility and non-discrimination in public accommodations (such as hotels, restaurants, and health care facilities) and in services offered by most private entities (Title III); and telecommunications services, such as relay services available to deaf and speech-impaired individuals (Title IV). This range of areas implies

recognition of “the need to combat the discrimination imposed by a disabling environment” that includes architectural, attitudinal, and communication barriers, and the need to regard disability more broadly than bodily impairments and personal limitations (Hahn 2002, 171).

Who is and who is not covered is a prominent theme in the literature on the *ADA* in the United States (Koenig 1998; McGuire 1994; Percy 2000). Campbell (1994, 134) offers a useful and critical entrée to this when she writes:

Disabled persons are not a homogeneous group with common needs and equal social power. The disability community is not immune from the same stereotypical attitudes about different disabilities that affect the non-disabled community; there is a hierarchy of disabilities within the community itself, and people with mental illness are generally among the most stigmatized even among those with disabilities. Since the *ADA* exists in such a stratified society, even within the disability community the subtext of the *ADA* legislation reveals stereotypes and discrimination.

Thus, Campbell shows how provisions of the *ADA* to do with rights to equal opportunity disproportionately underprotect people with psychiatric disabilities. Research has also found that people with visual impairments rate the effectiveness of the *ADA* consistently lower than people with hearing and mobility impairments, who are more positive about the American legislation (Hinton 2003; Tucker 1997).

Daly (1997) examined the *ADA* in relation to the “doubly disadvantaged,” that is, those with a poor education and poor job skills plus a disability. She estimated that as of the early 1990s, about 39 percent of Americans with disabilities were so doubly disadvantaged. Will the *ADA* assist all Americans with disabilities then? Daly offered a mixed prognosis, being

cautiously optimistic about the *ADA*’s ability to maintain employment in the short run among those who become disabled during their work life. However, we must be less sanguine about the long-term prospects for the doubly disadvantaged. While the *ADA* can tear down disability-related barriers, it cannot encourage employers to hire or keep employees whose skills prohibit them from performing the job. (116)

Studdert and Brennan (1997) examined the extent to which the *ADA* protects people living with HIV infection and AIDS against discrimination. While the *ADA* intended to cover HIV and AIDS as “disabilities” under the legislation, and the US Supreme Court has ruled that HIV is an impairment (Percy 2000, 428), statutory ambiguities of the *ADA* along with other factors have limited a clear role of this law for these groups.

One feature of the *ADA* particularly interesting to a Canadian audience, given our system of federalism, is how the legislation relates to intergovernmental relations. With the legislation *ADA*, Congress claimed the dominant role in creating and enforcing non-discrimination mandates to protect the rights of people with disabilities (Percy 1993). Intended to create national standards across the United States, the *ADA* placed disability rights mandates and obligations on state and local governments. Specifically, the *ADA* rests on the exercise of “pre-emptive power” which, under the supremacy clause of the American Constitution, enables a federal law to displace a state or local law thus allowing a clear and comprehensive national mandate.¹ This exercise of federal power is regulatory federalism—in which the federal government legislates and enforces compliance in state, local, and private spheres—an approach thought to be more effective than the practice until that time of using the federal spending power to attach conditions to federal transfer payments to state governments (Percy 2001b). The legislation therefore represents a strong assertion of national government authority—a centralized approach with national standards justified in terms of a civil rights discourse and legal protection culture that

resonates in American politics. In short, the American federal government has greater jurisdiction compared to the Canadian federal government. Another noteworthy difference between the American and Canadian political context is the active role the courts have played in defining what is a disability and in shaping the effect of this national rights legislation (Cameron and Valentine 2001; Gostin 2003; Jones 1995; Percy 2001a), a factor that eventually prompted Congress to clarify and amend the legislation.

