Equal in Theory: An Assessment of Anti-Discrimination Statutes as Equality Tools for People with Disabilities

by

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Abstract

In recent years, the enforcement of Canadian human rights statutes has been the subject of much criticism. That criticism comes not only from organizations that are required to change their practices to comply with the statutes, but from advocates who question the effectiveness of human rights enforcement. Studies which attempt to address these criticisms generally review the criticisms and then seek to modify the enforcement models to ameliorate the problems which have generated the criticism. This thesis considers the problem from a more theoretical perspective. With a focus on disability, this thesis considers whether Canadian anti-discrimination statutes, which were created when the prevailing theory of equality was a formal one, are capable of achieving substantive equality as it is now conceived.

Applying a disability rights perspective, substantive equality for people with disabilities requires that a wide and complex variety of barriers be removed. These barriers may result from intended or unintended discrimination. They may be physical or attitudinal. They may be isolated, individual acts or they may reflect widespread societal norms. To eliminate such an array of barriers, anti-discrimination statutes must include a range of powers and procedures: they must incorporate provisions that protect people with disabilities from such barriers; they must provide mechanisms to identify the barriers; there must be mechanisms to determine whether the barriers contravene the protected right; and the statutes must provide effective remedies.

This thesis concludes that contemporary human rights enforcement models are capable of effectively addressing many individual barriers to equality for people with disabilities. However, under a complaint-based model, human rights agencies cannot effectively address barriers that result from the operation of widespread norms. Canadian human rights agencies are therefore limited in their ability to achieve the societal transformation that is necessary to achieve substantive equality for people with disabilities. For such equality to be realized, anti-discrimination statutes must be seen as just one facet of a much broader approach.
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Introduction

Our fascination with equality lies not in mere theory or established practice, but in the repeated moment of transition from theory into practice. The importance of this moment is obvious, since it forces an abstraction's sterile form to accommodate life. Trying to make laws or families or universities live up to the doctrine of equality is the point at which we discover egalitarianism as a living conception.¹

This project explores that moment when theory intersects with practice. In particular it examines whether the legislative tools that aim to achieve equality are capable of meeting that goal.

Human rights statutes, particularly anti-discrimination legislation, began to appear in Canada shortly after the Second World War. In the 1960s, 1970s, and 1980s the statutes became more comprehensive and established publicly-funded mechanisms to investigate and enforce complaints of discrimination. These changes were, in part, a result of the perceived failure of earlier enforcement mechanisms to address discrimination. They also reflected a growing belief that discrimination hurt more than the individuals affected; it was also a public wrong and therefore required a public response.

Recently, the public's confidence in the effectiveness of human rights agencies has eroded. In the past decade, there have been reviews of human rights enforcement in a number of

Canadian jurisdictions. Some are internal reviews, some external; some are government initiated and sponsored, some the result of independent scholarship. These reviews reflect and document concerns among stakeholders that human rights statutes are not achieving the purposes for which they were intended. Rights-seekers complain that human rights agencies have become over-burdened with individual complaints at the expense of broader systemic equality issues; employers and service-providers complain that the enforcement mechanisms are an undue burden. At times both sides argue that the system favours the other side, and there is near universal concern that complaints take too long to process.

These reviews are, to varying degrees, empirical. They examine an agency’s processes, assess its effectiveness and make recommendations for change. The starting point is an existing agency. And the conclusions and recommendations are based on some measure of the effectiveness of that agency. These reviews are valuable in understanding how human rights agencies are functioning and where they are failing. Some of their recommendations have been implemented, some not. The most dramatic response has been in British Columbia where recent legislative amendments created a direct-access system in which human rights disputes are addressed largely as a private matter, with little role for those advocating a public interest.

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During this evolution of human rights legislation, equality theory has also been transforming. The formalistic theories of equality that were prevalent in the post-war period have been replaced by theories that focus on a contextual analysis of equality. Equality is no longer just a question of ensuring that all people are treated the same; equality theorists and advocates now look more broadly at the impact of policies and practices on the ability of people to participate in and receive the benefit of society and its institutions.

My aim is to investigate whether Canadian human rights statutes are useful tools to achieve equality as it is now conceived. This project differs fundamentally from previous reviews. They sought to advance equality by investigating the effectiveness of an existing agency; I use equality theory to try to build an effective agency. One of the shortcomings of the various reviews of human rights statutes is that, while the recommendations seek to incorporate contemporary theories of equality, they do so by revising enforcement models that were initially designed to address more formal conceptions of equality. Rather than beginning with a review of the effectiveness of an existing agency, my focus is on the relationship between equality theory and the practical utility of anti-discrimination statutes. My approach thus is primarily theoretical rather than empirical. I will un-bundle equality theory to identify some particular inequalities that must be eliminated if equality is to be achieved. I will relate those inequalities to discrimination theory and identify the statutory powers and procedures that would be required to achieve such equality. And I will then use actual legislation, in this case British Columbia’s, to consider whether it incorporates the powers and procedures necessary to achieve equality.
Consideration of the effect of human rights statutes on all of the groups protected by the legislation is beyond the scope of this thesis. My focus will be physical disability, and I will use the lens of disability rights. I adopt the disability rights lens for several reasons. I have a personal interest in the subject of disability, but there are also practical and scholarly reasons to focus on disability. By almost any measure, people with disabilities are unequal. As discussed below in Chapter III, they are more likely to be poor, unemployed, and undereducated than other segments of society. They are marginalized by those factors and by a complex and varied array of barriers to full participation including inaccessible physical or social structures and prejudice. Finding effective mechanisms to achieve equality for people with disabilities is therefore an important and difficult challenge. And it is a challenge that is relevant beyond the area of disability. The inequalities associated with disability may be caused by simple prejudice or bigotry, by misunderstanding or misconceptions, or by the organization or structure of society's institutions. By looking at equality through a disability rights lens, it is therefore possible to observe a range of inequalities that will include the types of inequality that are of concern to other equality-seeking groups. Moreover, disability, as one of the newest subjects in equality rights discourse, incorporates the most current conceptions of equality. Conclusions drawn from an analysis of disability rights will therefore be relevant to those studying other areas of (in)equality such as gender or race.

1. Structure of the Thesis

My goal is to bridge the gap between theory and practice by assessing the effectiveness of current Canadian human rights statutes in achieving equality, particularly for people with
disabilities. I will address three questions: First, what theory of equality should be used to measure the effectiveness of human rights agencies? Second, what powers or procedures will enable agencies to bring about the change necessary to achieve equality? And third, do contemporary Canadian human rights statutes incorporate those powers and procedures? Generally, the paper moves from the theoretical to the practical and from the general to the specific.

The first chapter provides an introduction to the development of Canadian human rights statutes. The legislation arose out of a recognition that our judges and legislators had failed to provide an adequate response to the social injustice of discrimination. The chapter begins, therefore, with a discussion of the social context from which emerged the demand for human rights legislation. I then review the development of human rights statutes from their introduction in the 1950s and the creation of Human Rights Commissions in the 1960s, to their expansion in the 1980s. Chapter I concludes with discussion of some of the criticisms of those statutes that were expressed in the 1980s and gained momentum through the 1990s.

Chapters II and III provide an answer to the first question: what theory of equality should be used to measure the effectiveness of human rights agencies? Chapter II provides an introduction to equality theory. Academic scholarship on equality is rich and diverse. There are equality theories representing the range of political orientation from conservative to socialist. Even within a particular orientation, such as liberalism, there are a variety of perspectives from which to view equality. And the perspectives do not always use the same vocabulary to describe equality. In order to analyze equality, it is necessary to give it some
definition. The chapter therefore begins with a discussion of some of the language of
equality. I then turn to a discussion of some of the more influential theories of equality,
focus on some of the liberal and feminist perspectives. The purpose of this chapter is not
to resolve the conflicts that arise from the varied perspectives, nor to determine their merits.
Rather, it is to provide a theoretical background for the analysis that follows.

Some equality theorists begin with the question of whether equality is an interest that ought
to be promoted or protected through state intervention. Implicit in the purpose of this thesis
is an assumption that the state will intervene at some level to protect or promote equality.
However, while I begin from the position that equality is a fundamental interest that justifies
state intervention, differing equality theories reach different conclusions about the goal of
such intervention: is it that all people should be treated the same, or that they should all have
the same opportunity to share in what society has to offer, or should they all have the same
share in society’s resources and opportunities? It is possible to conceive of human rights
agencies being created to address each of those possibilities. I seek a practical outcome, one
that reflects the real-world application of the law. Human rights agencies are required to
apply their statutes in a manner that is consistent with judicial interpretation. Therefore, in
answering the first question, I will consider the meaning of equality as it emerges from
judicial reasoning. Chapter II concludes with a discussion of Canadian judicial
interpretations of the meaning of equality. Those interpretations vary, and are not
consistently applied. Nevertheless, they provide some boundaries within which human rights
agencies must operate when applying their statutes. Although judicial statements on the
meaning of equality are often the subject of a critical analysis, my aim is simply to identify the current doctrinal limits of anti-discrimination laws.

In assessing the utility of human rights laws as a tool for equality, I must move from general theories of equality to their application. For example, a particular theoretical conception of equality may, in its practical application, operate differently for racial minorities than for women. One group may seek substantive equality by creating a world that ignores differences between groups, while another may seek it through the accommodation of, or focus on, difference. My lens is disability rights. Chapter III identifies the changes that must be accomplished if people with disabilities are to achieve equality. However, there is not a unified vision of equality for disabled people. I will use the lens that developed out of the disability rights movement. To appreciate that perspective, it is necessary to be familiar with the context to which it responds. The disability rights movement was in large measure a reaction to the vision of disability that was dominant prior to the 1970s. That vision – the medical model – is deep-rooted. The chapter begins with a discussion of the genesis and content of the medical model of disability, then examines the disability rights movement and the model of disability that informed that movement (i.e., the social model). Finally, the application of equality theory to people with disabilities is discussed, concluding with a the debate over the impact on equality for disabled people of laws that prohibit discrimination.

In Chapter IV, I address the second question: what powers or procedures will enable agencies to bring about the change necessary to achieve equality? People with disabilities face a variety of barriers to equality. The effectiveness of anti-discrimination statutes may be
measured by their effectiveness at eliminating those barriers. The meaning of
"discrimination", like "equality", is complex and disputed. Therefore, the chapter begins
with discussion of the conceptions of discrimination that are encompassed by anti-
discrimination statutes (either expressly or through judicial interpretation). I then analyze
those conceptions of discrimination to identify the particular powers and procedures that are
necessary to eliminate barriers to equality for people with disabilities. Chapter IV concludes
with a tentative answer to the third question: do contemporary Canadian human rights
statutes incorporate the powers and procedures necessary to achieve equality?

In Chapter V, further light is shed on this question by making the analysis more specific and
practical. I focus on two models of anti-discrimination enforcement that have been or are
being applied in British Columbia. British Columbia provides an interesting case study
because differing visions of equality are, for reasons of political expediency, effected through
change to the structures and powers of the institutions that are charged with combating
discrimination. Examining British Columbia legislation therefore allows me to explore the
relationship of the structure and powers of anti-discrimination agencies to the achievement of
equality. The chapter begins with a discussion of the politics of anti-discrimination reform in
British Columbia, at least to the extent that those politics are expressed through reform of
anti-discrimination legislation. Then, using the barriers to equality discussed in Chapter IV, I
consider the strengths and limitations of the two most recent enforcement models in British
Columbia.
The conclusion that emerges from the analysis in Chapters IV and V is ambivalent. Canadian courts and tribunals have rejected a purely formal theory of equality. They have interpreted anti-discrimination statutes as having broad, sometimes even radically egalitarian, purposes. So interpreted, the statues incorporate current progressive conceptions of equality. Moreover, such statutes have the ability to remedy a wide range of discriminatory barriers. On the other hand, there are limitations inherent to these statutes, limitations that become more apparent the further removed the equality goals are from formal inequality. In Chapters IV and V, I identify those limitations.

This thesis focuses on anti-discrimination statutes. Such statutes are not the only legislative tools designed to address inequality. The *Charter of Rights and Freedoms*, particularly section 15, also addresses equality. Although this thesis is not about the *Charter*, I do occasionally refer to *Charter* cases. Interpretations and applications of section 15 of the *Charter* often guide the interpretation or application of anti-discrimination statutes (and *vice versa*). When I refer to *Charter* cases, it is to illustrate particular points related to anti-discrimination statutes, not to advance a *Charter* analysis. Similarly, occasionally I discuss other legislative tools, such as employment equity or licensing laws that seek to achieve some of the same purposes as anti-discrimination statutes. Again, my aim is to discuss such laws to advance my analysis of anti-discrimination laws. A comparative analysis of the various legislative initiatives to combat the inequalities associated with disability would be interesting and useful. But it is beyond the scope of this thesis.

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3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].
2. A Note on Terminology

(a) "Human Rights" or Anti-Discrimination"

In Canada, since the 1960s, public policy aimed at combating discriminatory practices has been incorporated in statutes described as human rights legislation and entitled “Human Rights Codes” or “Human Rights Acts”. They are administered by Human Rights Commissions and/or Human Rights Tribunals. Most of these statutes deal exclusively with discrimination; they do not address other human rights issues, such as legal rights or social and cultural rights. In the context of domestic law, “human rights statutes” and “anti-discrimination statutes” are used interchangeably. Although “human rights” is the more common usage, for the purposes of this thesis, I prefer the term “anti-discrimination”. The latter more precisely describes the focus of this thesis and may avoid confusion, particularly for readers more familiar with the international or constitutional context where “human rights” has a more expansive meaning. Occasionally, I refer to “human rights” legislation (such as in the opening paragraphs of this introduction); when I do, I am using it in the narrow sense that it is used domestically.

(b) "Disability"

Beginning in Chapter III, I focus on disability as an equality issue. But what does “disability” mean? In its common usage, the term may refer either to a physical condition or to the limiting effect of the condition. Theorists, policy-makers and activists have struggled to give disability a more precise meaning. That struggle often reflects a more fundamental debate about the nature and causes of disability. That debate is discussed in Chapter III and I need not summarize it here. Nevertheless, that debate illuminates the importance of the
language we use to describe disability. Our perspective on the nature and causes of disability affects the language we use to describe it. Much has been written on the meaning of “disability”. It is not my intention to review that literature. Nevertheless, it is important for me to explain what I mean when I say “disability”. A more precise definition will help to avoid confusion; it will also reveal the perspective that I bring to this analysis.

In an effort to standardize the language around disability, the World Health Organization developed a framework for describing disability. It distinguishes “impairments”, “disabilities” and “handicaps”. An “impairment” is a physical anomaly; a “disability” is a limitation in the ability to perform normal activities because of the impairment; and a “handicap” is a disadvantage that arises from the social reception of the disability or impairment. This tripartite conceptualization of disablement clarifies the mechanics of disability. For my purposes, however, it is too precise. It requires subtle distinctions that may be more distracting than helpful. Michael Oliver, a sociologist and a pioneer in the area of disability studies, offers the following classification:

Impairment lacking part of or all of a limb, or having a defective limb, organism or mechanism of the body;

Disability the disadvantage or restriction of activity caused by a contemporary social organisation which takes no or little account of people who have

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physical impairments and thus excludes them from the mainstream of social activities.\footnote{Oliver, supra note 4 at 11. This definition was initially developed by the Union of the Physically Impaired against Segregation.}

This classification reflects Oliver’s perspective of disability as the consequence of oppression. There is no recognition of any limiting effects of the impairment that are not socially constructed.

For my purposes, it is not necessary to incorporate such a clearly defined perspective in my definition of disability. It is, however, necessary for me to be clear about the distinction between a physical condition and its effects. I will therefore use the term “impairment” as it is used in both the classifications discussed above to describe a physical condition or anomaly. I will use “disability” to describe the limitations that are created by the impairment. I accept that those limitations may be socially constructed. I do not find it helpful, in the context of my analysis, either to use a definition of disability that excludes the possibility of limitations that are not socially constructed or to use a separate term (i.e. “handicap”) that includes only those that are socially constructed.

Generally, the focus of the paper is on physical rather than mental disability. My discussion will not be related exclusively to physical disability, and I will occasionally use examples that relate to mental disabilities. However, there may be particular issues on which the interests of people with mental disabilities diverge from people with physical disabilities. I have not attempted to identify such issues, or to analyze them from both perspectives. My perspective is through the lens of physical disability.
Defining “disability” raises difficult issues of theory and policy. Describing people who
have disabilities raises different challenges. How we describe people can have a profound
effect on the lives they live. Language can stigmatize, belittle or demean. Sometimes it is
downright offensive to those who experience it. In North America, activists generally
describe themselves as “people with disabilities”. This focuses attention on them first and
foremost as people. They have a disability, but the disability does not encompass them.
British activists prefer “disabled people”. Oliver explains that the liberal and humanist view
that the disability is a mere appendage to the person “flies in the face of reality as it is
experienced by disabled people themselves who argue that far from being an appendage,
disability is an essential part of the self. …[D]isabled people are demanding acceptance as
they are, as disabled people.”

Oliver’s position has resonance for me. Much of the power of the message of the disability
rights movement, which is described in Chapter III, comes from disabled people’s strength as
a collective. Despite the vast range of disabiling conditions, there is a shared experience of
disability. Their disability does not define them, but it is essential to their lived experience.
Nevertheless, in this paper, I will generally refer to “people with disabilities” rather than
“disabled people”. I do so out of deference to those North American activists who prefer the
former term. Nevertheless, I will occasionally use the term “disabled people”. I do so
primarily for reasons of style (though it may also reflect my sympathy for Oliver’s position);
efforts to read any nuance into my occasional use of the term will be futile.

7 Oliver, Ibid. at xiii.
Referring to people with disabilities as “the disabled” fell out of favour among activists in the mid-1980s. Coalitions of the disabled became coalitions of people with disabilities. The change reflected the same reasoning that gives preference to “people with disabilities” over “disabled people”: the focus should be on the person rather than the disability. The reasoning has more force in this context because “the disabled” leaves out the person altogether. For me, however, something was lost in the transition. “The disabled” suggests a unified collective, a social force. “People with disabilities” connotes a diverse group of individuals who happen to share one characteristic. It does not evoke the power associated with a social movement. If I refer to “the disabled”, therefore, it is to evoke that collective force; it is to identify people with disabilities not merely as a group with a shared characteristic but as a collective with a shared goal.

3. About the Author

In stubbornly clinging to “the disabled” as a term with some descriptive value, I may be fighting a rear-guard action in a battle I lost long ago. In the mid-1980s, I was on the Board of the BC Coalition of the Disabled when it changed its name to the BC Coalition of People with Disabilities. During debate on the name change, I took a similar position to the one I described above. Apparently my argument was not persuasive. With the aid of hindsight, I recognize that some, perhaps many, members of the coalition did not see themselves as part of a social movement and that the name change might have reflected that reality.

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8 It may also reflect the tendency of each generation of activists to respond to the stigma associated with disability by advocating for a new, and less stigmatizing, term. Hence “cripples” was replaced by “the handicapped”, which was replaced by “the disabled”, and then “people with disabilities”. 

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There are many points throughout this paper where the story it tells touches my life story both personally and professionally. I have a disability. In 1969, as a result of a diving accident, I crushed two vertebrae in my neck, leaving me with limited use of my legs and hands. Since then I have relied on crutches or a wheelchair for mobility. At the time of the accident, anti-discrimination statutes did not prohibit discrimination on the basis of disability. In 1979, I became involved with the BC Coalition of the Disabled (as it was then called) and became part of the growing disability rights movement. I actively lobbied for inclusion of disability as a prohibited ground of discrimination in human rights statutes. And as a representative of the disability community on the Solidarity Coalition steering committee, I fought against the dismantling of human rights institutions by the BC Social Credit government in 1983. Professionally, I was employed as an investigator with the Canadian Human Rights Commission throughout the early 1980s. I was appointed to the BC Council of Human Rights in 1991, then to the BC Human Rights Tribunal in 1997. I participated in the evolution of human rights legislation which is described in Chapter I. I was part of the disability rights movement described in Chapter III. I have worked as an investigator and adjudicator applying the powers described in Chapters IV and V. And I have observed at close range the boisterous history of British Columbia’s anti-discrimination legislation, which is described in Chapter V.

Although the story that this thesis tells has touched my life in many ways, it is not the story of my life. It is not intended to be autobiographical. Nor, unless expressly indicated or when I am describing processes with which I am very familiar (such as those of the BC Council of Human Rights), do I consciously draw on my own experience when analyzing the issues.
addressed in this paper. Nevertheless, it is likely that my vision of equality and the role of anti-discrimination legislation in removing barriers to equality, especially for people with disabilities, has been shaped by my personal experience. My hope is that that vision does not distort my analysis in the pages that follow; but rather that it focuses the analysis on issues that have not been addressed or have been addressed differently by other scholars.
Chapter I: Human Rights Legislation

Following the [second world] war, governments ventured into the area of human rights only hesitantly and when pushed by an aroused public opinion following some dramatic incident of discrimination. Amendments to initial pieces of legislation most often were designed to go only as far as was necessary to cope with specific discriminatory practices that labour, religious or other groups had documented and publicized. Meanwhile, as pressure groups demonstrated inadequacies in the enforcement of the laws, administrative structures were patched up and expanded bit by bit.¹

1. Introduction

On July 11, 1936, Fred Christie, a Black man, entered the York Tavern, placed 50 cents on the bar and ordered three steins of beer, one each for himself and the two friends who accompanied him. The waiter refused to serve him, stating that he was instructed not to serve “colored persons”. Mr. Christie sued the tavern. Approximately three years later, the Supreme Court of Canada dismissed his suit.² It held that the tavern was within its rights to decline service to Mr. Christie. The Court based its decision on the following proposition:

… [W]e ought to start from the proposition that the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order.³

³ Ibid. at 142.
In short, the Court concluded that freedom of commerce – or perhaps more accurately, freedom of a merchant to deal – trumps the freedom of a customer to be treated without discrimination. At the time, the decision does not appear to have engendered any great controversy. It was reported on the inside pages of the local newspapers without comment.4

The muted response to a decision which today would provoke outrage reflects the social and judicial context in which the decision was made. At the time, discrimination was common and widespread in Canadian society. Neither the legislators nor the judiciary demonstrated an interest in prohibiting such conduct.

However, following World War II, many groups demanded laws to prohibit discrimination. And the legislators responded by introducing anti-discrimination statutes. Initially the laws were narrow in scope, and provided little support for those who sought to enforce them. Since then, in response to public pressure, legislators have incrementally increased the scope of the legislation and have introduced mechanisms intended to enhance the effectiveness of the legislation.

The first stage of the evolution of anti-discrimination legislation was the unregulated pre-war context in which Christie was decided. In the second stage, “fair practice” statutes of limited scope were introduced. That was followed in the 1960s, 1970s and 1980s by the creation of statutory human rights agencies with the authority to administer and enforce consolidated human rights statutes, and expansion of the scope of the legislation. The fourth stage reflects

growing concern about the effectiveness of anti-discrimination enforcement, and is marked by reviews of the legislation in many jurisdictions and the establishment of new forms of statutory agencies to enforce it. The legislation was not introduced at the same time or in the same form in all Canadian jurisdictions; however, the evolutionary stages have been similar. My review will not identify every statute from every Canadian jurisdiction. Rather, I will discuss representative legislation from the various stages. In subsequent chapters, I will consider the effectiveness of current anti-discrimination legislation, particularly in achieving equality for people with disability.

2. Discrimination before World War II

The discrimination experienced by Fred Christie was not anomalous. After the abolition of slavery, Canadian legislation did not deny Blacks any of the rights granted to the white majority. In this respect, Blacks had an advantage over other racial minorities. In the first half of the century, discriminatory legislation was not unusual. For example, laws restricted immigration from Asian countries, denied Asians and Native people the right to vote, and restricted and segregated land ownership and employment and business opportunities. The National Japanese Canadian Citizen’s Association presented a submission to the Special Committee on Human Rights and Fundamental Freedoms of the Senate of Canada (the “Senate Special Committee”), which met in 1950 to consider whether Canada should enact a Bill of Rights. That submission appended a long list of laws and regulations that discriminated against Japanese Canadians directly or indirectly. The discrimination included,

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5 For a more exhaustive review, see W.S. Tarnopolsky & W.F. Pentney, Discrimination and the Law (Scarborough, Ont.: Carswell, 2001) at Chapter 1.
6 Ibid. at 1-3 to 1-5.
for example, prohibitions on voting, working underground, practicing pharmacy or law, or being elected mayor or alderman.  

Although Blacks did not face overtly discriminatory legislation, Jim Crow rules that segregated Blacks and whites were widespread. James Calbert Best, the associate editor of *The Clarion* newspaper, a bi-weekly Black newspaper in Nova Scotia, wrote:

> We do have many of the privileges which are denied our southern brothers, but we often wonder if the kind of segregation we receive here is not more cruel in the very subtlety of its nature. […]

> True, we are not forced into separate parts of public conveyances, nor are we forced to drink from separate faucets or use separate washrooms, but we are often refused meals in restaurants and beds in hotels, with no good reason.

> Nowhere do we encounter signs that read “No Colored” or the more diplomatic little paste boards which say “Select Clientele”, but at times it might be better. At least much consequent embarrassment might be saved for all concerned.  

Examples of the colour-bar abound: the military was segregated; churches tended to be segregated, only sometimes by choice; orphanages could segregate by race; Blacks were denied burial in segregated cemeteries; and various hotels, restaurants and theatres were closed to Blacks. Separate seating for Blacks in Canadian theatres was common. Canadian hospitals typically did not accept African-Canadians as nurses and, in several cities, Black doctors were denied hospital privileges. At least one hospital in Edmonton would not receive Black patients in the 1920s and 1930s.  

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10 Walker, *supra* note 4 at 131-32
Overt discrimination and segregation was not limited to Blacks. In housing, entire suburbs were closed to Jews. "Gentiles Only" signs were common. Resorts displayed signs that said, "No Jews or Dogs Allowed". The right of landlords, employers and resort owners to discriminate on the basis of race or religion was taken for granted.\footnote{Lita-Rose Betcherman, \textit{The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties} (Toronto: Fitzhenry & Whiteside, 1975) at 51-52}

Most of the groups that made submissions to the Senate Special Committee in 1950 referred to such discriminatory practices. For example, the Canadian Jewish Congress discussed discrimination by employers and restrictive covenants on property. They also noted racial restrictions in hotels and resorts.\footnote{Proceedings, supra note 7 at 74-75.} The submission of the Canadian Youth Groups described a study in which it was found that, when answering job ads, an applicant with the name of "Greenberg" was far less likely to make an appointment for an interview than an applicant with the same qualifications named "Grimes". Similar results were obtained when resorts were tested.\footnote{Ibid, at 295-96.}

Political scientists Brian Howe and David Johnson have considered the evolution of human rights policy in Canada.\footnote{R. Brian Howe & David Johnson, \textit{Restraining Equality: Human Rights Commissions in Canada} (Toronto: University of Toronto Press, 2000).} They state that, prior to World War II, Canada lacked an equality-rights consciousness; consequently, discrimination was widely practiced and human rights legislation was resisted. The prevailing ethic was a belief in social \textit{laissez-faire}: "While prejudice and discrimination might be morally wrong or socially undesirable, human rights
legislation or legal action against discrimination would do more harm than good."\(^{15}\) The common view was that discrimination was to be corrected through moral suasion, not by law. This approach was favoured even among minority leaders and ethnocultural organizations, who feared that pressing legislatures for anti-discrimination laws might lead to a backlash.\(^ {16}\) Thus, in *Christie*, the Court was reflecting a view that was prevalent in contemporary Canadian society.

*Christie* was not the first time that the Supreme Court of Canada had been required to address the issue of discrimination. In previous cases, the Court had demonstrated a similar reluctance to support egalitarian values. For example, in *Quong-Wing v. The King*,\(^ {17}\) the Court considered Saskatchewan legislation that prohibited any person from employing a white woman or girl in an establishment owned by a "Chinaman". In dismissing Mr. Quong-Wing's appeal of his conviction under the statute, the majority of the Court characterized the object of the Act as the protection of white women and girls, which it found to be *intra vires* the province. Idlington J., in dissent, was the only judge to recognize that, while purportedly aimed at protecting white women, the purpose of the Act was "to curtail or restrict the rights of Chinamen".\(^ {18}\)

The Court showed a similar attitude when addressing other equality issues. In *Re Meaning of Word “Persons” in Section 24 of the B.N.A. Act* (the *Edwards* case),\(^ {19}\) the Court was required to determine whether “persons” in the British North America Act included women. The

\(^{15}\) Ibid. at 4.  
\(^{16}\) Ibid. at 5-6.  
\(^{17}\) (1914), 49 S.C.R. 440.  
\(^{18}\) Ibid., at 451.  
Court again avoided dealing directly with issues of equality. Instead, it focused its inquiry on whether, in 1867, the legislators had intended “qualified persons” to include women, and found that it had not. The Judicial Committee of the Privy Council disagreed and was prepared to advance the common law so as to reflect contemporary values. Lord Sankey stated:

...[T]heir Lordships do not think it right to apply rigidly to Canada of today the decisions and reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development.20

The Supreme Court’s reluctance to address egalitarian issues in those cases may be explained by society’s absence of an equality-rights consciousness. However, that consciousness changed rapidly after World War II. Howe and Johnson suggest that the war itself was the main stimulus for the change: the nature of the struggle against fascism and the extent of the Holocaust affected the way Canadians thought and was a catalyst for change. The war also led to events that influenced the growing human rights consciousness in Canada, including the United Nations’ *Universal Declaration of Human Rights*21 and anti-discrimination legislation in New York.22 Howe and Johnson identified a number of other factors that influenced the growth of a Canadian human rights consciousness. These included the civil rights movement, and later, the women’s movement; the changing demographics of Canadian society; and the ease with which equality rights fit with Canadian liberalism.23

Nevertheless, the Supreme Court of Canada appears to have resisted the tide of equality-rights consciousness. In 1952, the Court issued its decision in Noble and Wolfe v. Alley, which concerned a restrictive covenant prohibiting the sale of land to any person of the "Jewish, Hebrew, Semitic, Negro or coloured race or blood". In an earlier case, Re Drummond Wren, the Ontario High Court had considered a restrictive covenant which prohibited the resale of land to "Jews, or to persons of objectionable nationality". Mr. Justice Mackay declared that the rule was invalid because it was contrary to public policy, void for uncertainty and was a restraint upon alienation. In reaching his conclusion he relied on international instruments, including the Atlantic Charter and the United Nations Charter, as well as some Ontario Acts that indicated a policy of non-discrimination. In Noble and Wolfe, neither the trial nor appellate courts agreed with the decision in Re Drummond Wren that the covenant was void on the grounds of public policy. At the Supreme Court, the covenant was set aside, but not for reasons of public policy: five of the seven judges ruled that the covenant did not relate to the user of the land and, therefore, could not run with the land; four held that it was void for uncertainty. Although, in the result, the covenant was set aside, the decision was not a ringing endorsement of equality rights as a value fundamental to Canadian society.

The judiciary's reluctance to address discrimination contributed to the pressure on legislatures to take steps to protect equality rights. For example, after the Nova Scotia Court

of Appeal denied the appeal of a conviction of a woman who had done nothing more than sit in an area of a theatre reserved for white patrons,\textsuperscript{28} James Calbert Best wrote in \textit{The Clarion}:

> People have come to realize that the merchant, the restaurant operator, the theatre manager all have a duty, and the mere fact that such enterprises are privately owned is no longer an excuse for discrimination on purely racial grounds. [...] Here in Nova Scotia, we see the need of such legislation every day.\textsuperscript{29}

Tarnopolsky states:

> It is no wonder, then, that the legislatures, with no aid from the judiciary, had to move into the field and start to enact anti-discrimination legislation, the administration and application of which has been largely taken out of the courts.\textsuperscript{30}

By 1950, when the Senate Special Committee met to hear submissions on a possible Bill of Rights for Canada, this equality-rights consciousness was evident in many of the presentations. F.R. Scott, a constitutional lawyer at McGill, was the first speaker. He opened with these remarks:

> No subject, in my opinion is more worthy the attention of the legislatures of democratic states today than the one referred to your consideration, for it is by enlarging human rights and fundamental freedoms that we strengthen the

\textsuperscript{28} In 1946, Ms. Desmond was dragged out of a theatre in Nova Scotia, arrested and jailed because she insisted in sitting in an area of the theatre reserved for whites. She was taken before a magistrate to answer a charge that she had violated the \textit{Theatres, Cinematographs and Amusements Act} by failing to pay an amusement tax. The tax was included in the ticket price. The downstairs ticket cost 40 cents, rather than 30 upstairs, and included an additional one cent tax. Ms. Desmond was therefore, in effect, charged with failing to remit the one cent tax. She was not represented by counsel and no crown attorney was present; the theatre manager was listed as the prosecutor. The record indicates that Ms Desmond testified that she had offered to pay but the theatre had refused. She was, nevertheless, convicted and fined $20. She applied to the Supreme Court for a writ of \textit{certiorari} to quash the magistrate’s decision. The application was denied and an appeal to the full bench of the Nova Scotia Supreme Court failed: \textit{R. v. Desmond} (1947), 20, M.P.R. 297, aff’d [1947] 4 D.L.R. 81. For a thorough discussion of the facts in the \textit{Desmond} case, and its historical context, see Backhouse, \textit{supra} note 8 at 226-271.

\textsuperscript{29} Cited in Backhouse, \textit{ibid.} at 268-69.

\textsuperscript{30} W. S. Tarnopolsky, “The Supreme Court and Civil Liberties” (1976) 14 Alberta L.Rev. 58 at 76.
moral basis of our social order, and give to all our people a stake in democracy which is the surest defence against anti-democratic creeds.\footnote{Proceedings, supra note 7 at 15.}

3. Introduction of Anti-Discrimination Laws

There was some pressure for anti-discrimination legislation before the war. In 1933, a Conservative backbencher in Ontario introduced a bill aimed at prohibiting advertisements and notices that discriminated on the basis of race and religion.\footnote{Betcherman, supra note 11 at 51.} And the Co-operative Commonwealth Federation (CCF) sought a Bill of Rights in 1935.\footnote{Howe & Johnson, supra note 14 at 169, n. 1.} However, the first modern anti-discrimination legislation in Canada was passed in Ontario in 1944.\footnote{Tarnopolsky & Pentney, supra note 5 at 2-3, trace the first anti-discrimination legislation in Canada to legislation abolishing slavery in Upper Canada in 1793: “An Act to prevent the further introduction of Slaves and to limit the term of contracts for servitude within this province”, 1793 S.U.C. (2\textsuperscript{nd} Sess.), c. 7. Prior to 1944, discrimination was addressed in some statutory provisions: the Insurance Act, S.O. 1932, c.24, s.4 prohibited unfair discrimination between risks “because of the race or religion of the insured”; the Unemployment Relief Act, S.B.C. 1931, c.65 validated a clause of a federal-provincial agreement that prohibited discrimination in employment in relief projects on the basis of political affiliation, and in 1932 the Unemployment Relief Act, S.B.C. 1932, c.58 extended that prohibition to include “race or religious views”.} The Racial Discrimination Act,\footnote{S.O. 1944, c. 51, s. 1.} which was introduced by the Conservative government, prohibited the publication or display of signs, symbols, or other representations indicating racial or religious discrimination or an intention to discriminate. The legislation passed with relatively little opposition. The Grand Orange Lodge of Ontario sent a “strongly worded” telegram to the Government protesting the bill. It described the measure as an “insult to the intelligence of Ontario citizens,” and asserted that the bill would prevent any Protestant paper from lawfully discussing or propounding its own faith.\footnote{“Orange Lodge Scents ‘Insult’ in Anti-Discrimination Bill” Globe & Mail March 9, 1944.} Initially, the Globe and Mail also opposed the legislation. In an editorial it wrote:

Civil liberties, individual rights, all the freedoms are based on toleration. But toleration is not to be advanced by intolerant laws. On the face of it, the ...
[Racial Discrimination] Bill would imprison, not free, the minorities. It is in essence a violation of the rights it seeks to guarantee to them.37

On second reading, the government announced that, in committee, it would introduce an amendment stating that the Act “shall not be deemed to interfere with the free expression of opinions upon any subject....”38 The amendment satisfied the Globe and Mail, which withdrew its opposition to the bill.39 In the house, only one member opposed the legislation. His opposition was based on concerns that the legislation would prevent members of the legislature from speaking at public meetings, or ministers from printing their sermons, and it would prevent publications of papers such as the Orange Sentinel, the Protestant Action and the Catholic Register.40

The Ontario legislation was very limited in scope. It prohibited only the outward manifestation of a discriminatory intent; it did not prohibit discriminatory conduct. Premier Drew stated that the Act was intended to stop the use of offensive signs, notices and symbols.41 He made it clear that he did not intend to introduce legislation dealing with terms of employment or the obligation of hotel keepers. He stated:

It would not only prove ineffective, but it would actually cause confusion and dissatisfaction to the very people who claim protection if any attempt were made to pass laws which could not be enforced. That we will not do in this or in any other case.42

37 “Racial Bill Not the Cure” Globe & Mail March 10, 1944.
38 Ontario, Legislative Assembly, Journal of the Legislative Assembly, (March 10, 1944) at 757 [Journal].
40 Journal, supra note 38 at 765-67.
41 Ibid. at 758.
42 Ibid. at 759.
The first comprehensive anti-discrimination legislation in Canada was the *Saskatchewan Bill of Rights Act*,\(^{43}\) which was enacted in 1947. The Act protected political civil liberties, including the freedom of speech, press, assembly, religion, and association, in addition to prohibiting discrimination with respect to accommodation, employment, occupation, land transactions, education, businesses and enterprises. As with the Ontario *Racial Discrimination Act*, the *Saskatchewan Bill of Rights* was largely unopposed. The Regina *Leader-Post*, which was no friend to the governing CCF party, questioned the need for the legislation but did not oppose it.\(^{44}\) In the Legislature the bill was unopposed; however, the Attorney-General, J. W. Corman, complained that the opposition members belittled the bill by giving it only half-hearted approval.\(^{45}\)

The *Racial Discrimination Act* and the *Saskatchewan Bill of Rights* were quasi-criminal legislation. Tarnopolsky notes that such legislation was subject to a number of weaknesses: the victims were reluctant to initiate criminal action; it was difficult to prove the offence beyond a reasonable doubt; it was extremely difficult to prove that the person had not been denied access for a non-discriminatory reason; and judges were often reluctant to convict.\(^{46}\)

4. **Fair Practice Statutes**

As a result of the weaknesses of the earlier statutes, legislators enacted fair employment and fair accommodation practices Acts. These Acts, which were modeled on legislation passed

\(^{43}\) S.S. 1947, c. 35.
\(^{44}\) "Fundamental Freedoms" *The Leader-Post* March 19, 1947.
\(^{45}\) "Rights bill smeared Corman tells house" *The Leader-Post* March 27, 1947.
in the State in New York in 1945, provided for the investigation and conciliation of complaints and, if the conciliation was unsuccessful, for the appointment of commissions or boards of inquiry to hear evidence and make recommendations. A person who failed to comply with the Act or an order made under the Act was guilty of a summary conviction offence.

The Ontario Conservative government enacted the first *Fair Employment Practices Act* in 1951. The Act prohibited any person from discriminating against an employee, or potential employee, because of race, creed, colour, nationality, ancestry or place of origin. Other provinces passed similar legislation. Ontario also led the way with its *Fair Accommodation Practices Act* in 1954. The Act prohibited any person from denying accommodation, services or facilities to which the public is customarily admitted because of a person’s race, creed, colour, nationality, ancestry or place of origin, and it incorporated the provisions of the 1944 *Racial Discrimination Act*.

In British Columbia, the *Fair Employment Practices Act* was introduced in 1956. The Act was typical of such legislation. It provided that:

> No employer shall refuse to employ or refuse to continue to employ any person in regard to employment or any term or condition of employment because of his race, religion, colour, nationality, ancestry, or place of origin.

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48 S.O. 1951, c. 24.
49 S.M. 1953 (2nd Sess.), c. 18; S.N.S. 1955, c. 5; S.N.B. 1956, c. 9; S.B.C. 1956, c. 16; S.S. 1956, c. 69.
51 S.B.C. 1956, c. 16.
52 *Ibid*. s. 3.
The statute also prohibited discrimination by trade unions (s. 4) and in employment advertising (s. 5). The enforcement procedure required a written complaint. Upon receipt of the complaint, a government official (the "Director") could designate an officer of the Department of Labour to investigate the complaint and "endeavour to effect a settlement of the matter". The legislation did not grant any powers to the investigator. If a settlement could not be achieved, the Director had discretion to refer the matter to the Board of Industrial Relations for a hearing. If the Board concluded that the evidence supported the complaint, it was required to make a recommendation to the Director, which could "include reinstatement with or without compensation for loss of earnings and other benefits." The Minister of Labour had discretion to issue an order requiring that the recommendations be carried out. Failure to comply with the Act or an order was an offence subject, on summary conviction, to a fine of up to $100.

In 1961, the British Columbia government introduced the Public Accommodation Practices Act. It provided that:

No person shall deny to any person or class of persons the accommodation, services, or facilities available to the public in any place to which the public is customarily admitted because of the race, religion, colour, nationality, ancestry, or place of origin of such persons or class of persons.

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53 Ibid. s. 6.
54 Ibid. s. 7.
55 Ibid.
56 S.B.C. 1961, c. 50.
57 Ibid. s. 3.
The Act also prohibited the publication or display of signs that indicated discrimination or an intention to discriminate.\textsuperscript{58} The Act was enforced in the same manner as the \textit{Fair Employment Practices Act}.

During this period a number of provinces also introduced legislation prohibiting discrimination in employment with respect to sex\textsuperscript{59} and age.\textsuperscript{60} Legislation was also enacted to prohibit restrictive covenants on the sale of property.\textsuperscript{61}

There were very few prosecutions under the fair practice legislation. In 1963, Bowker could find only three reported cases, all from Ontario, under the \textit{Fair Employment Practices} statutes, and none under the \textit{Fair Accommodation Practices} statutes.\textsuperscript{62} These statutes were an improvement over the quasi-criminal statutes: they replaced the laying of an information leading to prosecution with the filing of a complaint leading to an administrative proceeding.

However, Tarnopolsky observed:

\begin{quote}
[T]his legislation continues to place the whole emphasis of promoting human rights legislation upon the individual who has suffered the most, and who is often in the least advantageous position to help himself. It does place the administrative machinery of the state at the disposal of the victim of discrimination, but it approaches the whole problem as if it were solely his
\end{quote}

\textsuperscript{58} \textit{Ibid.}, s. 4. This prohibition has been included in subsequent legislation. However, the section was amended in 1993 amidst much controversy: S.B.C. 1993, c. 27, s. 2, amending S.B.C. 1984, c. 22, s. 2. The thrust of the controversy was around repeal of a free speech exemption similar to the one that had been inserted to Ontario legislation to quell controversy in 1944 as discussed above at note 38 and accompanying text.

\textsuperscript{59} See e.g. S.O. 1951, c. 26; S.B.C. 1953 (2\textsuperscript{nd} Sess.), c. 6.

\textsuperscript{60} See e.g. S.B.C. 1964, c. 19; S.O. 1966, c. 3.

\textsuperscript{61} The \textit{Conveyancing and Law of Property Amendment Act}, S.O. 1950, c. 11 was passed in March 1950, shortly after the Ontario Court of Appeal had upheld a decision which allowed a restrictive covenant that prohibited the sale of a property to "any person of the Jewish, Hebrew, Semitic, Negro or coloured race": \textit{Noble and Wolf v. Alley}, [1948] 4 D.L.R. 123 (Ont. H.C.J.), aff'd [1949] 4 D.L.R. 375 (Ont. C.A.), rev'd [1951] 1 S.C.R. 64.

problem and his responsibility. The result is that very few complaints are made and very little enforcement is achieved.63

These concerns led to pressure on governments to create more effective mechanisms to address discriminatory practices.

5. Consolidated Statutes

The next phase of legislative development involved the creation of human rights commissions and the consolidation of anti-discrimination statutes into comprehensive legislation. Ontario again led the way when, in 1962, it enacted the Ontario Human Rights Code.64 The Code consolidated the anti-discrimination statutes and was administered by the Ontario Human Rights Commission,65 which was responsible for receiving, investigating and conciliating complaints, and delivering public education programs.

British Columbia introduced a Human Rights Act66 in 1969. The legislation consolidated the previous legislation with some modifications. Sex and age (between 45 and 65) were included in the provisions on employment discrimination, but not in other prohibited areas. The legislation also added a bona fide occupational qualification defence on the grounds of sex,67 and, in the case of age, it added a defence based on bona fide retirement or pension

63 Tarnopolsky, “The Iron Hand”, supra note 46 at 570-71
64 S.O. 1961-62, c. 93.
65 The Ontario Human Rights Commission was established a year earlier (S.O. 1960-61, c. 63) replacing the Anti-Discrimination Commission which had been established in 1958 (S.O. 1958, c. 70). This appears to be the point at which “human rights” replaced “anti-discrimination” when describing the legislation.
66 S.B.C. 1969, c. 10.
67 Ibid. s. 5.
plans, or bona fide insurance plans. On other grounds, the Act did not include any justification defence to discriminatory practices except for employment advertising.\textsuperscript{68}

In addition to consolidating and expanding prior anti-discrimination provisions, the Act created a Human Rights Commission, with responsibility for enforcing the statute. As with the earlier legislation, the process started with a complaint. The Commission’s Director could appoint an officer to inquire into and attempt to settle the matter. The Commission was given broad, delegable powers to compel production of documents and other information. After investigation, if a complaint could not be settled, the matter was referred to the Commission. If the complaint was, in the Commission’s view, without merit, it could dismiss the complaint. If the Commission concluded that the respondent had contravened the Act it was required to order that the respondent cease the contravention,\textsuperscript{69} and could order reinstatement and lost wages.\textsuperscript{70} In addition, the Act provided that the Commission’s Director was required to promote equality based on the enumerated grounds, promote an understanding of and compliance with the Act, and develop educational programs aimed at eliminating discriminatory practices. Although this statute was an improvement over previous legislation, its enforcement mechanism was weak; “There was almost no staff, and very few cases were heard.”\textsuperscript{71}

\textsuperscript{68} Ibid. s. 7(2). It appears that employers could advertise a preference based on a proscribed ground if the preference was based on a bona fide occupational requirement (“BFOR”), but if they exercised that preference in hiring, they could not rely on a BFOR defence.
\textsuperscript{69} Ibid. s. 14(6)(a).
\textsuperscript{70} Ibid. s. 14(6)(c).
This legislation was typical of the anti-discrimination legislation that had been enacted across the country. For Tarnopolsky, this consolidated legislation, enforced by an independent commission insured “community vindication of the person discriminated against.”\(^{72}\) The presence of human rights commissions appears to have facilitated complaints of discrimination and the number of such complaints increased dramatically.\(^{73}\)

Between the 1960s and 1990s a considerable expansion of the scope of human rights legislation took place. The prohibited grounds of discrimination were expanded to include additional grounds such as disability, sexual orientation, political belief and criminal conviction. The areas of coverage also expanded to include contracts, employment agencies, sexual harassment, and hate literature. In addition, commissions were given broader and more proactive powers. They were given the power to investigate systemic discrimination and order remedies. They could approve or initiate special programs to address systemic or indirect discrimination, and some could initiate complaints. Boards of inquiry were given broader remedial powers, including the power to order affirmative action programs. Some commissions were given power to address complaints of equal pay for work of equal value.\(^{74}\)

Although there was variation across the country, a similar course of expansion occurred in all jurisdictions – except in British Columbia. In 1973, the B.C. New Democrat Party (NDP) was elected to govern. It introduced a human rights code that provided for mandatory investigation of all complaints and prohibited discrimination in employment without “reasonable cause”. The “reasonable cause” clause provided human rights officials with

\(^{72}\) Tarnopolsky, “The Iron Hand”, supra note 46 at 572.