On employment protections (Title I), research by economists cast doubt on the effectiveness of this section of the *ADA* in improving the labour market opportunities for people with disabilities, at least in the first several years the law has been in effect (Burkhauser 1997; Daly 1997; DeLeire 2000; Haveman and Wolfe 1999; Mudrick 1997; Yelin 1997). Indeed, as one study pointed out, “during the 1990s, the employment rate among working-age people with disabilities fell and disability benefit rolls and expenditures grew” (Burkhauser and Daly 2001, 2). While not all available evidence is dismal—some information suggested educational and employment gains over the 1990s for people with severe disabilities and for people with developmental disabilities—“it is the case that overall findings are, at best, mixed” and “that for the majority of those covered by the law [*ADA*], few improvements have been realized” (Schwochau and Blanck 2000, 273).

A survey of approximately 150 people with disabilities asked their perceptions about the effectiveness of the *ADA* under Titles II, III, and IV in regard to changes in accessibility to goods, services, and programs offered by the public sector, private sector, and telecommunications field (Hinton 2003). A majority of respondents (60 percent) rated accessibility better for Title IV (telecommunications), while just under half (48 percent) rated accessibility for Title II (public sector) better, and only one-third of respondents (32 percent) rated access for Title III (private sector) better since the passage of the *ADA*. Hinton (2003, 218) offers an intriguing policy implementation explanation for these differing

perceptions, an explanation that highlights the size and diversity of the target groups and the extent of change required in the three domains:

Due to the smaller, less diverse target group and the smaller degree of change required [along with more specific implementation requirements provided for it than the other two titles], Title IV (telecommunications) was consistently rated better in terms of accessibility. Title III (private sector), which had the largest and most diverse target group and required the greatest amount of change [in expenditures and in processes and procedures], was consistently rated the lowest in its effectiveness. Public sector accessibility, covered by Title II, was ranked between the other two titles. The target group size, diversity of the group, and extent of change required [state and local governments, for example, were subject to Section 504 of the *Rehabilitation Act* of 1973] were in an intermediate position in relation to the other titles.

Numerous studies of the *ADA* have pointed out its limited success overall and identified various factors to account for this partial and inadequate result. Hinton (2003, 216) observed that the “*ADA* is an unfunded mandate [that is to say, there is no dedicated federal funding for implementation of this law] and the costs must be borne by the covered entities.” Additional limitations include inadequate enforcement due to “insufficient staffing and budgetary resources in the responsible federal agencies” (Hinton 2003, 217), official inaction by public authorities at the state and local levels, opposition by private sector employers, and resistance by the courts through highly restrictive interpretations of the *ADA* (Hahn 1993, 2000, 2002; Percy 2001a; Rioux, Crawford, and Anweiler 2001).

Indeed, a series of narrow and strict interpretations of the *ADA* by the United States Supreme Court and other federal courts, through the 1990s and into the early 2000s, provoked American legislators to reaffirm, clarify, and strengthen key provisions of the 1990 legislation. During this period as well, a number

of states enacted or enhanced their anti-discrimination laws, surpassing the scope of the federal law. The *ADA Amendments Act* of 2008 was the outcome of growing discontent and activism by the disability community, including incisive legal analysis, and successful alliance-building in bipartisan congressional efforts to both assert and explicate legislative intentions to the courts and to federal regulatory agencies (Feldblum, Barry, and Benfer 2008). The legislation's short title clearly declares this motivation: "An Act to Restore the Intent and Protections of the *Americans with Disabilities Act* of 1990."

Significant changes and elements in the *ADA Amendments Act* of 2008 are as follows:

- moving away from judicial interpretations of disability as a severe restriction to reaffirming the concept of disability endorsed by Congress as a substantial limitation on a person's activities, as the standard;
- including impairments that are in remission or that are episodic in nature as disabilities if they substantially limit a major life activity of the person when they arise;
- illustrating through explicit, extensive lists (which the *ADA* did not include) many of the major life activities to be considered in determining the presence and effect of a disability;
- considering the role of uninformed beliefs, social myths, and stereotypes as factors in any adverse actions against an individual with an actual or perceived impairment; and
- providing specific authority to issue rules on implementing the definition of disability in this law to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation.