\(^{73}\) Ibid. at 571.

\(^{74}\) For a discussion of this expansion, see Howe & Johnson, supra note 14 at 14-22.
much greater discretion to expand the scope of the legislation beyond the enumerated
grounds. Hunter expressed concern about “this dangerously open-ended section”, arguing
that:

Not only does this section exemplify the paternalism which increasingly
animates much contemporary human rights legislation, but it also betrays a
disturbing insensitivity to the particular rights of an employer, and to the
generalized right of a free citizenry against arbitrary, *ex post facto* law-making
by unelected public authorities.\(^\text{76}\)

The Social Credit government, which replaced the NDP, apparently agreed. In 1983, it
repealed the *Human Rights Code* and abolished the human rights commission, replacing
them in 1984 with the B.C. Council of Human Rights under a new *Human Rights Act*. The
new legislation appeared to contemplate a much more limited role for human rights in the
province. The “reasonable cause” clause was eliminated and the administrative support that
was available to victims of discrimination was reduced. Complaints were no longer
investigated by specialized human rights officers, and legal assistance was not provided
directly to victims of discrimination by the Council of Human Rights. This legislation, and
the subsequent history of legislation in British Columbia, is discussed in Chapter V below.

6. Disillusion

Despite the expansion of the scope of anti-discrimination laws and the strengthening of the
enforcement mechanisms, the legislation and its enforcement were criticized by equality-

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\(^75\) In 1983, the chief complaint officer of the human rights branch, April Katz said:
The reasonable cause provision as a catch-all for group characteristics not specifically named in the legislation is unique to
British Columbia. The provision has allowed complaints to go forward on the basis of such group characteristics as physical or
mental condition, sexual orientation, family status, ages under 45, ages 65 and over, sexual harassment, racial harassment and
(*Hansard*), (4 May 1984) at 4536 (Brown))

\(^76\) Ian Hunter, “Human Rights Legislation in Canada: It’s Origin, Development and Interpretation” (1976) 15 U.
Western Ontario L.Rev. 21.
seekers on a number of grounds: there was an inadequate focus on human rights education; the process took too long; investigations were slow and incomplete; a process relying exclusively on individual complaints was not a sufficient strategy to deal effectively with discrimination; the human rights process overlapped with other legal processes, particularly in the workplace; and the human rights agency needed to have stronger links to the community.77

By the 1990s, there was growing dissatisfaction with human rights enforcement mechanisms across the country. Moreover, the dissatisfaction was coming from a variety of sectors. In a recent study, Howe and Johnson found that human rights agencies did not receive high ratings from advocacy groups, business organizations or human rights officials.78 That dissatisfaction led to large-scale reviews in a number of jurisdictions as well as internal reviews by the agencies themselves. The experience in Ontario is illustrative: in 1985, the minister of labour conducted an operational review of the effectiveness of the Ontario Human Rights Commission; in 1987, the Coopers & Lybrand consulting group conducted a review; in 1989, a comprehensive case management plan was initiated; in 1991, the Ombudsman issued a report strongly critical of the Human Rights Commission’s case processing; and in 1992, the Cornish Report79 was released.80 The human rights process in Ontario has also been a subject of scholarly studies including those of Howe and Johnson81

77 These concerns are discussed in the Black Report, supra note 71 at 26-28.
78 Howe & Johnson, supra note 14 at 149.
81 Supra note 14.
and Joachim.\footnote{Supra note 80.} Although the review process has not been as relentless in other jurisdictions, there have been a number of major reviews.\footnote{See, for example: Black Report, supra note 71; Donna Grechner \textit{et al.}, \textit{Renewing the Vision: Human Rights in Saskatchewan} (Saskatoon: Saskatchewan Human Rights Commission, 1996); Gerard V. La Forest \textit{et al.}, \textit{Promoting Equality: A New Vision} (Ottawa: Canadian Human Rights Review Panel, 2000) [La Forest Report].}

This extensive review process has not led to substantial legislative reform. Some studies including the \textit{Cornish Report}\footnote{Supra note 79.} and the \textit{La Forest Report}\footnote{Supra note 93.} have been largely ignored, at least if measured by the legislative response. In other cases governments have responded selectively; as discussed in Chapter V, most of the procedural recommendations in the \textit{Black Report}\footnote{Supra note 71.} were implemented, but the substantive recommendations were shelved.\footnote{An exception to this legislative reticence is the speedy introduction of legislation in British Columbia in response to a background paper on human rights reform. That legislation, and the process leading up to it, is described below in Chapter V.}

Consequently, anti-discrimination statutes and the mechanisms for enforcing them have not changed dramatically since the 1960s. Nor has there been a sustained effort outside the federal jurisdiction, to introduce other legislative tools to promote equality, such as employment equity or pay equity legislation.\footnote{Federally there is an \textit{Employment Equity Act}, S.C. 1995, c. 44 and equal pay for work of equal value is required by the \textit{Canadian Human Rights Act}, R.S. C. 1985, c. H-6, s. 11. Some provinces, including Ontario and Quebec, have adopted pay equity laws: \textit{Pay Equity Act}, R.S.O. 1990, c. P7; \textit{Pay Equity Act}, R.S.Q. 1995, c. E-12. Ontario adopted employment equity legislation in 1993; however it was repealed in 1995: \textit{Job Quotas Repeal Act}, 1995, S.O. 1995, c. 4, repealing \textit{Employment Equity Act}, 1993, S.O. 1993, c. 35.}

\section{Conclusion}

Anti-discrimination legislation was introduced in the 1950s to address particular social wrongs. Discrimination was widespread and practiced openly. When the laws appeared to be ineffective at addressing discrimination, the enforcement system was radically altered by
creating human rights commissions. Since then, there have been incremental changes to the legislation, adding new grounds of discrimination as they became recognized as social wrongs, increasing the range of activities covered, and broadening the remedial powers of the enforcement agencies. But the basic enforcement mechanisms remain as they were in the 1960s.

As will be discussed in the following chapters, conceptions of equality and discrimination, and the aspirations of equality-seekers, have changed since the 1960s. Now equality-seekers hope that society’s institutions can be transformed so that they reflect and include Canadian diversity, and so that all Canadians are able to participate fully and equally in those institutions. Anti-discrimination statutes are failing to meet these aspirations. Discrimination is not practiced as openly as it once was; however, inequalities persist. In later chapters, I will examine anti-discrimination statutes as tools for achieving equality, and whether they can be expected to achieve the hopes of equality-seekers. But first, I need to identify and describe those hopes. I begin that process in the next chapter.
Chapter II: The Idea of Equality

Few terms of political discourse have had as long a life and as important a role in the making of modern history as the idea of equality. From the earliest outcropping of social controversy to the clash of ideologies in our own day it has continued to arouse great expectations and grave apprehensions. It would be too much to expect that an idea carrying such passionate appeal and such symbolic force should be easy to define to everyone's satisfaction.¹

1. Introduction

Anti-discrimination laws aim at achieving equality by reducing the discriminatory barriers that cause inequality.² This egalitarian goal is stated expressly in some statutes. For example, the Canadian Human Rights Act states that its purpose is:

... to give effect ... to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have ... without being hindered in or prevented from doing so by discriminatory practices ...³

But how effective is anti-discrimination legislation as a tool for achieving equality? The answer to that question depends on what is meant by “equality” and “discrimination”. As discussed in Chapter I, anti-discrimination statutes were first introduced in the 1950s and 1960s. Anti-discrimination statutes have evolved since then, as have the concepts of

³ R.S.C. 1985, c. H-6, s. 2. Similarly the preamble to the Ontario Human Rights Code states that it is public policy “to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination”: R.S.O. 1990, c. H.19.
discrimination and equality. However, the statutory evolution does not necessarily reflect the conceptual evolution. Statutes are revised for a variety of reasons. They may, for example, respond to pressure from particular stakeholder groups, to financial pressure from within government, to judicial decisions that affect the effectiveness of the statute, or to academic or other commentary on the merits of the statute. So it is not always the case that, as thinking evolves, the law does too. If the evolved anti-discrimination statutes do not incorporate current conceptions of equality, they may be limited in their ability to address discrimination and equality as they are now conceived. The effectiveness of anti-discrimination statutes, therefore, must be measured against current conceptions of equality and discrimination, or at least the debate about their effectiveness should be based on contemporary ideas of equality.

However, contemporary conceptions of equality are varied and inconsistent. This is not surprising. As political scientist Douglas Rae observes: “The universal use of ‘equality’ as a category of thought depends upon its very abstractness, its formal emptiness”.\(^4\) As a mathematical equation, we understand what it means to say that \(X=Y\). But as an issue of social policy or justice, the idea of equality is more difficult to define. If we accept that equality is a worthy goal for social policy (an assumption that is not universally accepted), at what level do we measure equality – the individual person, their family unit, their community? To whom are they compared? And what does it mean to be equal? Any discussion of the practical application of “equality” must give it a more concrete form by answering these questions. But the answers depend on the political orientation or philosophy of those answering them. Therefore, before I begin my analysis of the effectiveness of anti-

discrimination statutes as tools for equality, I must answer these questions, and to do that, I
must identify the perspective from which I will answer them.

I begin that process in this chapter by discussing the idea of equality. This chapter is not
intended to be an exhaustive review of equality theory or its literature. The literature on
equality and egalitarianism is vast and complex. The purpose of this chapter is much more
modest. It is to provide a theoretical background for the discussion in subsequent chapters.
My aim is to illustrate some of the variety of lenses through which equality is viewed, and to
explain some of the conceptions of equality that divide theorists.

This chapter has three sections. In the first section of this chapter, I discuss the vocabulary of
equality. This involves more than a definition of terms. Theorists do not agree on what
equality means, in either its theoretical or practical application. Nevertheless, they have
developed some common language to describe various ideas about what equality is or should
be. This section will therefore introduce some of the terms used to describe equality and
which often divide theorists. These will be relevant to discussions of equality in later
chapters of this thesis. The second section focuses on two perspectives that have profoundly
influenced equality theory: liberalism and feminism. Both perspectives have been
particularly relevant in the context of equality for disabled people, as will be discussed in the
next chapter.

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5 For a review of that literature, see generally William B. Griffith, "Equality and Egalitarianism: Framing the
In the last section of this chapter, I will discuss the meaning given to equality by Canadian judges. This thesis is about the effectiveness of anti-discrimination legislation. It is therefore necessary to consider equality as it is applied in that context. Anti-discrimination statutes are administered by tribunals who are bound by judicial interpretation of the meaning of equality and discrimination. The ability of the legislation to achieve equality thus depends on a combination of the scope of the protected rights and the effectiveness of the enforcement mechanisms. The scope of the legislation is determined ultimately by the courts. It is, of course, possible to critique judicial interpretation or to assess the impact of that interpretation on the achievement of equality. Certainly, the courts have not been consistent in either their interpretation of equality or their application of that interpretation. Nevertheless, their interpretation of the statutes can provide a useful description of the doctrinal limits of the legislation. In later chapters I look at the effectiveness of the enforcement mechanisms within those limits.

This chapter provides a theoretical grounding for the discussion in subsequent chapters. In the next chapter, I describe the particular lens, disability rights, through which I will analyze the effectiveness of anti-discrimination laws. That chapter gives more concrete meaning to the notion of equality by describing what it means for people with disabilities. I will use that definition, or perspective, in the following chapters to analyze the effectiveness of those laws.
2. The Vocabulary of Equality

As discussed above, equality is a vague concept. Equality theorists have therefore developed a vocabulary to give it greater meaning. This section explains the vocabulary that is used to describe equality and which serves to divide (sometimes) and unite (sometimes) various theoretical perspectives, some of which are described in the next section. There are four sets of contrasting concepts that are particularly relevant when evaluating anti-discrimination legislation: formal and substantive equality; equality of the individual versus equality of the group; equality of treatment, opportunity or result; and positive and negative rights.

(a) Formal and Substantive Equality

In *Andrews v. Law Society of British Columbia*, McIntyre J. observed that Canadian courts had previously applied a formal conception of equality when assessing equality rights claims. However, as with other aspects of equality theory, there is not a uniform view of the meaning of formal equality. In its simplest conception, formal equality requires identical treatment for everyone. In this view, equality is achieved if laws, policies and practices apply identically to all people affected by them. Another view of formal equality requires that laws, policies or practices treat likes alike and unlikes differently. In this conception, known as the “similarly situated approach”, distinctions are acceptable as long as they are not arbitrary. It was this conception of formal equality that the court had in mind in *Andrews*. Formal equality, in either view, does not concern itself with the effects of the law, practice or procedure.

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6 [1989] 1 S.C.R. 143 at 165-166 [*Andrews*].
7 *Ibid.* McIntyre J., after noting that the similarly situated test had been widely applied across the country, stated (at 166): “The similarly situated test is a restatement of the Aristotelian principle of formal equality – that ‘things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness’” [citation omitted].
Substantive equality considers the effects of laws, practices and procedures in light of their social and economic context. As described by Joel Bakan, substantive equality involves social equality; that is, it requires "an absence of major disparities in people’s resources, political and social power, well-being, and [an absence] of exploitation and oppression." An assessment of whether substantive equality has been affected by a law, practice or procedure requires consideration of its effect on people’s economic, social and political circumstances. Are the disparities or inequalities made worse or better? Shelagh Day and Gwen Brodsky describe substantive equality as being “concerned with conditions of inequality experienced by groups, and with the imbalance in power among groups and society that is at the root of inequality.” They elaborate:

In the human rights context, the ideal implicit in formal equality is to eliminate differential treatment of individuals in relation to employment, housing, and public services. The ideal implicit in substantive equality is to eliminate systemic factors that produce conditions of inequality for disadvantaged groups, recognizing that that may mean altering systems that facially treat everyone the same.

Because of this difference in focus – on differential treatment of individuals as opposed to inequality of conditions for disadvantaged groups – there is a significant difference between how much change is envisioned by formal and substantive equality theories. The formal model of equality implies that the existing frameworks are acceptable, except that there are occasional incidents of prejudice, and perhaps some marginalization of minority groups. The solution is to conciliate between individuals when there are incidents of prejudice and to ensure that all groups are included in existing institutions by being treated the same as those already inside. In other words, this version of equality anticipates little change in the functioning of institutions.

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8 Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 47.
A substantive model of equality, which considers inequality in conditions and imbalances in power among groups, anticipates a deeper level of change. It posits that the functioning of institutions and the structure of relationships among groups must change significantly, and that working towards equality is a process of transformation, not minor adjustment.¹⁰

Formal and substantive equality are not mutually exclusive. Although some equality theories, such as libertarian, accept only formal equality as an appropriate purpose for state intervention, theorists who adopt a substantive conception of equality recognize that formal equality remains an important consideration. Donna Greschner, for example, does not “deny the importance of... any version of formal equality; every version contributes, in different circumstances and in different ways, to a just society.”¹¹ Although the goal of substantive equality is to transform society’s institutions to eliminate the imbalances of power and conditions for disadvantaged groups, there remains a need to eliminate formal inequalities that do not impede substantive equality. For example, if people with disabilities are to achieve substantive equality, the structures of society must be transformed to remove barriers that result from the application of mainstream norms. Sometimes, that will require recognition that a person with a disability must be treated differently to be able to participate equally. In such cases, application of principles of formal equality might impair substantive equality. On the other hand, if the disability is irrelevant to the decision being made, then there is no reason to deny that person formal equality.

(b) Individual and Group Equality

It is implicit in the discussion of formal and substantive equality above that equality theories differ with respect to the proper subject of equality. Is it the individual or is it the group?

¹⁰ Ibid.
Formal equality is primarily concerned with equal treatment of individuals. Substantive equality may address an individual case; however, it does so by considering that individual’s circumstances as a member of a group. However, even theories which support substantive equality differ in their conception of the proper subject of equality. In modern liberal theory, the individual is the proper subject of equality.\(^{12}\) Liberal theorists who accept that equality must be substantive, such as Ronald Dworkin and Michel Rosenfeld,\(^ {13}\) nevertheless accept that the focus is on the individual, albeit as a member of a group. For other theorists, the principal concern is the equality and well-being of groups. The passage from Day and Brodsky, which is quoted above, reflects such a concern.

\( \text{(c) Equality of Treatment, Opportunity, or Result} \)

Equality is a comparative concept. But what is being compared? And what does it mean to be equal? In mathematics, those questions are easily answered. We know that in the equation \( X=Y \), the comparison is of numerical values. We also know that, for \( X \) to equal \( Y \), those values must be the same: 99.99 does not equal 100.\(^ {14}\) However, when dealing with equality as a question of philosophy or social justice, the nature of the comparison is less obvious. If we accept equality as a legitimate goal for social policy, what aspects of human conditions or social relations should be compared. And does equality in this context mean the same as in the mathematical context? Given the complexity of the human condition and social relations, such a standard would seem impossible to meet in most comparisons. But if


\(^{13}\) Dworkin and Rosenfeld support affirmative action programs which aim at transforming institutions by increasing the representation of historically disadvantaged groups, such as Blacks or women: Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000); Rosenfeld, ibid.

\(^{14}\) Unless, of course, an assumption such as rounding to whole numbers is introduced into the equation.
not that standard, then what? How alike must the two sides of the equation be to be equal? Can difference be equality? Equality theorists disagree both with respect to the appropriate comparison and the degree of sameness required to determine equality. Generally, they refer to three areas for comparison: treatment, opportunity and results. But within those three concepts, there is also debate about the degree of similarity that is required. I begin with the concept of equal treatment.

On its face the aim of equal treatment seems simple enough: all people must be treated equally. This is the goal of formal equality in its most basic form. But even this concept of equality is open to interpretation. In one view of this model, for people with disabilities, in an equal treatment model the disability is deemed irrelevant. Decisions made on the basis of that characteristic are arbitrary and, therefore, illegitimate. The equal treatment approach fails to address the practical reality that sometimes equal access for people with disabilities requires modification of architectural or organizational barriers.15 There are, however, other ways to view the concept of equal treatment. For example, a written pre-employment test that is administered in an identical manner to all job applicants and is marked without favour to any, would appear to meet the test of equal treatment. But what if an employer knows that, because of a physical impairment, an applicant is unable to read the test or write a response? Is it equal treatment to require that they compete in the identical manner as other applicants? Aristotle’s classic description of formal equality required that likes be treated

alike and unalikes be treated differently. That view of formal equality has been used to justify discriminatory laws, but it can also be used to justify accommodating differences.

More commonly, the accommodation of difference is justified through an equal opportunity analysis. Equality of opportunity may be conceived in different ways. In its classical liberal formulation, equality of opportunity meant:

... only that those obstacles to the rise to higher positions should be removed which were the effect of legal discriminations between persons. It did not mean that thereby the chances of the different individuals could be made the same. Not only their different individual capacities, but above all the inevitable differences of their individual environments, and in particular the family in which they grew up, would still make their prospects very different.

On this conception, there is little to distinguish equal opportunity from equal treatment. But few today would hold to this narrow conception of equality of opportunity.

Rae describes two alternative conceptions of equality of opportunity. Equality of opportunity may be concerned with ensuring that the prospects for obtaining the scarce resource are equal; in other words, all persons have the same probability of achieving a particular outcome, such as in a fair lottery. Alternatively, equal opportunity may mean that all persons have the same tools, or means, for obtaining the good they seek. Rae describes these as "prospect-regarding equality of opportunity" and "means-regarding equality of

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16 See above at note 7.
17 This was done through application of the similarly-situated test described above at note 7 and accompanying text.
opportunity”. Equal means may not lead to equal prospects. For example, if two persons of unequal strength are competing for a good that only requires the exertion of strength, their prospects for success will be different. Even if both are given a tool that increases their strength by the same amount, so their means-regarding equality of opportunity is equal, their prospects will remain unequal.

A distinction is also drawn between “formal equality of opportunity” and “fair equality of opportunity”. According to formal equality of opportunity, two persons have equal opportunity to attain a particular result if neither faces a legal or quasi-legal barrier to the result that the other does not face. Fair equality of opportunity requires that differences in the prospects of persons competing for the scarce resources be a function of differences in natural abilities and skills, and not of differences in socially-generated abilities and skills. In other words, competitors should not be disadvantaged by socially-caused differences that result from social or income class. Formal equality theorists argue, in the tradition of classical liberals, that the state’s role is limited to the removal of legal or quasi-legal barriers that prevent individuals from competing for scarce goods and resources. Substantive theorists argue that, where there has been a history of discrimination creating a disadvantaged class, the mere elimination of barriers will not be sufficient to achieve equality. Fair equality of opportunity may require the eradication of social disadvantages, which may justify an unequal allocation of some goods.

19 Rae, supra note 4 at 65-66.
20 Rosenfeld, supra note 12 at 28-29.
Equality of opportunity is used to justify a requirement that barriers to equality be removed.

According to Degener and Quinn:

The equal opportunity paradigm recognizes both stereotypes and structural barriers as obstacles to inclusion: if stereotypes are the basis for discrimination then the fact of disability must be ignored, but disability must be taken into account when environmental or social norms act as the bars to genuine access and inclusion.21

Equality of opportunity ensures that people with disabilities have equal chances; it does not ensure equal outcomes. According to Rae, where there is equality of opportunity,

"opportunities of power, right and acquisition are to be equal: power, right, and acquisition themselves are not.”22

Equality of results requires equality in power, right and acquisition. The focus of an equality of results analysis is on outcomes not opportunities. Some writers distinguish “substantive equality of opportunity” from “substantive equality of results”. Both will require some intervention to achieve the desired outcome, but the purpose of the intervention differs. In the former, it is to equalize opportunities; in the latter it is to equalize results.23 Philosopher Christine Koggel states that liberal theory encompasses both formal and substantive equality of opportunity. It does not encompass substantive equality of results, which is generally associated with a position which she describes as “radical egalitarianism”.24

21 Degener & Quinn, supra note 15 at 9.
22 Rae, supra note 4 at 64.
23 The difference may be more theoretical than practical. As discussed in Chapter IV below, in discrimination cases, the outcome of an employment competition, or competitions, may be used to demonstrate that the complainant was denied an opportunity because of a prohibited ground of discrimination.
The effect of these different equality goals – equal treatment, opportunity or result – is illustrated in a problem posed by lawyer/philosopher Michel Rosenfeld: if a group of one hundred people is accidentally trapped in a building that is on fire and there are only sufficient firefighting resources to rescue fifty of them, how are those resources to be justly distributed? Applying a purely formal equal treatment model, the only solution would be to refuse to rescue any of them; all one hundred would die. That would also meet the goal of equal results. Rosenfeld suggests, in these circumstances equality of opportunity is a more just goal. Equality of opportunity would mean that all of those trapped in a building would have the same opportunity to be rescued, but not all will have the same result. For example, a fair lottery would give each of them the same chance to be rescued, but only half would survive. More generally, Rosenfeld argues that “justice requires the implementation of equality of opportunity whenever equality of result would be mandated if it were not impossible to achieve.” So, in a fire, if it is impossible to achieve equality of results by saving everyone, then justice requires that everyone have an equal opportunity to be saved.