Not surprisingly for a major piece of civil rights and social policy, the *ADA Amendments Act* of

2008 left some important and controversial issues unresolved, such as the coverage of short-term or transitory impairments and the meaning of reasonable accommodation in employment settings for individuals regarded as having a disability (Long 2008). Overall, however, initial assessments have judged the *ADA Amendments Act* as introducing significant reforms to the *ADA* and to disability law in the United States (Feldblum, Barry, and Benfer 2008; Foodrill and McCabe 2009; Thomas and Gostin 2009). As one legal scholar notes, "many of the changes that Congress did make were long overdue and are likely to provide greater coverage at the initial stage of determining whether an individual has a disability than existed previously under the Act" (Long 2008, 229).

In addition to changing access, the new legislation has implications for litigation and economic costs and benefits, which at this point are unknown, although some observers suggest the costs will not be that great:

Theoretically, the more explicit definition of disability should reduce the number of legal cases brought forth to establish qualifications. However, in practice, more individuals should receive protection under the *ADA* with the new amendment, which could result in more people pursuing lawsuits to gain their accommodation. Although it is not always the case, accommodations for people with disabilities more broadly covered under the amendment tend not to be very costly. Such accommodations are typically flexible scheduling, working from home, and other intangible adjustments, rather than expensive equipment. (Foodrill and McCabe 2009, 2)

AUSTRALIA'S DISABILITY DISCRIMINATION ACT, 1992

Similar to the politics of disability in the United States in the 1990s, Australia's *Disability Discrimination Act (DDA)* of 1992 received bipartisan

parliamentary support and came after other laws on anti-discrimination and rights for other groups. As a federal law, the *DDA* followed on similar disability legislation by all Australian states except Tasmania (Lindsay 1996; McIntosh and Phillips 2002). The Australian *DDA* has three objectives: (a) to eliminate, as far as possible, discrimination against persons on the grounds of disability; (b) to ensure, as far as practicable, that people with disabilities have the same rights to equality before the law as the rest of the community; and (c) to promote recognition and acceptance within the community of the principle that people with disabilities have the same fundamental rights as the rest of the community. This statement on the rights of persons with disabilities is in the give-and-take language of negotiation and compromise. There are no moral absolutes asserted here, but rather aims of achieving desired results as far as possible and practicable. This is a common feature across disability rights laws, policy guidelines, and administrative regulations. Exemptions are to be granted, on application by a person or persons, only in relation to a specified disability standard and after consulting with affected groups.

In terms of public policy scope, the Australian legislation prohibits discrimination in several specified areas: employment (including contract workers, partnerships, and employment agencies); education; access to premises; provision of goods, services, and facilities; buying land; clubs and associations; sporting activities; the administration of federal laws and programs; and discrimination involving harassment or victimization.

Like other laws of this kind around the world, Australia's *DDA* includes some exemptions: private life insurance policies, infectious diseases, charities, telecommunications, migration and refugee law, public pensions, and combat and peacekeeping duties. This range of exemptions have been criticized by disability activists and scholars as excluding from rights protection "key aspects of the lives of Australians with disabilities" (Goggin and Newell 2005, 38). The Australian Human Rights

Commission, which is responsible for considering requests for and granting temporary exemptions from parts of the *DDA*, limits exemptions to a five-year period, seeking to encourage improvements to access or opportunity within a reasonable time frame. By contrast, disability activists have called for ending exemptions to the *DDA* on the grounds that they offend other national and international commitments to rights, and that sufficient time has elapsed to enable organizations to adapt and comply with the legislative requirements (Goggin and Newell 2005, 207).

Experience in Australia also underscores how groups see practices as beneficial or threatening, depending on types of disability. For example, in the debates over the Commonwealth disability services program in 1980s and 1990s, some groups of people with severe or multiple disabilities, as well as advocacy groups, expressed concerns that the federal government's goals of community integration were inappropriate and unrealistic, and that people with severe or multiple disabilities would be disadvantaged by having to receive services from small community agencies instead of large institutions and to work in open employment rather than in sheltered workshops (Lindsay 1996; McIntosh and Phillips 2002).

The definition of disability in Australia's *DDA* was no doubt influenced by the broad definition contained in the *Americans with Disabilities Act* of 1990, in that it includes disabilities that presently exist, previously existed, may exist in the future, or that are imputed to a person. The definition is cast widely and includes physical, intellectual, psychiatric, sensory, neurological, and learning disabilities, plus physical disfigurements and the presence in the body of disease-consuming organisms, for example HIV/AIDS. The *DDA* also employs traditional and outmoded language (at least in the Canadian context), referring to malfunctions, malformations, and disfigurements of a person as part of the meaning of disability under the law.

As a national law the *DDA* applies to the federal jurisdiction in Australia and is not meant to

exclude or limit a law of a state or territory relating to disability anti-discrimination that is operating concurrently. This provision is a standard one in intergovernmental relations and in this case reflects the fact that most states and territories had anti-discrimination laws about disability before this Commonwealth law came into effect. Unlike the Canadian federation, in Australia the states and the Commonwealth hold concurrently most jurisdictional responsibilities, reflected in active intergovernmental relations at the executive level via the Special Premiers' Conferences and the Council of Australian Governments. One of the success stories of Australian federalism and social policy in the 1990s was the development of a national agenda on disability services and supports. Again unlike in Canada, "the Commonwealth government has exclusive responsibility for social security matters, including pension benefits and labour market programs" (Hancock 2001, 46). Fiscal powers are far more concentrated at the national level, enabling the central government to dominate disability policy through taxation and agenda-setting (Cameron and Valentine 2001, 39).

At the same time, when the government changes at the central level, the momentum for reform can also change, as occurred under the Coalition government of the Liberal and National parties led by John Howard from 1996 to 2007, during which there were efforts to restrict the powers of the Human Rights and Equal Opportunity Commission (HREOC) to initiate actions on instances of discrimination. Moreover, the position of disability discrimination commissioner at the HREOC was filled only with acting appointments for a number of years (Goggin and Newell 2005, 38-39). Under the Howard governments, too, policy measures on welfare to work raised worries among individuals with disabilities and their families about increased scrutiny of clients, forced job placements, and reduced income security benefits (Galvin 2004).

How effective is the *DDA* as a vehicle for preventing discrimination and advancing access and

inclusion? Early assessments, while somewhat optimistic, warned about the problems of implementation due to resource constraints (Cooper 1999; Tucker 1995; Tyler 1993). Newell (1996, 430) and Goggin and Newell (2005, 38) concluded that the law has had a beneficial impact in some circles; specifically, it enhanced accessibility in public transport for people with physical disabilities, and improved access to communications and information for people with sensory disabilities. Areas of slow progress, such as employment, have meant less beneficial results for people with intellectual or psychiatric disabilities, according to Goggin and Newell. On balance, Newell (1996) is critical of the *DDA*, claiming that "the teeth which the disability rights movement advocated to be part of the legislation was certainly not part of the final legislation, and the onus is on individuals with disabilities to take complaints against well-resourced organisations, with marked inequities" (430). In addition, Newell remarks that

there has been marked dismay amongst people with disabilities with regard to the processes involved in setting standards under the Act. Unlike the US legislation, standards are being drafted after the legislation in such key areas as employment, education and public transport. Yet, the representation of the disability rights movement in the process seems minimal, with non-disabled bureaucratic and provider interests dominating the membership of drafting bodies. Hence, there is marked dissatisfaction at a grassroots level with the standard setting process and a concern that some standards could act contrary to the interests of people with disability. (1996, 430-31)

In a similar vein, Handley (2001) notes that the *DDA* has some progressive elements but that in practice it is delivering at very best only partial improvement. He argues that Australians with disabilities are caught between a "rock and a hard place": "They are caught between Commonwealth financial retrenchments on the one hand [for the enforcement of the *DDA* at the national level] and

the recently increased emphasis on the role of the States on the other" (522). As a result, "the extent to which one might expect one's rights to be protected and enforced remains dependent upon the amount of resources that one's home State is prepared to commit for that purpose" (522), likely reproducing an unevenness in how rights are protected across jurisdictions in Australia's federalism (Thornton 2005). Handley (2001, 526) concluded that "nine years after the DDA was enacted, and despite the rights that it established, it has not become conspicuously easier for disabled Australians to secure these rights."