There are other difficulties associated with the goal of result equality. Lawyers Degener and Quinn observe that, as a policy goal, “equality of results poses some thorny problems”. First, who is responsible for ensuring an equal allocation, the private or public sector? Second, if equal results require a strong welfare state, will it interfere with market ideology? Third, equal results may flow from policies that are unjust. For example, segregated schools for people with disabilities may provide equal educational opportunities and therefore be deemed legitimate under an equal results analysis. Equal results may legitimize formal

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25 Rosenfeld, supra note 12 at 23.
26 Rosenfeld, supra note 44 at 24.
27 Degener & Quinn, supra note 15 at 8.
inequality.28 This problem may, however, be related to the question of which results are compared, rather than whether results are the measure of equality. If, in the segregated schools example, the result measured is participation in society, rather than performance on skills-based assessments, the conclusion might be quite different. Similarly, if wealth is the measure of equality, a generous welfare program could create equality for people with disabilities through a redistribution of wealth. Equality could be enhanced further by recognizing that people with disabilities incur additional costs and adjusting their wealth to compensate for those costs. However, in the unlikely event that a state were to initiate such a scheme, it would eliminate only one inequality. People with disabilities would still be prevented from participating in society as equal citizens because of the other barriers they face. On the measure of full participation, equal wealth would not achieve substantive equality of results.

(d) Negative and Positive Rights

In is common for theorists to speak of “negative” or “positive” liberties or freedoms.29 Yet, as with other equality-related concepts, their descriptive value is questionable. Negative liberty is described as the area in which an individual must not be interfered with by others, including the state;30 “liberty in this sense means liberty from.”31 Positive liberty is the freedom to be one’s own master, to have one’s life and decisions depend on oneself rather than external forces.32 It is the freedom to be.33 These concepts of negative and positive

28 Ibid. at 8-9.
30 Ibid. at 16.
31 Ibid. at 19.
32 Ibid. at 22.
freedoms have led some to speak of corresponding concepts of rights. That is, if freedoms are negative, rights that protect those freedoms are also negative. For example, the right to free speech is said to be a negative right in that it restrains government from interfering in an individual’s speech. Similarly, positive freedoms are protected by positive rights.

Negative rights are protected through restraints on state action; positive rights are associated with a duty for positive state action. So, for example, education and health care are positive rights because they enhance positive freedom – they encourage self-development. It can be argued that the state therefore has a duty to provide schools, teachers, books, etc. Thus, on this analysis, the positive freedom of self-mastery creates a positive duty on the state to provide the means to self-mastery. However, the distinction between positive and negative rights and their connection to corresponding freedoms is not always clear. For example, enforcement of the negative right to free expression requires positive intervention by the state through the judicial system.

In practice, there may be little to gain by engaging in the philosophical exercise of connecting negative and positive rights to corresponding freedoms. It is significant, however, that political philosophers differ in the extent to which they recognize a role for the state in advancing equality interests. For some, the state’s role should be limited to actions that protect individuals from being interfered with in their pursuit of resources that could help

33 Berlin observes that: “The freedom which consists of being one’s own master, and the freedom which consists in not being prevented from choosing as I do by other men may, on the face of it, seem concepts at no great logical distance from each other – no more than negative and positive ways of saying the same things.”: Ibid, at 23. Nevertheless, the two notions have developed in quite different directions.
35 Ibid.
them achieve equality. For others, the state has an obligation to take positive steps to achieve equality either by providing the means to those with few resources to gain a greater share, or to redistribute the resources to ensure those with less get more.

The divide between those who support state action to achieve equality and those who see it as inappropriate interference with individual liberty is evident even between philosophers who share a broad theoretical orientation.

3. Perspectives on Equality

Equality has been an issue in political decision-making since ancient times. But what equality means and how it should be applied continue to be debated. According to political scientist Sanford Lakoff, three conceptions of equality – liberal, conservative and socialist – have existed since the middle ages. He states:

At first the three concepts of equality, appear in religious terms and with relation chiefly to the organization of the church. From these religious grounds they are transferred in the seventeenth century, though to a social setting. By the end of the eighteenth century all three concepts have acquired a certain distinctness addressed almost entirely on secular philosophic premises.

In the nineteenth century existence of the three traditions is made perfectly clear as they are brought into conflict with one another.

As Lakoff tells it, liberals advocate for competitive equality based on a belief in individualism and universal rationality. Socialists mainly believe that equality is best expressed in collectivism. Conservatives, who oppose levelling tendencies, believe that the

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36 Griffith, supra note 5 at para. 19.
37 Lakoff, supra note 1 at 9.
demand for equality is based on “envy and appetite rather than a sense of justice”\textsuperscript{38}

According to Lakoff, by the end of the nineteenth century, the philosophical discussion of equality between and within these three traditions “waned to the point of utter disappearance”\textsuperscript{39}

Lakoff was writing in 1964. In the last half of the twentieth century, the debate about equality was resurrected with intensity. In addition to the wealth of academic scholarship on equality, social movements – such as civil rights, feminism and disability rights – propelled the equality debate. So, while the three historical concepts of equality are reflected in the contemporary debate, new voices are also heard. And those voices bring a rich diversity of perspectives. To suggest that there are only three modern concepts of equality would be a gross oversimplification of the debate.

My aim in this section is not to review all of the many perspectives on equality, or even to present a thorough and comprehensive analysis of one particular perspective. My purpose in this section is merely to illustrate the range of perspectives on equality. I do so by focusing on the variety of ideas about equality within just two schools of scholarship: liberalism and feminism. They are useful illustrations for several reasons. Both of them have generated an abundance of scholarship within which there is a broad range of perspectives. They have been powerful forces in the equality debate. And both of them have strongly influenced the disability rights perspective, which will be my focus in the next chapter.

\textsuperscript{38} Ibid. at 10.
\textsuperscript{39} Ibid. at 10-11.
The following discussion of liberal and feminist perspectives is brief. This thesis is not about either liberalism or feminism; a comprehensive survey of either perspective is therefore beyond its scope. Instead, I rely primarily on the work of scholars I have found helpful in understanding the range of perspectives.\(^{40}\)

(a) Liberal Perspectives

Classical liberalism emphasizes individual freedom and equality. But, for classical liberals, individual freedom did not mean freedom from all constraints by others. For people living in society, individual freedom could only be ensured through laws that prevented others from restraining an individual’s freedom. As Hayek puts it, liberalism “recognizes that if all are to be as free as possible, coercion cannot be entirely eliminated, but only reduced to that minimum which is necessary to prevent individuals or groups from arbitrarily coercing others.”\(^{41}\) Individual freedom, in this conception, “meant primarily that the free person was not subject to arbitrary coercion.”\(^{42}\) Further, to the extent that coercive laws were acceptable at all, they had to be applied equally. That is, government was required to apply the same formal rules to all. Classical liberals demanded “equality of opportunity”, by which they “meant only that those obstacles to the rise to higher positions should be removed which were the effect of legal discriminations between persons.”\(^{43}\) Thus, in classical liberalism individual freedom was protected by minimal state action and formal equality.

\(^{40}\) For the liberal perspectives, I rely on Michel Rosenfeld, supra note 12; for the feminist perspectives, I rely on Dorothy E. Chunn & Dany Lacombe, eds., *Law as a Gendering Practice* (Don Mills, Ont.: Oxford University Press, 2000).

\(^{41}\) Hayek, supra note 18 at 133.

\(^{42}\) *Ibid.* at 131.

\(^{43}\) *Ibid.* at 141.
However, contemporary liberal theorists vary considerably in their attachment to the elements of liberalism described above. Some view formal equality as an inadequate goal for liberalism, others are comfortable with a significant role for the state in achieving equality. Rosenfeld groups the contemporary liberal equality arguments into four broad categories: libertarian, contractarian, utilitarian and egalitarian.\(^44\)

Rosenfeld states that the libertarian position, which can be traced to the classic works of John Locke and is found more recently in the work of Robert Nozick,\(^45\) stresses individual autonomy and property rights, with the role of state being limited to protecting the lives and property of its citizens and enforcing contracts.\(^46\) The libertarian position strongly opposes any action by the state to achieve equality through positive measures such as affirmative action. However, libertarians may support measures to avoid arbitrary discrimination based on grounds such as race or colour (Rosenfeld refers to this as “first-order discrimination”).\(^47\) The libertarian position is closest to the classical liberal position described by Hayek.

The contractarian position can be traced to the classical social contract theory of Hobbes, Locke, Rousseau and Kant. In contractarian theory, the legitimacy of principles of justice depends on the consent of those who are supposed to be bound by them. The purpose of this social contract is to provide a balance between the social cooperation necessary for the proper functioning of society and protection of the individual’s right to pursue his or her own

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\(^{44}\) Rosenfeld, *supra* note 12.


\(^{46}\) Rosenfeld, *supra* note 12 at 52.

conception of the good. The most influential contemporary proponent of the contractarian position is John Rawls. Indeed, much of the equality debate of the last quarter century responds to his *A Theory of Justice*. Rawls asks what principles of justice parties would consent to from behind a “veil of ignorance” that prevents them from knowing their place in society or their natural talents and abilities. He concludes that they would agree to two principles: First, “Each person is to have an equal right to the most extensive total system of basic liberties compatible with a similar system of liberty for all.” Second, “Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged ... and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.” So, for Rawls, state action is justified to rearrange social and economic inequalities in some circumstances. Rawls’ purpose was to develop a theory of justice, not merely a theory of equality. Nevertheless, his theory, particularly his second principle, addresses equality and has been the starting point for much of the contemporary discussion of equality theory.

The utilitarian seeks to maximize welfare. Rosenfeld distinguishes three utilitarian approaches: “those who treat considerations of social utility as being paramount; ... those others that treat such considerations as being legitimate, provided individual rights are properly considered”; and Ronald Dworkin’s utilitarian argument. For the pure utilitarian, the focus on utility is exclusive. All questions of individual rights or deserts become

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48 Rosenfeld, *supra* note 12 at 65.
51 *Ibid.* at 266.
53 Rosenfeld *supra* note 12 at 94-95.
questions of utility. Positive actions of the state that interfere with individual rights are justified if such actions result in an increase in overall welfare. However, a pure utilitarian argument could also be used to justify first-order discrimination.\textsuperscript{55} Under a limited utilitarian argument, considerations of social utility are subject to individual rights. For example, affirmative action would be justified either if it did not violate any individual rights or, if it did violate individual rights, the gain in social utility would be so great that it would outweigh the impact on individual rights.\textsuperscript{56} Under this limited utilitarian analysis, first-order discrimination could be justified if the benefit was great. For Dworkin, the right to be treated as an equal is fundamental. That does not mean that each person has "the right to receive an equal lot, but 'the right to be treated with the same respect and concern as anyone else.'"\textsuperscript{57} Dworkin claims that his model is able to justify affirmative action without legitimizing first-order discrimination.

Rosenfeld's last grouping includes egalitarians. The egalitarian argument, as advanced by Thomas Nagel, says that persons are morally equal and each has "an equal claim to actual or possible advantages". Under egalitarianism, needs are ordered and given priority, with preference to the most urgent needs. Improving the welfare of the worst off is a more urgent need than improving the welfare of the better off.\textsuperscript{58} According to Rosenfeld, this model "would seem to require the pursuit of equality of result rather than of equality of opportunity." In a society characterized by inequalities of wealth, education and natural

\textsuperscript{54} Ibid. at 95.
\textsuperscript{55} Ibid. at 100.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid. at 104.
\textsuperscript{58} Ibid. at 116.
abilities, equality of opportunity will lead to inequalities of result.\textsuperscript{59} So merely pursuing equality of opportunity would not ensure that the welfare of the worst off is improved. It follows that, under this model, state action to redistribute welfare to ameliorate the lot of the worst off appears to be justified.

As Rosenfeld's groupings demonstrate, there is within liberal rights discourse a spectrum of views on the meaning of equality and the role of the state in addressing inequality.\textsuperscript{60} What unites them is their focus on the individual. According to Rosenfeld, it is widely accepted that the proper subject of equality is the individual rather than the group.\textsuperscript{61} "In other words, regardless of what equality may require in concrete situations, it is the individual rather than the group who is entitled to such equality."\textsuperscript{62} However, many theorists who do not share that liberal perspective apply a communitarian vision of equality. For them, the proper subject of equality is not the individual; rather it is the equality or welfare of groups. Both communitarian and liberal views can be found within feminist perspectives on equality, to which I now turn.

\textbf{(b) Feminist Perspectives}

Like liberal theorists, feminist perspectives encompass a broad range of theoretical frameworks. Dorothy Chunn and Dany Lacombe provide a helpful introduction to the range

\textsuperscript{59} \textit{Ibid.} at 117.
\textsuperscript{60} Rosenfeld’s grouping is not the only taxonomy of conceptions of equality. Trebilock organizes them as “autonomy theories”, which include classical liberal or libertarian theories, and “welfare theories”, which include utilitarian theories, efficiency theories, distributive justice theories, and communitarian theories. Michael J. Trebilock, \textit{The Limits of Freedom of Contract} (Cambridge: Harvard University Press, 1993) at 192-204.
\textsuperscript{61} Hayek observes that the British or classical liberal tradition focused on the individual; however, in continental Europe, liberals were more likely to focus on the self determination of groups: Hayek, \textit{supra} note at 119-120.
\textsuperscript{62} Rosenfeld, \textit{supra} note 12 at 4.
of feminist perspectives. Their analysis addresses legal feminism, the feminist critique of law. And equality figures prominently in their discussion of feminist frameworks. It is therefore relevant to my thesis, which considers the impact of law, at least as it is expressed and applied through anti-discrimination statutes, on equality. Chunn and Lacombe divide feminist theoretical frameworks into two groups: one views law as instrumental; the other sees law as a discourse. In the first group, which includes liberal and radical feminists, law is “a set of rules that can be remoulded through feminist-inspired legal reforms”. In the second group are feminists who advance a “social constructionist conception of law as a hegemonic discourse that can be deconstructed and reshaped through the mobilization of feminist counter-discourse(s).”

Chunn and Lacombe state that liberal feminists start from the liberal assumption of sameness among individuals in their ability to reason. Moreover, for liberal feminists the evident gender inequality is not the result of innate differences between gender classes. Rather, inequality results from women’s adoption of roles, such as caregiver or housekeeper, that prevent them from developing their full potential. Further, when they engage in paid employment, they are not given the same opportunity to be successful as are male employees. According to Chunn and Lacombe, liberal feminists determine women’s equality by comparing women to men; that is, “men’s lived experience is the standard to which women should aspire.” Liberal feminists therefore focus on achieving equality through gender-

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63 Chunn & Lacombe, supra note 40 at 2-18.
64 However, they caution that feminist legal scholarship, particularly Canadian, is difficult to theoretically categorize because the categories are “fluid” and scholars may use different theoretical frameworks depending on the issue or audience: Ibid. at 2.
65 Ibid.
66 Ibid.
67 Ibid. at 4.
neutral laws and by using the law as a tool to ensure that women have an equal opportunity “to participate in the (public) world of men.” 68

Radical feminists share with liberals the view that law is instrumental. However, for radical feminists law is a tool used by men to preserve a society that is premised on male domination and female subordination. Chunn and Lacombe state that radical feminists reject the liberal notion of inter-gender sameness. Instead, they see the genders as fundamentally different with irreconcilable interests. Gender inequality is not an historical accident resulting from bad laws; rather, according to radical feminists, “it is the product of male design.” 69 Since the law is a tool designed to perpetuate male domination of women, it cannot be an effective tool for women’s liberation or equality. According to Chunn and Lacombe, for radical feminists, the route to sex equality is through “disengagement from existing (male) structures and the creation of women-centred alternatives.” 70

In the 1980s, liberal and radical feminists recognized limitations in their theories. Their resulting theoretical modifications have brought the perspectives closer. As Chunn and Lacombe tell it, liberal feminists realized that formal rule equality had not led to substantive equality for women. They concluded that “treating unalikes (i.e., women and men) as if they were similarly situated merely reproduced and possibly even exacerbated existing inequalities.” 71 Instead, they focused on the effects of laws on women with the aim of achieving equality of outcomes or results for women. Radical feminists realized that

68 Ibid.
69 Ibid. at 5.
70 Ibid. at 6.
71 Ibid. at 8.
disengagement often led to isolation and marginalization. They sought to develop strategies designed to transform patriarchal institutions including law. They sought to integrate women’s perspectives and experience into all social institutions, challenging inequality through integration rather than separation. These variations on liberal and radical feminist perspectives, which Chunn and Lacombe refer to respectively as “result-equality feminism” and “integrative feminism”, have converged in contemporary feminist strategies. They collaborate in seeking “legal reforms that synthesize the principles of equality and specificity for women.” This approach requires “attention to the principles of formal and substantive equality and therefore to both inter- and intra-gender differences.”

Chunn and Lacombe state that socialist feminists reject both the liberal feminist perspective “of the state as neutral arbiter and the law as an impartial instrument for the redress of (sex) inequality” and the radical feminist view that law is a weapon used by men to perpetuate their domination of women. For socialist feminists, the state, law and patriarchy are all socially constructed and can change as social relations change. For them, law is a “hegemonic process – an apparatus, or ensemble of practices, discourses, experts, and institutions, that actively contributes to the legitimation of a social order.” Neither the social order nor social relations are homogenous or totally fixed. It is therefore important to analyze differences within genders and commonalities between them and change is possible. They argue that women’s position in liberal states “is premised not only on their gender

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72 Ibid. at 7.
73 Ibid. at 8.
74 Ibid. at 9.
75 Ibid. at 10.
subordination in both the public and private realms but also on their class location.\textsuperscript{76} Socialist feminists noted that women in different social classes may experience law and legal institutions very differently. Chunn and Lacombe observe that for socialist feminists, and others who conceptualize law as a hegemonic process, "law becomes an ensemble of practices and discourses, or resources, that people can mobilize to reproduce or transform the conditions under which they live. In other words, law becomes a site of struggles."\textsuperscript{77}

(c) Summary

This survey of liberal and feminist perspectives, though brief and incomplete, demonstrates the rich variety of theoretical approaches to equality within and between those two methodologies. For some, equality is the central or fundamental concern; for others, to the extent that equality is a concern at all, it derives from other interests. For the purposes of this thesis, it is not necessary to analyze the various theories in detail. Nor is it necessary to consider their relative merits. It is, however, important to recognize that, although all of these theories recognize some role for the state in protecting equality, they differ considerably on what that role should be. Those differences become clear when questions involving the practical application of equality theory are considered. Even the most radical egalitarians do not argue that all persons must be equal in all respects.\textsuperscript{78}

Michel Rosenfeld states:

\begin{quote}
In the most general terms, in any complex socio-political universe, the implementation of any theoretical conception of equality promotes not
\end{quote}

\textsuperscript{76} Ibid.
\textsuperscript{77} Ibid. at 12.
\textsuperscript{78} Rosenfeld, supra note 12 at 16.
equality in general but certain particular equalities that are necessarily accompanied by correlative inequalities. \textsuperscript{79}

Therefore, to evaluate the effectiveness of any process for achieving equality, as I will be doing in subsequent chapters, it is necessary to identify the particular equalities that are sought. My aim is to move from the theoretical to the practical. Part of the practical reality is that those who administer anti-discrimination legislation – human rights tribunals and commissions – are constrained in their ability to promote equality or eliminate inequality. As administrative tribunals, they are confined to the jurisdiction given to them by the legislature. That is, they may only address equalities or inequalities that are expressly or impliedly included in their enabling legislation. I will return to this issue in Chapter IV. Tribunals and commissions are also constrained by the meaning(s) given to equality by the judiciary. Therefore, when assessing the ability of anti-discrimination statutes to achieve particular equalities, the judicial perspective forms part of the context that ought to be considered. As we shall see in the next section, that meaning has been influenced by some of the perspectives discussed above.

4. Judicial Perspectives

Over the last two decades, the Supreme Court of Canada has consistently expressed its support for the concept of substantive equality. It has not always been consistent in its application of that concept, and the strength of its commitment is not always apparent. \textsuperscript{80} But on a theoretical level, it has repeatedly adopted substantive equality as the appropriate goal of

\textsuperscript{79} Ibid. at 13.

equality rights laws. For example, in *O’Malley*, the Court adopted a definition of
discrimination that went beyond formal conceptions of equality, noting that sometimes
people had to be treated differently to achieve equality: the Court read a duty to
accommodate into the legislation. In *Andrews*, McIntyre J., with the agreement of the
majority of the Court, rejected the formal similarly-situated test for the resolution of equality
questions in favour of a substantive approach, once again accepting that sometimes equality
requires different treatment. And in the *Meiorin* decision, the Court indicated its approval
of this observation from Day and Brodsky:

The difficulty with this paradigm [that accepts the status quo as ‘normal’ with
adjustments made to accommodate those who are ‘abnormal’] is that it does
not challenge the imbalances of power, or the discourses of dominance, such
as racism, ablebodyism and sexism, which result in a society being designed
well for some and not for others. It allows those who consider themselves
‘normal’ to continue to construct institutions and relations in their image, as
long as others, when they challenge this construction are ‘accommodated’.

The Court accepted the argument that, “[i]nterpreting the legislation primarily in terms of
formal equality undermined its promise of substantive equality....” and unanimously held
that employers “must build conceptions of equality into workplace standards.”

The substantive conception of equality adopted by the Court in *Andrews* and *Meiorin* reflects
the collaborative strategy of “result-equality” and “integrative” feminists. That collaboration

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82 *Andrews*, supra note 6.
83 Ibid. at 163-71.
84 *British Columbia (Public Service Employee Relations Commission) v. BCGEU*, [1999] 3 S.C.R. 3 [*Meiorin*].
85 Ibid. at para. 41, citing Day & Brodsky, *supra* note 9 at 462.
86 Ibid.
87 Ibid. at para. 68.
was evident in interventions by the Women's Legal Education and Action Fund (LEAF) in both these cases.\textsuperscript{88}

The courts have adopted the language of substantive equality in recognizing that sometimes equality requires that people be treated differently and that it may require that institutions be reformed to reflect a broader image of society. They have been less enthusiastic about imposing positive obligations on government to achieve substantive equality. Writing in 1997, Bakan observed that the Court had refused to recognize positive equality rights under the \textit{Charter} or impose an obligation on government to take action to protect equality rights.\textsuperscript{89}

Subsequently, the Court appeared to shake off its reluctance to require positive action to protect equality. In \textit{Vriend},\textsuperscript{90} it found that the absence of protection from discrimination based on sexual orientation violated the rights of gays and lesbians. The Court applied a substantive analysis in finding that the exclusion of gays and lesbians from the anti-discrimination legislation adversely effected them. The subject of equality in this case was the group not individuals. The Court was concerned, among other things, that the message sent to the public was that discrimination on the basis of sexual orientation is acceptable. In finding a \textit{Charter} contravention, the Court found, in effect, that the government had a positive duty to take action to protect the equality of gays and lesbians. Similarly, in \textit{Eldridge},\textsuperscript{91} the Court held that the government of British Columbia contravened the \textit{Charter} by failing to provide sign language interpreters to make medical services available to deaf

\textsuperscript{88} For an analysis of the role played by feminist activists in achieving this substantive interpretation of equality, see Christopher P. Manfredi, \textit{Feminist Activism in the Supreme Court} (Vancouver: UBC Press, 2004).
\textsuperscript{89} Bakan, \textit{supra} note 8 at 49-51.
people; in effect, the government had an obligation to take positive action to ensure that deaf people received equal benefit of medical services.

However, there are recent signs that these cases may be anomalies. In Auton, the Court stated that it “has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner”.

The Court has not resiled from its express support for substantive equality, nor has it overturned decisions such as Meiorin, Vriend and Eldridge that represent high-water marks for substantive interpretation. So, though its commitment to the concept of substantive equality may be suspect, particularly if some positive government action is required, it is open to those who must apply judicial interpretations of equality to adopt interpretations consistent with the Court’s most egalitarian analysis.

5. Conclusion

For more than half a century, Canadian legislators have sought to protect equality rights through anti-discrimination legislation. But as I have shown, there are many and often contradictory ideas of equality. Before I can assess the effectiveness of legislation protecting or promoting equality, I must answer the question: Which equality? As Rae observes:

To assert “X=Y” is to say nothing about X or Y. The claim would stand if both symbols denoted numbers, formal sets of identical elements, the masses of twin planets, two poker hands of the same value. Equality is bereft of descriptive historical particulars. More definite terms (Indianapolis, Grant’s

Tomb) are tethered on short ropes to time and place, held down by the narrow limits of their referents. Equality and other formal terms float freely across layers of time, the points of the compass, the bounds of topical reference. Can we imagine that the simple formal idea of equality contains enough information, enough specificity, enough texture, to be capable of direct and consistent application to a concrete, complex world?93

In this chapter, I began to provide content to the concept of equality by describing a vocabulary of equality and by suggesting a range of possible equalities. However, those equalities remain too abstract to permit assessment of the practical effectiveness of legislation. Knowing that the goal is substantive equality for groups, possibly through positive government action, is helpful but insufficient. Equality must be made more concrete. In the next chapter, I will provide the referents needed to apply equality in this "concrete, complex world". I will do that by identifying a lens – disability rights – through which to view equality. And I will tether that perspective of equality to this time and place by putting it in its historical context and by identifying tangible (though not necessarily physical) barriers in the real world that prevent equality today. With those referents, I will be able to answer the question: Which equality? That answer will provide the focus for the analysis in later chapters of this thesis.

93 Rae, supra note 4 at 3.
Chapter III: Equality and Disability

Psychologically, socially, and legally, the disabled throughout history have enjoyed among themselves a peculiar 'equality'; they have been equally mistrusted, equally misunderstood, equally mistreated, and equally impoverished.¹

1. Introduction

Jacobus tenBroek, one of the authors of this quote, was a leading American legal scholar; he was also a leading disabled activist. He was blind and was a founder of the National Federation of the Blind and its president for 21 years.² tenBroek and Matson describe a world in which people with disabilities inhabited the bleak margins of society. Yet disability did not feature prominently in the rights discourse of the time. When, in 1950, the Canadian Senate Special Committee on Human Rights received submissions on the need for a Canadian Bill of Rights, there were no submissions from advocates of or for disabled people, nor were there any references to disability (or to language more typical of the era such as “the handicapped” or “cripples”) in the submissions of those who did appear.³ When anti-discrimination legislation was introduced in the 1950s and 1960s, the grounds of discrimination that were prohibited by such legislation included “race”, “colour”, “ethnic origin”, “religion”, “age”, and “sex”, but not “handicap” or “disability”.⁴

⁴ For example, when the first consolidated Human Rights Act was introduced in British Columbia, it prohibited employment discrimination on the grounds of “race, religion, sex, colour, nationality, ancestry, or place of origin” and age between the years of 45-65; “disability” or “handicap” were not mentioned: S.B.C. 1969, c. 10, s. 5.
Why was there so little discussion of disability in equality rights discourse? The inequality of people with disabilities should have been apparent. As tenBroek and Matson observed in 1966, "the two conditions – poverty and disability – are historically so intermeshed as to be often indistinguishable." They noted that in the United States, at the time they were writing, no more than six percent of people with serious physical disabilities were employed in ordinary non-subsidized occupations, with another two or three percent in subsidized sheltered employment. It is likely that disability was absent from the discussion of equality because the inequities associated with disability were not viewed as a rights issue. The prevailing contemporary model for social policy affecting the disabled – the medical model – located the source of problems associated with disability within the disabled individuals: the solution was to heal the individual rather than to seek legal remedies or change societal responses.

Inequities associated with disability are now widely accepted as issues of human rights. Disability is included in rights discourse, and legislation in all Canadian jurisdictions prohibits discrimination based on disability. Nevertheless, people with disabilities remain significantly disadvantaged – they have less education, higher levels of unemployment and lower income levels than people without disabilities. Why is it that, despite the inclusion of

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5 tenBroek & Matson, supra note 1 at 809.
6 Ibid. at 810.
7 The most recent Canadian statistics indicate the following: 37% of adults with disabilities have less than high school education compared to 25% of those without disabilities, 11% of people with disabilities have a university education compared to 20% without; the employment rate for adult males with disabilities is 59% (48% for women with disabilities) compared to 84% for males without disabilities; and the after-tax household income for persons with disabilities (aged 16-64) is $51,671 compared to $64,810 for those without disabilities: Government of Canada, "Advancing the Inclusion of People with Disabilities 2004", online at Social Development Canada website, http://www.sdc.gc.ca/asp/gateway.asp?hr=/en/hip/odi/documents/advancingInclusion04/toc.shtml&hs=pyp (accessed March 7, 2005).
disability in rights discourse and in anti-discrimination legislation, people with disabilities continue to be disproportionately represented in society’s margins? Are anti-discrimination statutes the wrong solution to the problem of the inequalities of disabled people? I will begin to address these questions in this chapter

In the previous chapter, I discussed conceptions of equality. In this chapter, I will narrow the focus to consider equality through a particular lens – disability rights. I focus on disability rights for several reasons beyond my personal interest in the subject. First, as noted above, the inequalities associated with disability are a particularly troublesome and persistent problem. Second, disability is one of the most recent issues to have emerged in equality rights discourse. Consequently, it borrows from more established theories of equality, including liberalism and feminism, to incorporate the most current conceptions of equality. Conclusions drawn from an analysis of disability rights will therefore be relevant to other contexts such as race or gender equality. Finally, the causes of the inequalities associated with disability are varied and complex. Sometimes they are caused by simple prejudice or bigotry, sometimes by misunderstanding or misconceptions, and sometimes by the organization or structure of society’s institutions. By looking at equality through a disability rights lens, it is possible to observe a range of inequalities many of which are of concern to other equality-seeking groups.

Current conceptions of disability rights are best understood in contrast with earlier models of disability policy. Until recently, disability policy has been driven by a medical model in which disability is viewed as a problem located within an individual. Disability rights
activists, and many others, are persuasive in their view of disability as, in large measure, a social construct. The source of inequality is located not in the disabled individual, but in the environment in which such an individual lives – an environment that has been shaped, both architecturally and culturally, by an expectation that disabled people will not participate fully in society.\(^8\) The remedy for inequality for such activists is, therefore, to alter the environment, not to cure the person with a disability.

The disability rights perspective, in which disability is seen as socially constructed and an issue of inequality, is a reaction to what has become known as the medical model. This perspective grew out of the dissatisfaction of disabled people with a model that cast them as victims of their own physical condition. That medical model remains deeply-rooted in society’s conception of people with disabilities. This chapter begins therefore with a relatively detailed discussion of the genesis and ideology of the medical model. I turn then to the social model and the disability rights movement out of which it was generated. In the last section of this chapter disability and equality theory is discussed, with a particular focus on a debate about the effectiveness of anti-discrimination laws as a tool for achieving equality for disabled people. The debate is between those who categorize people with disabilities as a distinct minority and those who view disability as a universal part of the human condition. The former group approaches the inequalities associated with disability as an issue of minority rights amenable to change through anti-discrimination laws. The latter seek to achieve equality by broadening the range of the “normal”, thereby creating a more inclusive society. Despite these differences, both groups reject the medical model of disability.

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\(^8\) For a more thorough discussion of the impact of environmental barriers, see M. David Lepofsky, “The Duty to Accommodate: A Purposive Approach” (1992) 1 Can. Lab. L.J. 1 at 6-7 [“Duty to Accommodate”].
2. The Medical Model

(a) Genesis of the Medical Model

Exclusion of disabled people from society’s mainstream has a long history. Negative attitudes about disability can be traced to at least biblical times. A large section of Leviticus, in the Old Testament, is devoted to listing the mental and physical perfections that are required to participate in religious ritual. Infanticide of disabled children was advocated in ancient Greece and Rome and was required by law in Sparta. In medieval Europe people with disabilities were associated with evil; for example, Martin Luther recommended killing children with profound disabilities.

Current Canadian attitudes about the role of people with disabilities are rooted in pre-colonial England, where the exclusion of people with disabilities was mandated by law, not merely enforced by cultural intolerance. Beginning as early as the fourteenth century, in response to the labour shortages that followed the Black Death, English lawmakers enacted legislation designed to ensure that those who could work did work. The Ordinance of Labourers, 1349 provided that any able-bodied person under the age of 60 was required to work and could be made to work for whoever required their services. The law exempted disabled people from the obligation to work, reflecting an expectation that people with disabilities cannot be productive workers. This legislation was followed by other legislation that divided

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9 This discussion of historical attitudes toward people with disabilities is from Colin Barnes, Disabled People in Britain and Discrimination (Calgary: University of Calgary Press, 1991) at 12-27.
10 Ibid. at 12.
11 23rd Ed. 3.
the world into those who could work (the able-bodied) and those who could not (the
disabled), and relegated the latter to a position of dependency on the charity of others.\textsuperscript{12}

These laws recognized the need for state intervention in the lives of people with disabilities. The laws did not, however, seek to segregate people with disabilities from the community; efforts were made to keep them within the local environment. The majority of resources were directed to those who were regarded as unable to work and were confined to their home, and funds were provided to families willing to accept responsibility for those considered incapable of working.\textsuperscript{13} And, although attitudes towards disabled people in this period were often deprecatory, many people with disabilities were able to contribute to the labour market. In an economy based on agriculture and small-scale crafts organized around the family unit, most people with disabilities could contribute.\textsuperscript{14}

Industrialization profoundly affected the position of people with disabilities. The demands of the workplace changed. Disabled people who had participated in the productive output of agriculture and small-scale industry tended to be excluded from factories.\textsuperscript{15}

The speed of factory work, the enforced discipline, the time-keeping and production norms — all these were a highly unfavourable change from the

\textsuperscript{12} For example, in 1531, an English Act was passed “concerning the punishment of beggars and vagabonds”: 22 Hen. 8, ch. 12 (1531). The statute provided for what amounted to the licensing of beggars. Local officials were required to search out beggars and to determine whether they should be permitted to live off the alms and charity of others. Only the “aged poor” and “impotent” were to be permitted to beg. The distinction between those who could work – the “sturdy” beggar – and those who could not – the “impotent” was carried into the Poor Laws which formed the basis of poor relief into the 19th century. For a thorough discussion of the Poor Laws, see William P. Quigley, “Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor” (1996) 30 Akron L. Rev. 73 at 97.

\textsuperscript{13} Barnes, supra note 9 at 14.  


slower, more self-determined and flexible methods of work into which many handicapped people had been integrated.\textsuperscript{16}

The focus on the productivity of individual wage labourers was detrimental to disabled people, who tended to fall to the bottom of the labour market. They came to be viewed as a social and educational problem and, increasingly, were segregated in institutions.\textsuperscript{17}

In the nineteenth century, segregation and institutionalization of the poor were useful tools by which the state could impose control. The institution was an important symbol: it represented the power of the state to remove from the community those who would not conform. Confinement in the workhouse was widely seen as an awful fate and served as an incentive to conform. However, there remained a need to distinguish those who would not conform from those who could not. As a result, through the eighteenth and nineteenth centuries, institutions became increasingly specialized. According to Oliver:

\begin{quote}
These developments then, facilitated the segregation of disabled people, initially in workhouses and asylums, but gradually in more specialist establishments of one kind or another:

The rise of specialist asylums signified an important shift in the way in which the poor, dependent, and deviant were contained ... Public workhouses, as opposed to domestic relief, were increasingly used for all those who could not or would not support themselves economically. In these, idiots, lunatics, the chronic sick, the old and vagrants were mixed up with allegedly able-bodied unemployment.\textsuperscript{18}
\end{quote}

With specialized institutions came the need for categorization, not just between the "deserving" and "undeserving" poor, but among the classes of "deserving" poor. The Poor

\textsuperscript{17} Oliver, \textit{Politics}, \textit{supra} note 15 at 28.
\textsuperscript{18} \textit{Ibid.} at 33-34, citing Ryan & Thomas, \textit{supra} note 16 at 100. See also Barnes, \textit{supra} note 9 at 15-16.
Law Commission of 1832 stated that the workhouse population should be separated into groupings of able-bodied males, able-bodied females, children and the “aged and infirm”, the latter two being the “deserving” poor. The Poor Law Amendment Act, 1834, refined the categorization into five groupings: children, the sick, the “insane”, “defectives”, and the “aged and infirm”. The groupings also defined who was able-bodied: a person who did not fall into one of the groupings was by definition able-bodied.

This process of exclusion coincided with the individualist ideology required by capitalism. According to Oliver, “[t]he requirements of the capitalist economy were for individuals to sell their labour in a free market and this necessitated a break from collectivist notions of work as the product of family and group involvement.” Quoting Foucault, Oliver writes that capitalism required new ways of seeing or constructing ... problems of order and control.

Within this set of problems, the “body” – the body of individuals and the body of populations – appears as the bearer of new variables, not merely between the scarce and the numerous, the submissive and the restive, rich and poor, healthy and sick, strong and weak, but also between the more or less utilizable, more or less amenable to profitable investment, those with greater or lesser prospects of survival, death and illness, and with more or less capacity for being usefully trained.

This, then, is the ideological underpinning for the separation and specialization processes which took place with the rise and development of the institution....

19 Barnes, ibid. at 16-17.
20 4 & 5 Wm. 4, c. 76.
22 Oliver, Politics, supra note 15 at 44.
The construction of “able-bodied” and “able-minded” individuals was significant for disabled people. Prior to capitalism, individuals contributed to their family or community; contributions varied, but those who contributed less were not excluded. Under capitalism disability was constructed as individual pathology; “disabled people could not meet the demands of individual wage labour and so became controlled through exclusion.”

This exclusion was controlled through the process of categorization that is described above; a process that involved a focus on the body. The need to categorize coincided with the burgeoning of the medical profession, and contributed to the medicalization of disability – the understanding that disability was a physical abnormality and therefore within the appropriate domain of medical doctors.

(b) Medicalization of Disability

The medicalization of everyday life was not unique to people with disabilities. It affected the vast majority of society. Beginning in the nineteenth century and into the twentieth century, the medical profession acquired the authority to define and treat many conditions that had previously been viewed as having a moral or social origin. Oliver describes four theories to explain the phenomenon of medicalization: the enlightenment theory; the necessity theory; the action theory; and the power theory. The enlightenment theory sees medicalization as a largely benevolent and progressive force resulting from the rise of science and the development of humanitarian ideas. Oliver observes that, although the move from punishment or deprivation to treatment may appear progressive, the experience of the labelling process that accompanied medicalization was often profoundly negative. For

24 Ibid. at 47.
25 Barnes, supra note 9 at 17.
26 Oliver, Politics, supra note 15 at 49-51.
example, at the beginning of the twentieth century advances were made in understanding
epilepsy. As a result, epileptics benefited from better treatment, but they were stigmatized by
society. The necessity theory views medicalization as arising from the need to impose order
on an industrialized society. This theory sees medicine as either an independent social and
ideological force or an agent of state control. According to the action theory, medicalization
is a struggle in which various groups seek to impose a set of meanings upon social
phenomenon, for example by medicalizing alcoholism or demedicalizing homosexuality.
The fourth theory, the power theory, explains the dominant position of the medical
profession based on the superiority of medical knowledge over other forms of knowledge, the
medical profession’s success in organizing and gaining positions within bureaucracies, or the
interconnections between the medical profession and the capitalist ruling class.

Other theories attempt to explain why disability, in particular, was medicalized. Oliver
describes two such theories. One suggests that the category of “disability” performed an
important function in sorting people into work-based or needs-based systems. This was
achieved by making disability a clinical concept and thereby assigning the allocation role to
the medical profession. Another theory links medicalization of disability to the rise of the
institution and segregation. Segregation fostered the growth of specialist professional
workers such as nurses, physiotherapists, occupational therapists and social workers. The
improvement of medical practices in hospitals led to the survival of greater numbers of
people with disabilities and strengthened the connection between disabled people and
institutions and facilitated the dominance of the medical profession.27

27 Ibid. at 51-52.
Whatever the reason for the medicalization of disability, there is no doubt that it happened. The involvement of doctors in activities such as diagnosis of impairment, stabilization following trauma, or treatment of disability-related illness is understandable and appropriate. However, doctors are involved in all aspects of the lives of people with disabilities. As Oliver observes, they are:

...involved in assessing driving ability, prescribing wheelchairs, determining the allocation of financial benefits, selecting educational provision and measuring work capabilities and potential; in none of these cases is it immediately obvious that medical training and qualifications make doctors the most appropriate persons to be involved.  

The medical model pervades all aspects of the lives of people with disabilities. The ideology that underpins the medical model has a profound effect on disability policy and on disabled people: it identifies them as the victims of tragic experience, whose impairments deprive them of the opportunity to participate fully in society. The rejection of this ideology by disability rights activists led to the rise of the disability rights movement and its conception of equality.

(c) The Ideology of the Medical Model

In the medical model, the focus is on the individual. More particularly, it is on that person’s bio-medical condition in comparison to some usually undefined able-bodied norm. Deviation from that norm indicates defect or abnormality. The aim of the medical model of

28 Ibid, at 48.
29 I use “ideology” in the sense that it describes a self-fulfilling system of beliefs that, having emerged from a particular social and political order, reinforces that same order.
30 It is likely not a coincidence that the medical model, with its focus on the individual, came to dominate disability policy at the same time that liberalism, with its focus on the individual, became the dominant philosophical force.
disability is to identify an impairment, determine its cause, and provide treatment and rehabilitation to return the individual to as near “normal” function as possible. The focus on normality at its best will enable a person with a disability to return to a “normal” life within the community. Failure to reintegrate indicates a failure of the medical profession or the disabled individual to achieve a sufficient degree of normality.

The ideology of normality can have a negative impact, not only on the individual with a disability, but on people with disabilities collectively. Victor Finkelstein, one of the early English leaders of the disability rights movement, describes the impact on him:

The aim of returning the individual to normality is the central foundation stone upon which the whole rehabilitation machine is constructed. If, as happened to me following my spinal injury, the disability cannot be cured, normative assumptions are not abandoned. On the contrary, they are reformulated so that they not only dominate the treatment phase searching for a cure but also totally colour the helper’s perception of the rest of that person’s life. The rehabilitation aim now becomes to assist the individual to be as “normal as possible.”

The result, for me, was endless soul-destroying hours at Stoke Mandeville Hospital trying to approximate to able-bodied standards by “walking” with callipers and crutches ... Rehabilitation philosophy emphasises physical normality and, with this, the attainment of skills that allow the individual to approximate as closely as possible to able-bodied behaviour (e.g. only using wheelchair as a last resort, rather than seeing it as a disabled people’s mobility aid like a pair of shoes is an able-bodied person’s mobility aid).31

The medical model’s focus on the impairment as a dysfunction or defect that is located in an individual also has a profound impact on disabled people as a group. First, by focusing on the impairment as the disabling condition, environmental factors may be ignored or minimized. This is illustrated by two sets of questions posed by Oliver, the first being actual

questions asked by the Office of Population Censuses and Surveys (OPCS) in Britain, the second being Oliver’s reformulation:

[OPCS Questions]
Can you tell me what is wrong with you?
What complaint causes your difficulty in holding, gripping or turning things?
Are your difficulties in understanding people mainly due to a hearing problem?
Do you have a scar, blemish or deformity which limits your daily activities?

... 

Does your health problem/disability prevent you from going out as often or as far as you would like?
Does your health problem/disability make it difficult for you to travel by bus?
Does your health problem/disability affect your work in any way at present?

[Oliver’s reformulation]
Can you tell me what is wrong with society?
What defects in the design of everyday equipment like jars, bottles and tins causes you difficulty in holding, gripping or turning them?
Are your difficulties in understanding people mainly due to their inabilities to communicate with you?
Do other people’s reactions to any scar, blemish or deformity you may have, limit your daily activities?

... 

Are there any transport or financial problems which prevent you from going out as often or as far as you would like?
Do poorly-designed buses make it difficult for someone with your health problem/disability to use them?
Do you have problems at work because of the physical environment or the attitudes of others?\footnote{Politics, ibid. at 7-8.}

Locating the problems associated with disability in the individual thus deflects discussion away from environmental causes. The focus on impairment ensures that disability remains a bio-medical issue, and consequently positions the medical profession as experts in disability policy. That is, if the problem is a physical one, then its solution can be found through proper diagnosis and treatment – skills which fall squarely within the expertise of the medical
profession. On the other hand, doctors have no particular expertise in the elimination of social and environmental causes of disability.

The medicalization of disability also has the effect of stigmatizing people with disabilities: it casts them in the “sick” role. A sick person is temporarily exempted from normal social obligations, without blame or obligation. In exchange, the sick person is expected to be a “good patient” by co-operating with the medical professionals and seeking to recover. According to Jerome Bickenbach:

In general, then, the autonomy of people with disabilities is prejudiced by the sick role. The role demands that the individual surrender to professional direction in order to satisfy the condition of being a good patient, and devote his or her energies to the (possibly futile) goal of cure or recovery.33

Some people do not recover. In such cases either the exemption from blame will be lifted because the person is not trying hard enough to recover, or the exemption will become permanent, relieving the individual from normal obligations. In the former case, the person is viewed as lacking motivation. In either case the person becomes permanently “sick”, excused from participation and dependent on others.34 As a result, people with permanent disabilities are cast in the role of incompetent. Moreover, it may be blameworthy incompetence. Bickenbach suggests that permanent disabilities represent a failure of medical technology. In the mythology of medicine, such failures must be explained, which is done by attributing the failure to the disabled individual.

33 Jerome E. Bickenbach, Physical Disability and Social Policy (Toronto: University of Toronto Press, 1993) at 83 [Physical Disability].
34 Ibid. at 81-82.
But a person with a disability is not necessarily sick. That person may not require any greater medical care than a person without a disability. As will be discussed in the following sections, people with disabilities do not seek to be excluded from normal obligations; on the contrary, they seek inclusion and opportunities to participate. When Chantal Peticlerc, a Canadian paralympic champion, was asked by a university professor if there is any chance she will recover, she responded: “I have nothing to recover from.” Her response reflects a different view of disability – the social model.