On the key feature in the *DDA* of developing "disability standards," progress has been remarkably slow. The first standard, on accessible transport, was not accepted or implemented until 2002, ten years after the legislation was passed. According to the Human Rights and Equal Opportunity Commission (2003), "some of the delay in producing standards results from the approach adopted, and supported by the Commission, of developing standards with the widest possible consensus, including relevant industry bodies, the disability community and Federal and State governments" (12). In its 2003 report, the Commission observed that the number of temporary exemptions granted to manage the shift from inaccessible to accessible services and systems had been "quite small, except in the public transport area" (12). Exemptions have been granted to Adelaide buses, Western Australia public transport authorities, Melbourne trams, Kendell Airlines, Queensland Rail, and the Olympic Roads and Transport Authority. An equally important issue concerns the claim that standards may have undesired consequences of reproducing disablement rather than promoting access and prohibiting discrimination. Disability activists warn,

Standards tend to reinforce dominant accounts of disability: stereotypes of people with disability as people with obvious physical disabilities, such as users of wheelchairs. Narrowly conceived standards do not address the needs of people

with a wide range of other impairments, such as chemical sensitivity or even intellectual disability. (Goggin and Newell 2005, 40)

Similarly, progress on the development of action plans by service providers to achieve the goals of the *DDA* was quite modest in the first ten years, with only 254 plans registered with the Commission in 2002. Most of the action plans came from the public sector (79 percent); that is, from Commonwealth, state, territory, and local government bodies, and from education providers. Only 11 percent were from the private sector, and 10 percent were from the non-governmental sector (HREOC 2003, 14). Issues the Commission identifies as deserving more attention through research and policy work include "the need for more effective measures of protection and remedy against abuse of people with disabilities in institutional settings" and "the psychiatric disability area" (22). No doubt, the Commission reports, "there have been many achievements"—such as increased captioning of television programs—but, at the same time, the Commission acknowledges "there are areas where individuals and advocates have expressed concern and frustration over the limits of the law, and where progress has been more difficult than was hoped when the legislation was passed" (2).

THE UNITED KINGDOM'S DISABILITY DISCRIMINATION ACTS, 1995 AND 2005, AND EQUALITY ACT, 2006

Following after the United States and Australia, the United Kingdom passed the *Disability Discrimination Act 1995*, the first country in Europe to do so. Key provisions and ideas about rights and responsibilities in this legislation are as follows:

Employers and providers of goods, services and education are not allowed to discriminate against disabled people. Discrimination is defined as providing less favourable treatment for a reason related to a person's disability without

justification or failing to make reasonable adjustments. In relation to the provision of goods and services and education, anticipatory adjustments must be made. If it is believed that discrimination has occurred, the onus is on the disabled person to bring a case to court or Tribunal.

There has therefore been a marked shift in understanding who has responsibility for taking action so that the state is seen as acting as regulator, individual disabled people are given a role in enforcing their rights, and employers are expected to meet expectations set down in law. (Goodland and Riddell 2005, 51)

Assessments of the *DDA 1995* were mixed but ultimately critical (Barnes 2000; Thornton 2005). On the positive side, one legal scholar accurately anticipated that the *DDA* would make some differences in the areas of employment protection and eradication of “some of the worst and more explicit discriminatory excesses in the public provision of goods and services” (Doyle 1997, 78). The legislation also encouraged businesses to make reasonable adjustments and to alter their views on people with disabilities, recognizing these individuals as valuable workers and consumers (Doyle 1997). Similarly, three disability studies scholars asserted that “the disabled people’s movement can claim to have made a significant advance in convincing the general public of the merit of anti-discrimination legislation” and that “rights for disabled people is now firmly on the political agenda, in complete contrast with the situation thirty years ago” (Barnes, Mercer, and Shakespeare 1999, 172). The *DDA 1995* did create some new statutory rights and new opportunities for individuals to challenge discriminatory practices, including the issue of website accessibility. On the critical side,