3. The Social Model

(a) The Ideologies of the Social Model

Harlan Hahn, an American political scientist, captures the essence of the social model of disability in the following passage:

Whereas ... prior orientations regard disability principally as a personal misfortune or limitation, the sociopolitical view stresses the role of the environment in determining the meaning of this phenomenon. Thus, disability cannot be defined simply by functional capabilities or by occupational skills. A comprehensive understanding of disability requires an examination of the architectural, institutional, and attitudinal environment encountered by disabled persons. From this perspective, the primary problems confronting citizens with disabilities are bias, prejudice, segregation, and discrimination that can be eradicated through policies designed to guarantee them equal rights.

In the medical model, disability is the result of functional limitations located in the disabled individual and the aim is to modify the individual so as to eliminate or ameliorate those limitations. In the social model, disability results when a person with an impairment interacts

with a hostile environment. The aim of the social model is to transform the environment so as to reduce its disabling effects. This focus on environmental change makes this model inherently political in that transformation will come through political action. The model’s power comes from the interaction of the social science that underlies it with the political action of activists with disabilities.  

The social model emerged from the work of professionals in rehabilitation therapy who recognized that therapy is more effective when the environment in which the individual lives is considered in the therapeutic response to impairment. Beginning in the 1950s, the work of medical sociologists on the “sick role” influenced the development of the social model. The inappropriateness of the sick role for people with disabilities led some to investigate the way disabling phenomena such as the sick role were socially created. This led social scientists to consider the stigmas associated with disability. In the 1960s social psychologists began to research the social and psychological aspects of disability. They applied deviance theory which "holds that behaviour is deviant when it does not conform to social norms or expectations, and so it is behaviour that most people … find offensive in some way or other." The research was founded on the principle that “handicapping is the product of a relationship between an impairment and the social environment.” Much of the social scientific research was aimed at demonstrating that disability is a social ill. However, this research maintained the assumption that the social problems associated with disability lies both in the individual and society. It is the interaction of the individual’s deviance from a

37 For a discussion of the interaction of social science and political activism in creating this model, see Bickenbach, Physical Disability, supra note 33 at 134-181.
38 This discussion of the roots of the social model is based on Bickenbach, ibid at 141-149.
39 Ibid. at 142.
40 Ibid. at 145.
social norm and the social response to it – stigma – that creates the social problem. The presumptions of interactionism that underlies much of the research into deviance and stigma inevitably re-focuses attention on the individual. That is, the stigmatizing attitudes that give rise to the disability are about something that is located in the stigmatized individual. As a result, this research is not sufficient to form the foundation of the social model, in which attention is focused on the environment as the cause of disability. Although the research provided empirical support for the model, politization of disablement created the model.41

The social model does not describe a single unified explanation of disability or justification for disability policy. As Bickenbach observes, the model “is still in the process of evolving, and there remains considerable controversy, even among its staunchest supporters, over the social-scientific basis for the model and the political agenda it mandates.”42

Oliver distinguishes between social constructionists and the social creationists. The social constructionist sees the source of the problem as located in the minds of able-bodied people either individually or collectively. It is manifested through “hostile social attitudes and the enactment of social policies based on a tragic view of disability.”43 Social creationists locate the problems in the institutionalized practices of society.44 In the former case, change must come from changing attitudes and through recognition in and enforcement of human rights legislation. In the latter, societal practices must be transformed. In either case, the goal is to

41 Ibid. at 149.
42 Ibid. at 158.
43 Oliver, Politics, supra note 15 at 82.
44 Ibid. at 83.
address disability policy through transformation of society rather than treatment of the disabled individual.

The social-scientific research on deviance and stigma provided empirical support for the political argument of disabled activists that they were an oppressed minority. They represented "people with disabilities as a minority group, a marginalized population experiencing systemic discrimination."\(^45\) Bickenbach identifies some theoretical problems with this minority rights approach, which I will discuss in the next section; however, he recognizes its value in providing a method for determining which disadvantages arising from impairment are society’s responsibility. Under the social model, disability is caused by the oppressive social environment. The true source of the problem is, therefore, systemic discrimination against people with disabilities. Disability is not a matter of bad luck; rather it is a social evil for which society bears responsibility.\(^46\)

For Bickenbach, the model is both revolutionary and liberating. It was revolutionary in demanding a shift in perspective on disability to the point of view of disabled people themselves. In Bickenbach’s words: “To be, or to be perceived to be, a handicapped person is to experience a social status, a role reinforced by the attitudes and beliefs of people as well as the practices and institutions of society.”\(^47\) Without the perspective of disabled people that their disabilities are created or exacerbated by social factors, it is easy to assume that the world is immutable and that, therefore, if a person with a disability is excluded, that person must accept the situation as it is. The social model challenges that assumption and broadens

\(^{45}\) Bickenbach, *Physical Disability, supra* note 33 at 152.


\(^{47}\) *Ibid.* at 158.
the possible response. The model liberated social policy and “jarred social policy analysts out of well-worn paths and demanded imaginative solutions to handicap situations.”

The force of the social model comes from its ability to convey the lived experience and aspirations of people with disabilities and to propel their political activism. That activism was expressed through the disability rights movement, to which I now turn.

(b) The Disability Rights Movement

In the 1960s and 1970s, the disabled began to challenge the hegemony of the medical model. The disability rights movement, which was in large measure a reaction to the medical model, began when people with disabilities began to emerge from their exclusion to form groups of people with similar disabilities and then across disability types.

In the evolution of the disability community, exclusion came to play a positive role. Rather than being a source of negative self-images and a barrier to interaction, the common experience of exclusion became a catalyst for shared identity and a target for collective action. Following in the wake of the black power, feminist and other social movements of the 1960s, which also stressed a positive self-image rooted in the collective identity of an excluded group demanding greater participation, increasing numbers of disabled people embraced activism and the creation of community.

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48 Ibid. at 159.

49 I do not mean to suggest that the social model is accepted by all people with disabilities as an expression of their lived experience. Some say that, by focusing on the social causes of disability, the model fails to connect to the experience of impairment; some restrictions caused by impairment cannot be removed by applying the social model. Others argue that the model fails to address the physical and psychological pain that is often associated with impairment. Oliver acknowledges these criticisms by returning to the political purposes of the model. Supporters of the social model insisted that there is no causal link between impairment and disability in order to prevent opponents from using such links as evidence that disability is really about physical limitation. For a discussion of the critiques of the social model, see Michael Oliver, Understanding Disability: From Theory to Practice (New York: Palgrave, 1996).

The movement sought greater inclusion of people with disabilities in mainstream society by empowering people with disabilities and re-casting their inequalities as an issue of civil rights.\textsuperscript{51}

Empowerment of people with disabilities began with the development of the independent living concept in the 1960s. The concept entailed people with disabilities living their day-to-day lives in the community rather than in institutions and taking control of the decisions affecting their lives. The start of the movement can be pinpointed in 1962, when Edward Roberts, a student in an iron lung, was admitted to the University of California at Berkeley.\textsuperscript{52} The student dormitories were inaccessible; however, he lived in the university hospital, where he was assisted by his older brother and another student. His presence led other students with disabilities to enrol. They formed “The Rolling Quads”, a political advocacy group, and helped initiate the Physically Disabled Students’ Program. In 1972, they formed the Centre for Independent Living, with Roberts as the first executive director. The independent living movement spread rapidly in the United States and became a powerful social force. Individual centres for independent living joined Statewide Independent Living Councils, which in turn formed the National Council on Independent Living. At the local level, the centres provided a variety of direct services for their members, such as housing referral, peer counselling, transportation and wheelchair repair, and provided advocacy on

\textsuperscript{51} For a very detailed discussion and analysis of the American disability rights movement, see Duane F. Stroman, \textit{The Disability Rights Movement: From Deinstitutionalization to Self-Determination} (Lanham, Maryland: University Press of America, 2003). The disability rights movement in Canada is discussed briefly in Bickenbach, \textit{Physical Disability}, supra note 33 at 149-152; Oliver, \textit{Politics}, supra note 15 discusses the movement in Britain at 112-131.\

\textsuperscript{52} Stroman, \textit{ibid.} at 201.
The umbrella organizations provided advocacy at the state and national levels.

The independent living movement empowered people with disabilities and succeeded in wresting control of many aspects of their daily lives away from the medical profession. The movement also sought to re-frame disability as a rights issue. The National Council on Independent Living states that it “is a membership organization that advances the independent living philosophy and advocates for the human rights of, and services for, people with disabilities to further their full integration and participation in society.”

In Canada, the independent living movement was part of what became known as the consumer movement. Disabled activists drew inspiration from the consumer activism of Ralph Nader. They saw and described themselves as consumers of government services and sought input into and control over the delivery of those services. They focused on empowering people with disabilities by creating organizations that were controlled by people with disabilities and either provided direct services to or advocacy for members. In 1975 the Coalition of Provincial Organizations of the Handicapped (COPOH) was organized as an umbrella organization to co-ordinate the efforts of provincial consumer-led disability advocacy groups. COPOH has changed its name to the Council of Canadians with Disabilities (CCD) but its vision remains the same:

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53 Ibid. at 202, quoting the National Council on Independent Living mission statement.
CCD believes in:

- **Citizenship**: Persons with disabilities hold the same rights and responsibilities as other Canadians. Barriers to our participation discriminate against us and must be removed.
- **Self Determination**: As full citizens, we assert our right to direct our own lives and make our own decisions.
- **Consumer Control**: We must be centrally involved in the decision making processes that affect our lives.
- **Equality**: The Charter of Rights and Freedoms guarantees equal benefit and protection of the law and prohibits discrimination based on physical or mental disability. All other legislation must be brought into line with the Charter.\(^\text{54}\)

The independent living movement was not the only source of disability activism.\(^\text{55}\) In the United States, powerful groups such as the Paralyzed Veterans of America and the American Coalition of Citizens with Disabilities (ACCD) were influenced by the civil rights movement and used it as a model for understanding the position of disabled people, and they adopted tactics from that struggle, such as sit-ins, to advance their message. The Vietnam War was also important: activists were influenced by the anti-war movement and the war produced disabled veterans whose message was compelling.

A watershed for Americans with disabilities was passage of the *Rehabilitation Act 1973*.\(^\text{56}\)

The aim of the legislation was to improve rehabilitation services by shifting the emphasis from vocational training to independent living. Initially, the legislation did not include any anti-discrimination provision. However, in committee, sections were added that forbade discrimination on the basis of disability in any program receiving federal funding (s.504),


\(^{55}\) For the discussion that follows, I rely on primarily on Gooding, *supra* note 14 at 20-24.

that required the federal government to cease discriminating and to adopt affirmative action programs for disabled persons in its employment practices (s. 501), and that imposed the same requirements on federal contractors (s. 503).\textsuperscript{57}

This was the first anti-discrimination legislation for people with disabilities. Section 504 was directly modelled on Title VI of the \textit{Civil Rights Act 1964},\textsuperscript{58} thereby linking disability to minority groups protected by that Act. The legislation also served to link disability activists in a common cause. The common experience of discrimination served to unify groups that had historically organized around single medical conditions (another legacy of the medical model). The ACCD was an umbrella organization of more than 80 such organizations.

Under the \textit{Rehabilitation Act}, federal policy towards the disabled was not defined in terms of allocation of finite resources that pitted one group against another. Rather, it was defined in terms of rights, which allowed the groups to advocate for the rights of other groups without financial sacrifice.\textsuperscript{59}

The \textit{Rehabilitation Act} identified people with disabilities as a minority group entitled to civil rights protection. Amendments to the Act in 1974\textsuperscript{60} redefined “disability” in a way that marked a break from the medical model to the social model. The Act’s original definition of “handicap” was based on a conventional medical model. It defined a handicapped person as “Any individual who (A) has a physical or mental disability which for such individual

\textsuperscript{57} Although initially resisted by the Nixon Whitehouse, the Act was passed following demonstrations by the President’s Committee on the Employment of the Handicapped in 1972 and by the grassroots disability rights group Disabled in Action in 1973: Jaqueline Vaughn Switzer, \textit{Disabled Rights: American Disability Policy and the Fight for Equality} (Washington: Georgetown University Press, 2003) at 59.
\textsuperscript{58} 42 U.S.C. §2000d.
\textsuperscript{59} Gooding, supra note 14 at 25.
\textsuperscript{60} \textit{Rehabilitation Act Amendments of 1974}, Public Law 93-516, 88 Stat. 1617.
constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services."\(^{61}\)

Disability was defined in terms of the individual’s impaired capacity for employment. The Act was amended the following year to define a handicapped person as anyone “1) with a physical or mental impairment which substantially limited one or more life activity, 2) with a record of such impairment or 3) regarded as having such an impairment.”\(^{62}\) This new definition recognized that disability could be caused by the perception – or prejudice – of others and that disability is defined not by the presence of an impairment, but by the relationship of that impairment to concrete activities of daily living. In Gooding’s words:

> This definition establishes prejudice as the defining fact of disability and thus marks the break from the medical to the social model for disability, by locating the “handicap” in social perceptions and in the restrictions imposed by concrete living situations, rather than listing medical conditions which come into the category of “disabled.”\(^{63}\)

The Supreme Court of the United States recognized that this was the intent of the definition in *School Board of Nassau County v. Arline.*\(^{64}\) The Court accepted that cosmetic disfigurement is a disability because other people's fears and prejudices irrationally limit the opportunities of the person with the disfigurement. Writing for the majority, Justice Brennan states:

> Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual ... The Senate Report provides as an example of a person who would be covered ... “a person with some kind of visible physical impairment, which in fact does not substantially limit that person’s functioning.” Such an impairment might not diminish a person’s


\(^{62}\) Gooding, *supra* note 14 at 58.

\(^{63}\) *Ibid.* at 59.

\(^{64}\) 480 U.S. 273 (1987).
physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.  

The social model is reflected in the recognition of the handicapping effect of society's reaction to an impairment. The Rehabilitation Act contained other provisions that reflected the social model's perspective that the environment creates handicaps: first, s. 504 spoke of the "exclusion" of people with disabilities; second, it required the federal government and contractors to undertake affirmative action programs to employ people with disabilities; and third, it required the removal of architectural and transportation barriers. The focus of these provisions is on changing the environment rather than the individual.

The social unrest in Canada was more muted than in the United States, and disability activists were not propelled by the large numbers of disabled Vietnam veterans. Nevertheless, activists in Canada lobbied vigorously for equal rights protection. They achieved some success when, in 1976, New Brunswick became the first Canadian province to include "disability" or "handicap" as a prohibited ground of discrimination. However, for Canadian activists the key victory was not anti-discrimination legislation. Although inclusion of "disability" in anti-discrimination was significant, it resulted from local activism and did not generate much national attention. Two subsequent events, a Parliamentary report and constitutional recognition of the rights of people with disabilities, served to unify Canadians with disabilities.

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65 Ibid. at 282-283 [citations omitted].
66 Bickenbach, Physical Disability, supra note 33 at 166.
In response to the United Nation's declaration of the year 1981 as the "International Year of Disabled Persons", the federal government appointed the Special Committee on the Disabled and Handicapped. People with disabilities and their advocates took the opportunity to present their vision of disability: they sought full participation in all aspects of mainstream society, and saw environmental barriers, whether attitudinal or structural, as the major obstacles to that participation. The Committee received over 600 submissions, and the voices of disabled people were clearly heard. In the introduction to its report to Parliament, the Committee wrote:

The purpose of this report is to identify the key obstacles faced by disabled persons in Canada, and to outline practical actions which will help to overcome these obstacles. The recommendations made by the Special Committee call for legislative, fiscal and organizational initiatives on the part of the Federal Government. Some of these new policies and practices will have immediate impact, while others may take several years before any real progress can be seen. Regardless of the time that will be required, the community of disabled persons in Canada will persist with their demands for just and cooperative treatment from the rest of society. They have shown remarkable self-determination, both collectively and as individuals. Disabled persons are not asking the Federal Government for a hand out, but for a hand up, so that they can build for themselves lives of independent choice and action. Ottawa must do certain things before this can happen. Disabled persons will do the rest.

The report, which was released in February 1981, remains a remarkable document for the breadth of its vision. It contains 130 recommendations cutting across all aspects of everyday life in Canadian society. It is also remarkable for its unflinching adoption of the social model of disability. It is evident in the passage quoted above, with its emphasis on the identification and elimination of environmental obstacles and the desirability of independence and self-determination for people with disabilities. It is also reflected in the structure and content of

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68 Canada, Parliamentary Special Committee on the Disabled and the Handicapped, Obstacles (1981) at 147.
69 Ibid. at 1.
the report. Its first chapter addresses human and civil rights and identifies the need for improved anti-discrimination legislation as the most repeated request heard by the Committee. Other chapters contain recommendations addressing a wide variety of issues including employment, independent living, consumerism, and changing attitudes. There is no chapter dealing with health or rehabilitation. There is a chapter on institutional living but it contains only two recommendations: that the federal government develop guidelines for the standard of care in institutions; and that the federal government study the cost-effectiveness of de-institutionalization.70

At the same time as the Special Committee on the Disabled was completing its report, another Special Committee, the Special Joint Committee of the House of Commons and of the Senate (the “Hays-Joyal Committee”), was convened to receive public input on the draft provisions of the Charter of Rights and Freedoms.71 This committee, and the provisions it was considering, became the focus of intensive activism by disabled advocates.72

When s. 15 of the Charter was initially presented to Parliament in October 1980, it prohibited discrimination because of “race, national or ethnic origin, colour, religion, age or sex”; it did not include “disability” or “handicap”.73 The deliberate omission of disability drew strong criticism, and the claim for inclusion was advanced in three forums

70 Ibid. at 111.
73 Lepofsky & Bickenbach, Ibid. at 332.
concurrently. First, it was advanced in public debate in public forums, the media, and in letters and petitions to legislators. Second, as discussed above, witnesses to the Special Committee on the Disabled frequently pressed for expanded human rights protection. Third, advocates made their case in formal presentations to the Hays-Joyal Committee. The three principle advocates were COPOH, the Canadian Association for the Mentally Retarded and the Canadian National Institute for the Blind. On January 12, 1981, the Justice Minister, Jean Chrétien, introduced amendments to the provisions; however, he specifically declined to approve inclusion of disability. Under much pressure from Committee members, including those of his own party, the government finally accepted an amendment on January 28, 1981 to include “mental or physical disability” in s. 15 of the Charter. Lepofsky and Bickenbach identify a number of factors that led to the amendment. One factor was the strong advocacy by the Special Committee on the Disabled, which as we have seen, was strongly influenced by the vision of equality advanced by advocates with disabilities. It formally resolved that: “If Parliament decides to enshrine human rights in the patriated Constitution, the Committee feels that complete and equal protection should be extended to persons suffering from mental and physical handicap.”

The legal impact of this constitutional guarantee was not immediate. Section 15 was not to come into effect until 1985. However, its impact on the disability rights movement was significant. It brought together in common cause individuals and organizations with a wide diversity of disabilities. They succeeded in gaining recognition that disability-based discrimination ought to receive protection from discrimination in the same manner as other

\[74\] *Ibid.* at 333.

\[75\] *Ibid.* at 335.

\[76\] *Ibid.* at 336.
historically disadvantaged minority groups. With recognition of disability in the Charter, and the powerful recommendations of the Obstacles report, the disability rights movement had achieved recognition that Canadians, as a nation, accepted a vision of society that included people with disabilities and that was committed to the elimination of barriers to that participation that were caused by discrimination.

The social model of disability had prevailed, at least in theory. In practice, people with disabilities continue to face many barriers to equality. Although the disability rights movement has achieved significant victories the fight is not over. For example, disabled activists in Ontario have for more than a decade been fighting for effective provincial legislation to create a barrier-free province for people with disabilities.\(^77\) In response to that activism, the Ontario government introduced the Accessibility for Ontarians with Disabilities Act, 2005,\(^78\) which incorporates many of the accessibility goals of the disability rights movement.

In challenging the assumptions of the medical model, the independent living and consumer movements liberated people with disabilities by empowering them. They found their voice and used it to take greater control of their lives. Part of the strategy was to work through the established systems to obtain greater rights to self-determination. Activists also sought, and obtained, legislative reform to give them enhanced rights within the system. The movement was also counter-hegemonic, and therefore more revolutionary than mere agitation for

\(^77\) For an interesting description of the long battle for this legislation from one of its leading participants, see M. David Lepofsky, “The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the Ontarians with Disabilities Act -- The First Chapter” (2004) 15 Nat’l J. Const. L. 125.

\(^78\) S.O 2005, c.11.
legislative reform. Disabled activists sought to change the dominant framework of society, not merely to improve their position within it. Their effort to take control of their lives away from medical professionals was like rebellion or secession.79 Their tactics of protests and sit-ins were similar to other counter-hegemonic movements of the time.

Whatever the tactics or strategies, whether framed as an issue of individual rights or systemic discrimination, the search for equality was, and is, central in the disability rights discourse. In the following section, I consider disability as an issue of equality.

4. Disability and Equality

(a) Disability Rights and Equality Theory

Equality is central to the discussion of disability rights. Disability rights theorists draw heavily on liberal and feminist conceptions of equality. However, disability does not figure prominently in either liberal or feminist literature.

As discussed in Chapter II, there is no single conception of liberal equality. Liberals are, however, unified in their focus on individuals. For liberal philosophers, disability is addressed as a problem that tests the limits of theoretical positions. It is generally accepted that justice requires that those who are disadvantaged due to a natural impairment should receive some form of redress, compensation or redistribution. But how are those who are disadvantaged by a disability to be distinguished from those who are disadvantaged by lack of talent? And if some form of redistribution is appropriate, what is the purpose of the redistribution: to eliminate the disadvantage, or to equalize the well-being? For disability

79 Bickenbach, Physical Disability, supra note 33 at 171.
rights theorists, the liberal answers have not been particularly helpful. As David Wasserman, an American lawyer and philosopher observes: “The liberal philosophers who have addressed disability have come up with proposals that bear a depressing similarity to the status quo.” Liberal conceptions of equality focus on the individual. It is therefore not surprising that liberal philosophers see disability as a natural disadvantage. They tend to locate the source of disadvantage in the person with a disability. The result bears a striking resemblance to the medical model.

Given its focus on disability as a disadvantage located within an individual, it is also not surprising that those few liberal equality theorists who have directly addressed disability have often considered it as an issue of health policy. As discussed in Chapter II, much of the recent debate on equality is a response to Rawls’ influential work. In the Rawlsian framework equal opportunity has priority over the distribution of primary goods. Based on this framework, philosopher Norman Daniels argues that health care needs should be given priority as a means to achieve fair equality of opportunity. For Daniels, the goal of health care is to restore or maintain normal functioning, and he argues that “we have special claims on others when our functioning falls short of the normal range.” Such a special claim does not arise from deficits in skills or talents if they fall within the normal range. Abnormal functioning creates a special claim because it restricts equality of opportunity.