the nagging awareness remains that in total the Act represents, at best, half measures and reluctant reform. The narrow and complex definition of the protected class, the exemption of small employers, the hybrid definition of discrimination,

the uncertain (sometimes subjective) application of the justification defence, the exclusion of education and transport from the central thrust of the anti-discrimination principles, and the lack of a strategic enforcement agency all combine to cast doubt upon the motives behind the Act. (Doyle 1997, 78)

Other analysts have pointed to these and other “fundamental design-flaws of the *DDA*” (Barnes 2000; Gooding 2000; Lee 2002; Thornton 2005). The formation in 2000 of the Disability Rights Commission (DRC) partly remedied the lack of an enforcement agency. Despite that, some legal analysts saw the DRC as lacking real teeth in powers.

Another criticism is that the *DDA 1995* reinforced “the medical model by linking impairments with the ability to carry out stated day-to-day activities, without allowing for social or physical environmental variables that may exaggerate or alleviate the effects of disability” (Woodhams and Corby 2003, 164; see Barnes 2000 for a similar critique). In the area of employment, the *DDA 1995* did not cover all people with disabilities. For example, Barnes, Mercer, and Shakespeare (1999) observed that those “who work in sheltered employment and supported employment schemes, the majority of whom are people with learning difficulties, are not protected under the legislation” (188). In the hotel and catering industries, despite the *DDA*, people with disabilities have been “shunned because they are perceived as ‘bad for business’” (188). Moreover, under the 1995 legislation, “employers and service providers are exempt if they can show that compliance would damage their business” (163), which also meant that “little is done to remove the environmental barriers faced by disabled people in the workplace” (116). This led observers of the UK situation to conclude that the *DDA 1995* was “unlikely to transform the employment situation of the disabled population as a whole” (116).

A final impact of this legislation concerns its effect on relationships within the British disability

community and on the disability community's links with government.

The 1995 *Disability Discrimination Act* reopened internal divisions and brought to an end the uneasy coalition between organizations of and organizations for disabled people. The former opposed the legislation as too weak and unenforceable. In contrast, [several] organizations for disabled people ... agreed to work with the government to implement the new law. (Barnes, Mercer, and Shakespeare 1999, 163)

McGuire (1994) made a similar point regarding the impact of the *Americans with Disabilities Act* on the disability community in the United States as a collective community.

The *Disability Discrimination Act 2005* sought to address a number of these limitations. The *DDA 2005* added the areas of transport and rail vehicles (exempted from key sections of the *DDA 1995*), new duties of "disability equality" upon public authorities, and provisions regarding discriminatory advertisements, group insurance, private clubs and similar associations of 25 members or more, housing and commercial premises, and general qualification bodies such as professions. The 2005 law also sought to clarify and modestly expand the meaning of disability, adding cancer, HIV infections, and multiple sclerosis to the statutory definition, thereby extending coverage to an additional 250,000 people. According to the Blair government, the *DDA 2005* represents "the most far-reaching programme of disability rights legislation that any European country has so far put in place" (Office for Disability Issues 2006, 4).

The UK *Equality Act 2006* provided for establishment of the Commission for Equality and Human Rights (CEHR); to do so, the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission were dissolved. The CEHR took over the work of the Disability Rights Commission in October 2007.

Establishment of the CEHR moves British practice closer to the Australian (and Irish) model of a multidimensional rights body rather than a series of specific commissions for different social groups and forms of discrimination (as found in such countries as the Netherlands, New Zealand, and Sweden). Like the Australian model, too, the new British commission has a division devoted to disability matters.