81 For the following analysis of Daniels’ and Pogge’s application of the Rawlsian framework, I rely on Wasserman, Ibid. at 152-172.
Wasserman notes a number of problems with Daniels' analysis, including the problem of finding a principled basis for distinguishing between deficits in functioning and deficits in abilities. That is, "it is not obvious that those with impairments are denied fair equality of opportunity by the failure to restore them to normal functioning any more than are those with mediocre talents by the failure to improve their level of performance." Moreover, applying the Rawlsian framework, under Daniels' analysis, society could not devote any resources to ameliorate wealth or income disparities until it had done everything possible to restore normal functioning to those lacking it. This model is not limited to the restoration of normal functioning through health care; education, for example, could also be effective. However, in that context too, the model raises questions of fairness. A student with little talent for math will get low grades, so too will a student with a math learning disability. Under Daniels' model, the student with no talent will get no resources until everything that can be done is done to restore the student with a learning disability to normal functioning. As Wasserman notes, this model "may demand too much for too few" and may obscure other issues of social justice. From a disability rights perspective, this focus on normalization, particularly through health expenditures, fits comfortably within the medical model: it is the individual who must be restored to fit the able-bodied norms of society.

Thomas Pogge argues that Rawls does not require that society compensate for natural inequalities by providing greater opportunities and resources. Rather, Rawls requires only that society mitigate natural inequalities by ensuring that society does not adopt a scheme of cooperation that compounds the inequalities. Under Pogge's model, health protection

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83 Wasserman, supra note 80 at 154.
84 Ibid. at 158.
resources must be distributed roughly equally. Poor people must have roughly the same access to health care as those of average means. Comparisons between people with disabilities and the able-bodied would be irrelevant: if poor people with disabilities received the same resources as disabled people with average means, there is no social injustice.\textsuperscript{85}

Even under the medical model, Pogge's analysis offers little for disability rights. Society meets its equality obligations as long as poor people with disabilities receive no fewer resources than the middle class. Such a formal conception of equality neither addresses the inequalities intrinsic in treating people with disabilities the same as the able-bodied nor recognizes societal obligation for the creation of that disability.

Ronald Dworkin comes closer to a social construction of disability. As Bickenbach observes, Dworkin is one of the few theorists to recognize the interactional nature of disabilities.\textsuperscript{86} For Dworkin, disabilities (or handicaps) are part of a continuum with abilities (or talents). He states: "Though skills are different from handicaps, the difference can be understood as one of degree: we may say that someone who cannot play basketball like Wilt Chamberlain, paint like Piero, or make money like Geneen, suffers from an (especially common) handicap."\textsuperscript{87} Dworkin also rejects normalization as an appropriate goal, in part because of the difficulty in establishing a "normal" standard, but also because there is no amount of compensation that could make a person with a disability equal in physical or mental resources with someone taken to be "normal" in these ways. Further, physical or mental "powers" are not resources for the theory of equality in the sense that material

\textsuperscript{86} Bickenbach, \textit{Physical Disability}, supra note 33 at 264.
resources are; they cannot be manipulated or transferred. That is, physical or mental powers cannot be taken from one person and given to another to equalize their distribution. This argument may suggest why Dworkin’s theory is a thin one for people with disabilities. For Dworkin, disabilities are “features of body or mind or personality that provide ... impediments to a [successful life].” Although he sees disabilities as part of a continuum of abilities that are affected by their context, he locates the problem to be remedied in the individual. Since the disabilities relate to physical, non-transferable resources within the individual, his only solution is to provide compensation through a hypothetical compensation scheme. He does not suggest any redistribution of resources to make society less disabling.

Despite the failures (from a disability rights perspective) of liberal theorists in addressing disability as an issue of equality, disability rights theory is often informed by liberal conceptions of equality. Harlan Hahn, for example, adopts a liberal individual rights approach to equality. While identifying the architectural, institutional and cultural environments as determining the meaning of disability, he argues that bias and prejudice underlie those environmental problems. He states:

\[\text{Governments bear an inescapable responsibility for those facets of the environment that have a discriminatory effect on persons with disabilities. Furthermore, evidence of widespread aversion to the presence of disabled individuals cannot be separated from the values and feelings that have contributed to the formation of social policy. Hence, if institutions allow the nondisabled majority to avoid and exclude people with disabilities, that result cannot be attributed to mere happenstance. This realization also imposes a}\]

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88 Dworkin, Sovereign Virtue, ibid. at 80.  
89 Ibid. at 82.  
90 Dworkin observes that it is possible to conceive of a single insurance scheme to address handicaps and skills as part of a continuum. However, a person would normally know their skills when purchasing insurance, whereas handicaps are future contingencies. He therefore devises two hypothetical insurance schemes: one for handicaps, the other for skills: Ibid. at 92-97.
corresponding duty on policymakers to protect the civil rights of disabled citizens by eliminating this form of segregation and inequality.\footnote{Hahn, supra note 36 at 184-185.}

In essence, Hahn’s view is that inequality for people with disabilities results, directly or indirectly, from bias and prejudice towards them from the non-disabled community. It reflects a formal conception of equality, albeit a complex one. As discussed in Chapter II, in formal equality all people are treated alike. In Hahn’s view, the negative attitudes of society lead to social policy that treats people with disabilities differently than the non-disabled.

Similarly Anita Silvers treats equality for people with disabilities as an issue of formal justice conceived broadly. She argues that formal justice requires equality of treatment, not treatment that is the same.

Pursuing formal equality requires carefully distinguishing descriptions of how people are treated that reveal the scope of the treatment’s instrumentality from other levels of description. To assess its efficacy, the scope of instrumentality permitted by the purportedly equalizing treatment must be known. This is because physical, sensory, and cognitive impairments reduce one’s instrumental options. So treating people similarly, will not be treating them equally in cases in which the actions instrumental to pursuing opportunity are so narrowly or rigidly constrained as to exclude people with (certain) impairments.\footnote{Anita Silvers, “Formal Justice” in Anita Silvers, David Wasserman & Mary B. Mahowald, Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy (Lanham, Maryland: Rowman & Littlefield Publishers, 1998) 13 at 126-127.}

For example, a program that can only be accessed by a flight of stairs is not treating people in wheelchairs equally to those who are able to climb stairs. Formal equality requires equal access to the program, not equal access to the stairs. Further, formal justice requires that “instrumentally effective accommodation” be provided where it is necessary to provide equal
access. Failure to do so “illegitimately impinges on the negative freedom of disabled program users and workers.” Silvers is careful to distinguish the equal treatment required by formal justice from the “special benefits” that are required under an equality of results model. In her view, “Claims of people with disabilities to equalized opportunity and to special benefits clash because they leave the public conflicted as to whether to interact with impaired individuals as equals or to focus on their having ‘special’ needs.” According to Silvers, modelling disability on civil rights presumes that, if given meaningful access to opportunity, people with impairments can flourish without special care. Silvers recognizes that some people have impairments that are so severe some distributive scheme is permissible but insists that such distributive “schemes neither do justice to people with disabilities nor equalize them.” Silvers thus appears to relegate people with very severe disabilities to some lesser form of equality.

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93 Ibid., at 127. This is similar to the Aristotelian notion that formal equality requires not only that likes be treated alike but that unalikes be treated differently. Silvers’ view could also be described as an adverse effects analysis. As I discuss more fully in the next chapter, at note 112 and accompanying text, her focus on formal equality may reflect peculiarities of the American context that do not apply in Canada.
94 Ibid., at 133.
95 Ibid., at 135.
96 Ibid., at 144. The distinction Silvers makes between equal treatment and special benefits may help explain the outcomes of two cases decided by the Supreme Court of Canada. In Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, the plaintiffs sought equal access to medical treatment through the provision of sign language interpreters. They were seeking the same medical treatment as other patients. The Court upheld their claim. In Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657, the plaintiffs were seeking funding for treatment for their autistic child that was not available to others. The Court denied the application. It is possible to characterize the goal of the plaintiffs in Auton as seeking substantive equality for their child, not a “special benefit”, but the Court does not appear to have seen it that way. A recent Ontario decision found that the absence of funding for this treatment violated their rights to freedom from discrimination on the basis of disability: Wynberg v. Ontario, [2005] O.J. No. 1228 (QL) (Ont. Sup. Ct. Jus.). In Auton, the issue was addressed as discrimination in provision of health services; in Wynberg it was found to be discrimination in education programs and services.
Mary Mahowald, a professor of medicine who writes on health care and feminist issues, sees Silvers as exemplifying a liberal conception of equality, leaning toward the libertarian side.\textsuperscript{97} Mahowald offers what she describes as a more egalitarian feminist perspective:

Like most feminists, I resist a conception of individual autonomy that ignores the context, which often compromises that autonomy. Until and unless the compromising influences are removed, equal liberty for individuals is not possible. These influences include all of the social biases and empirical obstacles placed in the path of people who belong to nondominant groups; they also include covert obstacles such as internalized biases, psychological pressures, and reduced expectations on the part of the nondominant persons themselves. Material equality, defined as the removal of both internal and external obstacles to autonomy, is thus a prerequisite to equal liberty.\textsuperscript{98}

This egalitarian feminist analysis fits well with the social model of disability advanced by disability rights theorists. The focus on removal of “social biases and empirical obstacles” to achieve equality is similar to the aim of Hahn and others to remove the barriers created by the bias and prejudice of the dominant group (the able-bodied). Although Hahn does not identify a need to remove obstacles internal to the nondominant (disabled) group, the focus on empowerment through independent living may reflect a similar goal. Michael Oliver’s analysis is even closer to Mahowald’s position. Applying an analysis of oppression, he observes that the “disabled identity” is formed through a combination of internal psychological processes and external factors.\textsuperscript{99} And for him, “disability is not merely socially constructed, but socially created as a form of institutionalised social oppression like institutionalised racism or sexism.”\textsuperscript{100} He argues that the disability movement, as part of new


\textsuperscript{98} \textit{Ibid.} at 290-291.

\textsuperscript{99} Oliver, \textit{Politics}, supra note 15 at 77.

\textsuperscript{100} \textit{Ibid.} at 121.
counter-hegemonic movements, has a central role to play in eradicating the social restrictions and oppressions associated with disability.\textsuperscript{101}

Susan Wendell, after noting the absence of perspectives on disability in feminist theory, argues for a feminist theory of disability.\textsuperscript{102} She states:

Disabled women struggle with both the oppressions of being women in male-dominated societies and the oppressions of being disabled in societies dominated by the able-bodied. They are bringing the knowledge and concerns of women with disabilities into feminism and feminist perspectives into the disability rights movement. To build a feminist theory of disability that takes adequate account of our differences, we will need to know how experiences of disability and the social oppression of the disabled interact with sexism, racism and class oppression. ...

Unfortunately, feminist perspectives on disability are not yet widely discussed in feminist theory, nor have the insights offered by women writing about disability been integrated into feminist theorizing about the body. My purpose in writing this essay is to persuade feminist theorists, especially feminist philosophers, to turn more attention to constructing a theory of disability and to integrating the experiences and knowledge of disabled people into feminist theory as a whole.\textsuperscript{103}

She observes that many of the issues with which feminists grapple are the same as those facing people with disabilities: whether to focus on sameness or difference; whether to emphasize independence or to question the de-valuing of dependence and vulnerability; whether to aim for full integration and equal power or to preserve some degree of separate culture.\textsuperscript{104} Applying a feminist perspective, Wendell concludes, like Oliver, that a theory of disability must address it as a phenomenon of oppression. However, unlike Oliver, she also

\textsuperscript{101} Ibid. at 130.
\textsuperscript{102} Susan Wendell, "Toward a Feminist Theory of Disability" in Debra Shogan (ed.), \textit{A Reader in Feminist Ethics} (Toronto: Canadian Scholars' Press, 1993) at 223.
\textsuperscript{103} Ibid. at 224-225.
\textsuperscript{104} Ibid. at 224.
sees a need to consider the relationship of disabled people to their own bodies: “We need a theory of disability for the liberation of both disabled and able-bodied people, since the theory of disability is also the theory of oppression of the body by a society and its culture.”

However, the fit between disability and feminism is not always a comfortable one. As Oliver notes, sometimes the oppressed can be oppressive. Anita Silvers observed an increasing insistence by women with disabilities that they were being marginalized in the women’s movement in a manner that was similar to their marginalization by patriarchal society; that is, women’s rights groups were reluctant to include women with disabilities or recognize their issues as women’s issues. Silvers followed Wendell’s lead by attempting to consider the intersection of disability and feminism. Her project was to persuade feminist theorists to adjust their theory to incorporate a disability rights perspective and, in so doing, further feminist liberatory theory.

Whether or not feminist theory finds a place for disability, feminist theory will continue to find a place in disability theory. In addition to the influence of feminist theory in the writing of disability theorists such as Oliver, feminist theories of equality are being argued by legal advocates in judicial proceedings involving disability. In Eldridge the Supreme Court of Canada considered, for the first time, the meaning of the prohibition of disability-based

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105 Ibid. at 242.
106 Oliver, Politics, supra note 15 at 76.
108 Ibid. at 81-82.
109 Eldridge, supra note 96.
discrimination in s. 15 of the *Charter*. The Disabled Women’s Network (DaWN) submitted a factum with a feminist perspective that is also consistent with a disability rights analysis:

Equality under s. 15 entails much more than simply “accommodating” persons with disabilities into existing societal norms and structures leaving unscrutinized those norms and structures themselves. Substantive equality challenges the very existence of mainstream structural and institutional barriers, including the socially constructed notions of disability which inform them. For persons with disabilities, equality means the right to participate in an inclusive society. It does not mean merely the right to participate in a mainstream society through the adoption of non-disabled norms.

... The “duty to accommodate” is antithetical to the meaning of substantive equality as its interpretation proceeds from and leaves intact the mainstream perspective, only making concessions to the disadvantaged group. Its frame of reference falls far short of full inclusion. In order to achieve what s. 15 demands, equality must not be denied by the perspectives, experiences, wants or desires of those privileged groups in society precisely because it is those groups who are least well situated to recognize and eliminate the discriminatory undertones of their own thoughts and actions.\(^\text{110}\)

(b) Minority Rights Analysis

Whether based on liberal or feminist principles of equality, the dominant disability rights model is based on what is commonly referred to as a minority group or minority rights analysis.\(^\text{111}\) Under this model, people with disabilities are viewed as a minority that has been disadvantaged by discriminatory practices. That is, as a group, people with disabilities are the victims of practices that, either consciously or unconsciously, deny them opportunities available to other members of society. Those practices cause them to be isolated and excluded from full participation in society. Under this model, political strategy is based on an assumption that elimination of the discriminatory practices will enable participation by

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\(^{111}\) For an extensive discussion of this model see Bickenbach, *Physical Disability*, supra note 33 at 152-158.
people with disabilities. Disability activists have therefore focused much of their energy on the enactment of effective anti-discrimination legislation. For American activists those efforts led to passage of the *Americans with Disabilities Act*.\(^{112}\) The preamble to the Act captures the ideology of the minority group model:

> Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society … \(^{113}\)

Bickenbach observes that, as the political strategy that forms the basic platform of disability rights movements around the world, the minority rights model is a proven success. In his words:

> These [disability rights] movements can be credited with nearly every change in attitude and treatment of people with disabilities in the last two decades – from kerb cuts to accessible bathrooms, to programs to integrate developmentally disabled children into the public schools to protections of the rights of people in mental institutions.\(^{114}\)

Despite this success, some disability theorists, led by Bickenbach, are questioning the long-term effectiveness of the minority rights model.\(^{115}\) Bickenbach advocates for a “universalist” paradigm to address the inequality of disabled people. While minority rights supporters consider people with disabilities as a discrete and insular minority, universalists see

\(^{112}\) 42 USC 12101 (1990) [*ADA*]

\(^{113}\) The words “discrete and insular minority” are consistent with the language used by the U.S. Supreme Court to limit the scope of constitutional protection and which was adopted by the Supreme Court of Canada to define the scope of s. 15 of the *Charter: Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 183.


\(^{115}\) His critique is developed in several sources: *Physical Disability*, supra note 33; “Minority Rights”, *ibid.*; and Jerome E. Bickenbach, “Disability and Equality” (2003) 2 Journal of Law and Equality 7 (“Disability and Equality”). For this summary I rely primarily on “Minority Rights”.

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disabilities as part of the universal human condition. The former advocate anti-discrimination laws to remedy the inequality; the latter seek to do so by expanding the range of the normal.

The universalist critique therefore begins with a challenge to the assumption on which the model is based: that people with disabilities can be characterized as a minority group. It is through their status as a minority group that disabled people claim rights (including equality rights) parallel to those granted to other minority groups. Bickenbach argues that the social response to impairment varies with the type of impairment, and there is no common experience or feeling of solidarity amongst people with different disabilities. In his words: “there is no unifying culture, language or set of experiences; people with disabilities are not homogeneous, nor is there much prospect for trans-disability solidarity.”

This critique suggests that the diversity of people with disabilities contrasts with racial minorities, on whom the model is based. Yet, many racial minorities are not marked by the homogeneity of experience that Bickenbach and others seem to require. Blacks as a minority includes Black men and women; they may be straight, gay, lesbian, or transsexual; they may be conservative, liberal or apolitical; they may have been born and raised in Atlanta, Vancouver, or Kinshasa; they may be rich or poor, urban or rural; and they may be able-bodied or disabled. What unifies them is not their common culture, language or set of experiences, but their common experience as members of a group that has been collectively disadvantaged by a history of discrimination. The same shared experience of discrimination

underlies the minority group analysis of disability. It is true that membership in the group is not necessarily permanent. People are constantly being added to the group by illness or injury; and some leave it through treatment, cure or technological change. However, they experience the same environment as long as they are in the minority as do other members of the group. Their different sets of experiences may cause them to respond to that environment differently, but the same can be said of other minority groups.

Bickenbach's second critique is that, even if people with disabilities are a minority group, there is no reason to think that anti-discrimination legislation is an effective means to address the social ill of discrimination. For support, he points to some of the failures of the ADA. First, plaintiffs have spent much time and energy trying to prove that they qualify for the protection of the ADA. He suggests that it is demeaning to have to "earn one's right to equality and eligibility to 'special treatment' by proving that one is a member of a socially discredited group". This, he says, is particularly problematic because of the definition of disability in the ADA, which requires medical evidence of disability, and thereby medicalizes the process. Finally he is critical because it excludes some people with disabilities because they are seen as "unworthy" people with disabilities.

The ADA has not been as effective as disability rights activists had hoped. Judicial interpretation has narrowed its scope and applicability. However, the failure does not

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117 Bickenbach, "Minority Rights", supra note 114 at 106.
118 Ibid.
119 In Sutton v. United Airlines Inc., 527 U.S. 471 (1999); Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999); and Murphy v. United Parcel Service, 527 U.S. 516 (1999), the U.S. Supreme Court held that, although the plaintiffs' employment had been curtailed by their impairments (correctable myopia, monocular vision, and high blood pressure respectively), they were not sufficiently disabled to fall within the coverage of the ADA. In Board of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001), the Court refused to apply the law to
demonstrate that anti-discrimination legislation will inevitably be limited in its application. More carefully crafted legislation may be more effective than the ADA. Moreover, courts in other jurisdictions may interpret anti-discrimination statutes more liberally. As Bickenbach acknowledges, Canadian judges have followed a different path than their American colleagues. The Supreme Court of Canada has accepted the social model of disability and has stated that, when considering discrimination on the basis of disability, whether in the context of anti-discrimination legislation or the Charter, the focus is not on the impairment but on the social response to the impairment:

Generally, these guidelines [for interpreting “disability” or “handicap”] should be consistent with the socio-political model proposed by J. E. Bickenbach in Physical Disability and Social Policy (1993). This is not to say that the biomedical basis of “handicap” should be ignored, but rather to point out that, for the purposes of the [Quebec] Charter, we must go beyond this single criterion. Instead, a multi-dimensional approach that includes a socio-political dimension is particularly appropriate. By placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a “handicap”. In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes.

The failure of the ADA to address disability under a social model does not reflect a flaw in the minority rights model, nor does it demonstrate the inadequacy of anti-discrimination law

state governments. And in Chevron U.S.A. Inc. v. Echazabal, 00-1406, 122 S. Ct. 2045 (2002), the court held that the ADA does not prevent an employer from firing a disabled employee for his own good.

121 Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000] 1 S.C.R. 665 at para. 77. The reasoning is not limited to the Quebec Charter. The Court reiterated (at paras. 43-46) that differences in terminology do not support a conclusion that there are different purposes in the legislation. The Court has adopted a similarly broad definition of disability in the context of s. 15 of the Charter of Rights and Freedoms. In Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, the Court stated (at para. 29): “The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life the so-called ‘disabled’ individual may not be impaired or limited in any way at all.”

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as a remedy for the social ill of discrimination; if there is a failure, it is in the vision of the American judiciary. A further criticism of the effectiveness of the ADA is that it has little to offer people with multiple or serious impairments.\textsuperscript{122} This tends to create another class of “inferior” people, those for whom anti-discrimination legislation offers no benefit. A recent study by Judith Mosoff lends some credence to this argument. Mosoff reviewed Canadian human rights decisions from 1985-1998 and found that people with serious disabilities were underrepresented in the pool of complainants whose complaints had proceeded to hearing.\textsuperscript{123} While this is a serious criticism of the effectiveness of anti-discrimination legislation, the problem may reflect systemic inequities in the enforcement of human rights legislation rather than a flaw in the minority rights analysis. The institutions that have been established by governments to administer human rights legislation and which are intended to remove discriminatory barriers may be insensitive to the barriers faced by people with severe disabilities or may create barriers that prevent people with disabilities from equal access to the those institutions. I will return to the issue of access to enforcement in the next chapter.

Bickenbach’s critique also raises the concern that, by focusing on their status as a distinct and disadvantaged minority, people with disabilities highlight their difference from the mainstream. This is the “dilemma of difference”, as it has been termed by Martha Minow. She describes the question thus: “when does treating people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on that
This dilemma has particular force for people with disabilities. They argue that their disabilities are largely socially constructed as a result of narrow mainstream conceptions about what is normal; however, to function within that mainstream they often require some accommodation of their differences. This dilemma is not unique to people with disabilities. Religious minorities and women face similar dilemmas, for example when addressing accommodation of pregnancy or religious practices. Racial minorities face it when seeking affirmative action programs that make irrelevant personal differences relevant for the purpose of eliminating inequality. The dilemma of difference raises difficult theoretical problems for minorities; it does not, however, justify abandoning the minority rights model. It is only by recognizing that mainstream norms have unnecessarily excluded a sector of the community and created a minority that those norms can be deconstructed and recreated on a more inclusive model. Until that happens, people with disabilities will require accommodation of their differences.