SOME LESSONS

What do we learn from this inquiry into laws that promote the rights of persons with disabilities? Is there a single leader on legislating rights to access for people with disabilities? An American law professor who wrote the original draft of the *Americans with Disabilities Act* has observed: "The *Australian Disability Discrimination Act* is extremely comprehensive, forceful, and specific. With some accuracy one can describe it as having out-ADAed the *ADA*.... The British version of a *Disability Discrimination Act*, in contrast, is much less broad, specific, and substantial than the *ADA*" (Burgdorf 1998, 1). While certainly not in disagreement with Burgdorf on the relative nature of the laws, the evidence presented here suggests that each of the American, Australian, and British laws on disability rights has limitations and each offers some lessons for the Canadian political and public policy context.

Nations worldwide in the last generation have introduced legislative measures on the human rights and social needs of persons with disabilities. While this may suggest international convergence on this issue, the first lesson is that there are in fact a number of perspectives on the nature and efficacy of disability legislation. It would be misleading to see these trends solely or even mainly as moves to civil rights for people with disabilities in the American style of the *ADA* (Burgdorf 1998). On the contrary, the development of anti-discrimination laws on disability has been more eclectic, with each country drawing on features from domestic sources along with international sources such as the United

Nations. Ultimately, equality rights legislation is the result of political, community, and administrative compromises (Gooding 1994, 2000; Lindsay 1996; McGuire 1994) and their effect wrought in large part by legal actions and regulatory and judicial interpretations (Campbell 2005; Gostin 2003; Hahn 2002; Jones 1995; Percy 2001a; Rioux, Crawford, and Anweiler 2001).

A second lesson is the political, statutory, and programming importance of policy legacies in this field as in many other domains of public policy. In the three jurisdictions examined here as well as in other countries, the introduction of disability discrimination laws followed by several years the enactment of laws dealing with racial discrimination and sexual discrimination at the national level and, in the case of Australia and the United States, also at subnational levels of government. In certain respects, disability discrimination laws were, and still are, influenced by the statutory form of these earlier rights laws and experiences with them. In Canada, in comparison, while there is a dense thicket of rights protections for persons with disabilities along with other social groups, there is not the presence of specific disability rights laws across the provinces anywhere close to the same extent as in either America or Australia.² If this means there is less policy learning and public awareness of such laws across Canada, it might present challenges to national disability organizations to mobilize widespread interest and forge strong alliances with other social movements (Goodland and Riddell 2005; Lepofsky 2004; Percy 2001b).

A third lesson concerns the relation between federalism and the development of disability rights policies and programs. In the United States, the *ADA Amendments Act* of 2008 illustrates the dynamic interplay of the legislative and judicial branches of government; in Australia, experience of the *DDA* of 1992 indicates the importance of the executive branch in a Westminster system of parliamentary government in shaping the interpretation and functioning of legislative initiatives. Cameron and

Valentine (2001) have concluded that compared to the political party system, the legislative system, or the judicial branch, federalism is relatively more prominent and significant in Canadian political affairs than in Australia or the United States. The general influence of Canadian federalism seems constraining in that Canada does not have a national policy or a robust intergovernmental process on disability issues to the degree that other federations do (Cameron and Valentine 2001; Prince 2001, 2004). Given the intricate federal condition of our body politic, parliamentarians recognize that to formulate a national disability law in Canada, consultations are essential with provincial and territorial governments as well as rights holders and stakeholders (Canada. Standing Committee on Human Resources 2008).

A fourth lesson is that these disability laws benefit people with disabilities differentially, depending among other factors on the type (including its social familiarity and medical acceptance) and the severity of impairments. Governmental practices—whether in the form of anti-discrimination laws, employment services, income benefits, or other service provisions—vary in their coverage of people by types of disabilities. Public programs in the countries surveyed are relatively more effective in service delivery for people with physical disabilities, for people with mild to moderate disabilities, and for people living in urban areas. In contrast, countries lag behind in servicing the needs of individuals with other types of disability—notably intellectual disabilities, learning disabilities, mental health conditions, severe or profound disabilities, and HIV/AIDS—and people with disabilities living in rural and remote communities. In short, disability rights and accessibility laws seem to assist people with certain kinds of disabilities more than other kinds. Thus, the impact of disability anti-discrimination laws and disability rights on accessibility also varies across different sectors, such as employment, public transport, and housing.

All four countries—the United Kingdom as a unitary parliamentary system and Canada, Australia, and the United States as federations—confront

similar problems of fragmented policies and program systems in the disability domain. These problems seem inherent in the history of liberal welfare states with market capitalist economies that are influenced significantly by medical knowledge and authorities (Barnes, Mercer, and Shakespeare 1999; Foodrill and McCabe 2009; Goggin and Newell 2005; Hahn 2002; Haveman and Wolfe 1999; Prince 2009; Thomas and Gostin 2009).

In view of this tendency in policy outcomes, a fifth lesson is to strive for a composite of valued practices in the legislative domain. These practices appear to include the following elements:

- one or more laws that address a wide range of rights and responsibilities (civil, economic, legal, economic, and social/cultural);
- meaningful input at the formulation stage to elicit support from disability groups, families and advocates, employers, and service providers in public authorities and community agencies;
- links to an overall officially recognized disability plan or strategy by the central government based upon a social model of disability and citizenship;
- legislative objectives that have measurable indicators and can be linked to data sets for tracking results and auditing progress;
- adequate funding of administration and other functions;
- support for citizen and community-based advocacy;
- phase-in over a limited number of years of full range of areas covered by the legislation; and
- legally enforceable duties on public authorities and private entities to promote access and equality, raise public awareness, and protect the rights of people with disabilities.

While far from a sufficient response to discrimination and advancing accessibility, disability rights legislation seems a necessary policy initiative in light of ongoing barriers and exclusion (Prince 2004, 2009).

In Canada's case, ideas about a federal disability act are usually framed in terms of positive action legislation. This is in contrast to anti-discrimination legislation that relies on complaints, the investigation of individual cases, possibly litigation, and court or tribunal orders. Canadian jurisdictions already have such legal remedies and mechanisms in human rights codes and related legislation. Positive action legislation, by comparison, is proactive and systemic in design with a focus on accessibility, mainstreaming, reducing inequalities, and promoting universal design. Core tools of positive action include public awareness, procurement and contract policies, development of standards, timelines for implementation and compliance, and enforcement. The potential scope of a federal act includes telecommunications, interprovincial and international transportation, broadcasting, banking, justice, immigration, First Nations, tax measures, employment in the federal public service and federally regulated sectors (about 10 percent of the overall Canadian labour force), and various other federal programs, services, and institutions.

A final lesson is that to be meaningful for the disability movement to promote and endorse, such legislation must be adequately equipped on a sustained basis over many years in terms of both delivery capacity and effective enforcement mechanisms, and must be supplementary to other required social policy reforms. A statement in 2007 by the Canadian disability movement declares support for the notion of a federal disability act if it "allocates significant resources for improving access and inclusion and ensures a mechanism for strong enforcement of access and inclusion. The development of a Federal Disability Act cannot preclude action in other areas nor can Canadians with disabilities and their families wait for a Federal Disability Act

to implement reforms that are desperately needed now” (End Exclusion 2007, 4). Within this context of an agenda of investments and actions, federal legislation is an important element in social citizenship and public policy for advancing equality and equity for Canadians with disabilities.

NOTES

¹ An exception is if a state or local law provides greater or equal protection for the rights of individuals with disabilities than is afforded by the *ADA* (Percy 1993).

² Ontario’s current legislative approach to removing barriers for persons with disabilities is the *Accessibility for Ontarians with Disabilities Act (AODA)*, 2005. The *AODA* applies to both the public and private sectors and sets out a process for developing accessibility standards for ensuring the removal of physical, attitudinal, informational, technological, or communications barriers for persons with disabilities by 2025. To date, standards have been developed for customer services, and will be developed in the further four areas of employment, communications and information, transportation, and the built environment (Law Commission of Ontario 2010).

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