Finally, Bickenbach argues that a strategy that relies entirely on civil rights and anti-discrimination legislation will have limited value for people with disabilities because of the obstacles they face. He states:

People with disabilities face unaccommodating physical and organizational environments, lack of educational or training programming, impoverished or non-existent employment prospects, confused and inadequate income support programs, under-financed research for assistive device technologies, lack of resources to meet impairment-related needs, policy neglect and minimal political influence.\(^\text{125}\)


\(^{125}\) Bickenbach, “Minority Rights”, *supra* note 114 at 108.
Bickenbach agrees that these are socially-constructed disadvantages created by disability. In his view, however, they are not problems of discrimination. He states that:

... a person is discriminated against when through no fault of their own the person is disadvantaged in some way by the decisions or actions of others explicitly carried out on the basis of some morally irrelevant feature of that person. In light of this injustice, a corrective or remedial response by way of compensation – flowing from the responsible party – for wrongful conduct.\footnote{Ibid, at 108-109.}

This description of formal and intentional discrimination rolls back Canadian judicial interpretation by about two decades. Canadian courts long ago rejected the view that the right to be free from discrimination was limited to conduct that was explicitly related to a prohibited characteristic. As I will discuss further in the next chapter, in O'Malley the Supreme Court of Canada held that a neutral practice that expressed no discriminatory intent could, nevertheless, constitute discrimination.\footnote{Ontario (Human Rights Comm.) and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 at para. 18.} Bickenbach acknowledges that “it is common in equality jurisprudence to speak of derivative forms of discrimination – ‘indirect’, ‘adverse effect’, or ‘constructive’”.\footnote{Bickenbach, “Minority Rights”, supra note 114 at 109.} In his view, however, these are legal fictions designed to provide a remedy where there is no evidence of a discriminatory intent or even a discriminator, and they should not form the basis of a political strategy. He reasons that discrimination is a social evil because it offends the dignity of an individual or group. Compensation is a meaningful remedy for the victim of an insult. Where neutral factors, such as economics, are the cause of disadvantage “there is no insult, because there is no insulter”.\footnote{Ibid.} For Bickenbach, inequality for people with disabilities lies primarily in a denial of their positive freedoms to achieve what it is they wish to achieve. The denial of resources

\footnote{\textit{Ibid.}}
and opportunities that lie at the root of this inequality are issues not of discrimination but of distributive justice.

There are problems with Bickenbach’s analysis. I have already alluded to the first: he relies on an obsolete definition of discrimination. Bickenbach may be correct in his description of the judicial motive for interpreting discrimination broadly. The interpretation may have been a legal fiction; however, that interpretation is now a reality for tribunals and courts seeking to apply anti-discrimination legislation. Adverse effect discrimination is an established part of Canadian law and must be applied by tribunals and judges. If tribunals and judges are able to interpret anti-discrimination statutes so as to provide for substantive equality that enhances positive freedom, why not adopt the use of such legislation as a political strategy? One reason suggested by Bickenbach is that, even where substantive interpretations are available, judges will return to the “core” notion of discrimination (i.e. Bickenbach’s notion) to determine if conduct contravenes the law. A conservative application of the legislation does not mean that a strategy that relies on the legislation should be abandoned; it may indicate a need for political action to reform the legislation to better ensure applications that are consistent with the substantive purposes of the legislation. More significantly, Bickenbach suggests that anti-discrimination legislation is a form of remedial or corrective justice; whereas the disadvantages of disablement are primarily problems of distributive

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130 Ibid. Some support for this suggestion can be found in the case of Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241 in which the parents of a child with cerebral palsy claimed that the School Board’s decision to place their daughter in a special education class was contrary to s. 15 of the Charter. The Court held that the Board’s decision to place her in a segregated setting “did not constitute the imposition of a burden or disadvantage nor did it constitute the withholding of a benefit or advantage”. The Court was persuaded that the Board was concerned with the child’s best interests. The Court may, without having said so, have been swayed by the absence of the invidious conduct that Bickenbach describes as underpinning discrimination. For further discussion of this case, see Margot Young, “Sameness/Difference: A Tale of Two Girls” (1997) 4 Review of Constitutional Studies 150.
injustice. However, the two forms of justice are not mutually exclusive. It may be possible to correct a discriminatory practice through an order requiring redistribution. For example, in *Eldridge*\(^{131}\) the Supreme Court of Canada required the government to pay the cost of sign language interpreters to provide deaf people equal access to medical services. This requires some degree of redistribution of funds, either by transferring money away from other government services or by raising additional funds through general taxation. *Eldridge* was a *Charter* case; nevertheless, it illustrates how discriminatory conduct may be remedied through a redistributive order. It may be that anti-discrimination enforcement mechanisms are limited in their ability to effect the distributional adjustments required for full equality (an issue I will address in the following chapter); however, if they can effect some redistribution, they may still be a valuable part of a political strategy.

That brings me to another problem with Bickenbach’s analysis. He suggests that the minority rights analysis “sets its sights entirely on civil rights and anti-discrimination protection”.\(^{132}\) It is true that anti-discrimination legislation formed an important part of the minority rights strategy.\(^{133}\) However, disability rights activists have not set their sights entirely on such protection. As is clear from the *Obstacles* report, activists advocated for a broad range of reforms, many of which did not involve anti-discrimination protection.\(^{134}\) The battle for equality is fought on many fronts.

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\(^{131}\) Supra note 96.  
\(^{132}\) Bickenbach, “Minority Rights”, supra note 114 at 108.  
\(^{133}\) For a powerful statement of that position, see Barnes, supra note 9.  
\(^{134}\) They sought, for example, stronger affirmative action programs, a national disability pension program, and the development of accessibility standards for housing: *Obstacles*, supra note 68.
Lawyer Jonathan Penney also questions the ability of the minority rights model to achieve substantive equality. He submits that "[i]n arguing for special equality guarantees and accommodation for a minority group of people with disabilities, it does not challenge mainstream norms and structures." It is true that the claim for accommodation has formed an important part of disability rights advocacy. For example, David Lepofsky observes that people with disabilities must function in a world in which virtually all institutions were designed on the premise that they are intended to serve the able-bodied; in such a world, "[a]bsent a duty to accommodate, equality guarantees would be entirely meaningless [for people with disabilities]." Penney is not alone in his concern that acceptance of the concept of reasonable accommodation may implicitly suggest that it is acceptable to base institutional and architectural obstacles on mainstream norms. The passage from the DaWN factum quoted above expresses the same concern. However, this concern reflects a problem with the concept of reasonable accommodation, not with the minority rights approach. That approach seeks to achieve equality through recognition of the rights of people with disabilities. Reasonable accommodation was a concept designed to overcome a formal conception of equality. However, conceptions of equality have evolved in theory and jurisprudence. Conceptions of substantive equality that call for transformation of society rather than individual accommodation are not inconsistent with a minority rights model. For example, Evelyn Kallen, who applies a minority rights analysis, views the disadvantage faced by minority groups as resulting from systemic human rights violations which create

135 Penney, supra note 116 at 93.
136 Lepofsky, "Duty to Accommodate", supra note 8 at 6-7. Similarly Anne Molloy (now Molloy J.) states: "If persons with disabilities are ever to achieve true equality in employment, ... it will only be upon an understanding and acceptance ... of the duty to accommodate as an essential element of equality": Anne M. Molloy, "Disability and the Duty to Accommodate" (1992) 1 Can. Lab. L.J. 23 at 24; she adds (at 26) that "[f]or people with disabilities, the right to accommodation goes to the very heart of equality."
oppression. Individual people with disabilities may experience discrimination, but it is because of their membership in an oppressed collective. Kallen concludes that, although disabled individuals have a valid legal complaint, social policy should be aimed at the oppressive environment.\textsuperscript{138}

Substantive conceptions of equality, that seek transformation rather than accommodation, can be incorporated into a minority rights analysis. Moreover, the Supreme Court of Canada has accepted that the purpose of anti-discrimination legislation is to achieve substantive equality, and that reasonable accommodation may not always achieve that purpose.\textsuperscript{139} Nevertheless, the duty to accommodate individuals will likely remain an important part of the minority rights model, if only because the transformation of society does not come easily. Although transformation is a laudable goal, it takes time. In the meantime, individual accommodation will enable some people with disabilities to participate in work or leisure activities who could not do so otherwise. Moreover, it is difficult to conceive of transformation so complete that everyone can be included without some accommodation.

Whether or not these critiques of the minority rights model are persuasive, they raise a practical question about the effectiveness of the minority rights model: Although a rights-based model is able to accommodate substantive and transformative conceptions of equality, are the mechanisms of enforcement effective in achieving those conceptions of equality? I

\textsuperscript{138} Evelyn Kallen, \textit{Label Me Human: Minority Rights of Stigmatized Canadians} (Toronto: University of Toronto Press, 1989) at 192-220.

\textsuperscript{139} \textit{British Columbia (Public Service Employee Relations Commission) v. BCGSEU}, [1999] 3 S.C.R. 3 at para. 41.
will address that question in the next chapter. Before I do, it will be helpful to consider the alternative proposed by Bickenbach.

(e) Universalism

Following the work of American sociologist Irving Zola, Bickenbach argues for a strategy that views disability as a universal condition. Bickenbach describes this model as “universalism”. Universalism accepts the social model of disability. It also accepts that, because of their disabilities, people with disabilities are disadvantaged with respect to resources and opportunities. Universalists differ from the minority rights analysis in two fundamental respects. First, they do not view people with disabilities as a minority. In Bickenbach’s words, “a disability should not be viewed as a human attribute that demarcates one portion of humanity from another (as gender does, and race sometimes does), but rather as an infinitely various but universal feature of the human condition.” There are no inherent boundaries to the variation of human abilities; rather they are part of a continuum in which “the complete absence of disability, like the complete absence of ability, is a limiting case of theoretic interest only.” In other words, boundaries are drawn which have the effect of creating disability; some people become disabled because they fall on the wrong side of the line. However, according to the universalist model, those boundaries do not reflect inherent boundaries in human abilities but are drawn for political or social reasons. They are therefore negotiable as a matter of social or political policy.

140 The model is discussed in Bickenbach, “Minority Rights”, supra note 114 at 111-114.
141 Ibid. at 112.
142 Ibid.
The second premise on which the universalist model differs from the minority rights model is its focus on distributional injustice rather than discrimination. People with disabilities face issues involving the fit of their impairment to the social and structural environment. That fit is determined by how society distributes resources and opportunities. That distribution may unfairly benefit some people at the expense of others. Bickenbach acknowledges that unfair distribution may be the result of discriminatory behaviours or practices. He adds:

But when discrimination is not involved, the injustice may well remain, if the distribution of society’s resources and opportunities ignores the full range of human variation in need, and caters instead to some frozen and arbitrary conception of the normal.\textsuperscript{143}

The strategy advanced by universalists is to expand the range of the normal. Not by forcing people with disabilities to become more like an able-bodied norm, but by widening the range of normal “to more realistically include empirically-grounded human variation.”\textsuperscript{144} Bickenbach provides little guidance on how this strategy is to be achieved; however, he is clear that anti-discrimination legislation will not be the central tool. In his words:

Anti-discrimination legislation, long the darling of the disability movement, must in the end be seen as playing an essential, but limited, role in the equality agenda. Attempts to extend and expand anti-discrimination law in order to remedy inequality in all of its manifestations will ultimately be futile and may completely undermine the effectiveness of this law in its proper domain. To better serve the disability equality agenda, the spotlight must be turned from anti-discrimination to social welfare law – that complex and highly political domain of law and policy designed to facilitate the transfer of resources, accommodations, and opportunities for persons with disabilities.\textsuperscript{145}

\textsuperscript{143} Ibid. at 113.
\textsuperscript{144} Ibid.
\textsuperscript{145} Bickenbach, “Disability and Equality”, supra note 115 at 13.
For Bickenbach, the normative basis for disability policy should be equality. That is a point on which he and the minority rights supporters would likely agree. For him, equality for people with disabilities is an issue of distributive justice. But what is the basis for a claim to distributive justice? And if people with disabilities are simply part of a human continuum of abilities, what distinguishes their claim from those who lack skills or talents? Bickenbach recognizes the importance of these questions:

... an adequate normative basis for disablement would address the fundamental entitlement controversies that set the agenda for policy development. It is essential that the basis resolve the question whether the entitlement of people with disabilities are enforceable rights or merely benefits that society provides or withholds at pleasure.  

These are questions of policy that, according to Bickenbach, ought to be addressed in the political sphere. He recognizes, however, that once policy becomes a matter of politics, it must compete with other claims:

Disablement policy decisions, plainly enough, cannot be made in a vacuum. There are other calls on society, its resources, institutions and citizens. An adequate framework for policy decision-making must come to grips with macroallocative dilemmas, and it must shed light on what is to be done about our obligations to people with disabilities, given our other social obligations.

Bickenbach does not offer a fully-developed theory of equality that addresses these issues. Indeed, he observes that an equality theory to address all of the problems associated with disability policy “would surely count as the major intellectual achievement of this [twentieth] century (or more likely the next).”

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146 Bickenbach, Physical Disability, supra note 33 at 224.
147 Ibid. at 229.
148 Ibid. at 223.
Although Bickenbach does not provide a comprehensive theory, he is clear that the focus should be on distributive justice and that the minority rights approach, with its emphasis on anti-discrimination laws, is therefore inadequate. He offers two examples of American legislation that, in his view, address distributional injustice. The first Act transfers federal funds to the states to support programs for the development of assistive technology.\textsuperscript{149} The funding is conditional on the involvement of people with disabilities in the maintenance, improvement and evaluation of the programs. It is not immediately evident how this reflects a universalist view. The funding is directed to providing resources for people with disabilities through programs in which people with disabilities have considerable control. It is a program that fits comfortably in a minority rights model. Although this Act does not support the universalist perspective, it illustrates how a social welfare law may, in some circumstances, be able to redistribute resources to people with disabilities more effectively than anti-discrimination legislation.

This Act also illustrates one of the theoretical gaps in the universalist analysis. Under a minority rights analysis the justification for allocating funds to such a program and for giving people with disabilities some control over the funding is clear: people with disabilities are part of a minority group that has been victimized by a history of prejudice that is reflected in exclusionary environmental norms. This history separates them from people who lack skills or talents. What is the justification for the program if people with disabilities are not a minority group? Doubtless there are many people whose lives could be made easier through the development of new technology. Why privilege people with disabilities? Bickenbach might respond that the social obligation arises from society’s responsibility for the creation

\textsuperscript{149} Bickenbach, “Disability and Equality”, supra note 115 at 13.
of disability, even if it did not create a discrete and victimized minority. But what makes this redistribution more urgent than a redistribution to relieve other socially-created inequalities? A further problem is that social welfare law generally requires some way of determining who benefits. That will require some form of categorization. It is possible to imagine programs that do not rely on disability to categorize. A guaranteed income scheme could address the problem of poverty that is central to the experience of many people with disabilities, without reference to disability. However, many people with disabilities face additional costs because of their disability. A fair distribution would, presumably, compensate for those costs, but with what justification? There may be philosophical answers to that question; however, as a political strategy, a claim based on legal rights arising from discrimination may be more effective than one relying on philosophical principles.

Bickenbach’s second example is an Act that addresses the housing design obstacles faced by people with disabilities.\(^{150}\) In addition to prohibiting discrimination, the Act provides for regulations that set out detailed design and construction standards for multi-family housing, requiring “modest accessibility” for all new housing. Once again, this legislation is consistent with a minority rights model. As Bickenbach acknowledges, the legislation arose out of the anti-discrimination tradition. And, although it moves in the direction of universal design, it falls far short of the ideal. This raises another troubling aspect of the universal model. Bickenbach acknowledges that boundaries that create disability will be set for political or social reasons. He does not explain where the people who fall outside the boundaries fit in his model. If people with disabilities are not a minority group with rights flowing from that status, what are the people who are left out of the broad range of “normal”

envisioned by the universalist? Released from the mooring of minority rights, what is the basis of their claim for justice – pity, charity, medical need?

In fairness, Bickenbach’s aim in describing these examples is not to demonstrate the superiority of a strategy based on universalism over one based on minority rights. Rather it is to demonstrate the possibility of legislation that will more effectively address distributive inequality than anti-discrimination legislation does. As previously discussed, his view is based on his conception of the limited scope of anti-discrimination legislation. He states:

[T]o be effective as an instrument of corrective justice, anti-discrimination law must be substantively focused and procedurally relevant to its remedial purposes. Nothing is gained – and much is lost – by extending the scope of anti-discrimination law to include inequalities arising from distributive injustice or characterizing disability in a manner irrelevant to the phenomenon of discrimination.151

One does not have to accept his view of discrimination, or his view that a remedial purpose in inconsistent with redistribution, to recognize a more practical question about the effectiveness of anti-discrimination legislation in achieving equality.

5. Conclusion

Bickenbach argues that the clash between the minority rights and universalist paradigms will dominate the politics of disablement for some time to come.152 And, in his view, universalism will win out. I am not yet persuaded. However, his analysis raises serious questions about the tools we use to achieve equality, and in particular, about the effectiveness of anti-discrimination legislation. Mosoff’s study of Canadian human rights decisions

151 Ibid. at 14.
152 Bickenbach, “Minority Rights”, supra note 114 at 113.
provides further reason to question its effectiveness. She concludes that anti-discrimination legislation is not achieving its mandate of improving the dignity of people with disabilities by increasing their access to mainstream institutions.\textsuperscript{153} However, her solution is not to abandon anti-discrimination laws but to make them stronger.

As Bickenbach observes, this clash of paradigms is not a central concern for people with disabilities or their advocates. Their concerns are more practical. At a time when government support for social welfare is diminishing and their budgets are shrinking, when employers are demanding more productivity out of a downsized workforce, and when the concept of de-institutionalization has been embraced without the provision of adequate community support, advocates must address the pressing daily needs of their constituents. Philosophers may seek a single unifying paradigm to explain and solve the inequalities experienced by people with disabilities. Advocates seek tools that will work. Anti-discrimination laws have been heavily relied on as one such tool. The work of Bickenbach and Mosoff raise both theoretical and empirical questions about the effectiveness of such laws for achieving equality for people with disabilities. In the following chapter, I will look more closely at the effectiveness of anti-discrimination legislation as a tool for achieving equality.

\textsuperscript{153} Mosoff, \textit{supra} note 123 at 270.
Chapter IV: Mapping Equality

We do not want charity or special favours and privileges; only the same basic rights and freedoms as others. We wish to be treated as equal human beings – to be able to participate in the common life, to the extent of our capabilities, without having to face unnecessary barriers to our involvement. We have the same needs and desires as anyone else – to be self-sufficient – self-determining – to have a measure of dignity and self-respect – to be contributing and responsible members of society – to enjoy the same basic freedoms, rights and responsibilities as anyone else in this country.¹

1. Introduction

The aim of this project is to explore the point at which equality theory becomes a practical reality, particularly for people with disabilities. In the preceding chapters, my focus was on equality theory. The transition from theoretical abstraction to practical application requires that equality be defined so that its achievement can be measured. I began that process in Chapter II by describing the terminology of equality and considering various conceptions of equality. In Chapter III, the focus narrowed to a view of equality through the lens of disability rights. Supporters of the minority rights and universalist paradigms, as discussed in Chapter III, agree that people with disabilities experience inequalities because of their disabilities. It is also common ground that the inequalities are not merely related to individual acts of prejudice; widespread societal attitudes and norms also exclude people with disabilities. Achieving equality for people with disabilities therefore requires not only the elimination of individual prejudice, it also requires societal transformation. However, adherents of the two paradigms disagree on the strategy needed to achieve equality. In

particular, they disagree on the importance of anti-discrimination laws as a tool for achieving equality.

This chapter moves the discussion from equality theory to its practical application in anti-discrimination legislation. This then is the lynchpin chapter of this thesis. In it, I consider the administrative powers or procedures that are required to eliminate barriers to equality for people with disabilities, and whether those powers and procedures are or could be effectively incorporated within anti-discrimination laws. When I refer to "administrative powers or procedures", I mean powers and procedures that are provided through legislation, either expressly or impliedly, to agencies charged with the responsibility of administering the legislation. In particular, my focus is on the powers and procedures of statutory tribunals administering anti-discrimination legislation.

If equality for people with disabilities requires both the elimination of prejudice and the transformation of society, how is that to be achieved? According to Caroline Gooding, discrimination against people with disabilities operates through four modes: "individual bias, exclusionary classifications, neutral practices and structural barriers". Jerome Bickenbach, a universalist whose views are discussed in the previous chapter, would likely disagree that the latter two headings reflect discrimination; however, he would likely agree that they are barriers to equality. There are not bright lines between Gooding’s barriers: exclusionary classifications may reflect individual bias; neutral practices may also be structural barriers. Nevertheless, the four types of barriers are helpful in identifying a measure of equality for people with disabilities. That is, removal of some of the types of barriers will bring

\[\text{Caroline Gooding, } \text{Disabling Laws, Enabling Acts (London; Pluto Press, 1994) at 67.}\]
improvements for people with disabilities, but they will not bring the degree of inclusion that is required for substantive equality. All four types of barriers must be eliminated or overcome to achieve such equality. Addressing the four types of barriers ensures that the measure of equality reflects a disability rights perspective of substantive equality.

However, the four barriers raise many overlapping issues. Some repetition can be avoided by analyzing them within a framework that is tied more directly to theories of discrimination. Discrimination can operate directly or by adverse effect. As will be discussed in the following section, the legal distinction between these two types of discrimination has eroded in recent years. Nevertheless, this analysis will consider those barriers that operate directly separately from those that operate by adverse effect. I do so because, although there is little legal distinction between the two types of discrimination, in practice they operate differently and raise different issues of identification and proof. Moreover, separating them analytically is a reminder that both types of discrimination serve to exclude people with disabilities, and to achieve equality both must be addressed. The first two of Gooding's headings, individual bias and exclusionary classifications, operate directly. However, those two types of barriers raise different issues of proof and analysis and therefore will be addressed separately. The latter two headings, neutral practices and structural barriers, have an adverse effect. The two headings may raise different factual issues,; however, they raise similar issues of proof and analysis and will therefore be considered together.

Within my analysis, I will consider the relationship of each barrier to equality and discrimination theory, the powers necessary to identify a barrier to equality, the powers and
procedures necessary to investigate and determine whether the barrier contravenes anti-discrimination laws, and the remedial powers needed to remove the barrier. The powers and procedures must be considered in their legal context. I will begin with a description of that legal context with a focus on the legal meaning of “discrimination”, the legal burden of proof, and the tests that are used determine if the burden has been met.

2. Discrimination and the Burden of Proof

(a) The Meaning of Discrimination

In O'Malley the Supreme Court of Canada distinguished between two types of discrimination, direct and adverse effect. Direct discrimination is intentional conduct. That is, the discrimination exists because a person intends to differentiate between people because of a distinguishing feature, such as race or disability. The person engaging in the conduct “knowingly treated one or more minority group members less favorably than similarly situated majority group members because of their group status” or because of personal characteristics related to that status. As noted by Tarnopolsky, the intent is not necessarily malicious. The concern is with the intended differential treatment, not the motive for the differential treatment. Such discrimination may be expressed openly (i.e. “overt discrimination”) or it may be hidden or repressed (i.e. “covert discrimination”).

7 For an extended discussion of the use of “motive” and “intent” in anti-discrimination law, see C.N.R. v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114 at para. 26-33 [Action Travail]. The courts have not always been clear about the distinction between intent and motive. In McKinney v. University of Guelph, [1990] 3 S.C.R. 229 at 279, the majority of the Court said that a mandatory retirement policy, which expressly
Overt and covert discrimination, terms which will be of some significance in subsequent sections, are similar in that both are direct and intentional. They differ only in the way they are manifested: with covert discrimination, the intended discrimination is hidden behind seemingly neutral conduct. For example, overt discrimination occurs if an employer refuses a blind person a job because of the employer’s stated belief that a blind person cannot do the job. However, it is covert if the same employer, with the same – but unstated – belief, allows the blind person to compete, then denies the person the job with the explanation that there were other better qualified applicants.

“Adverse effect” discrimination is distinguished from direct discrimination, whether overt or covert, by the absence of any necessary intent to differentiate. The concept of adverse effect discrimination, also referred to as “disparate impact” or “constructive” discrimination, captures any conduct that, though neutral on its face, has a greater impact on an individual or group because of some characteristic related to their membership in a protected group. For example, if an employer requires a driver’s licence as a job qualification, that policy will screen out applicants who cannot obtain a driver’s licence. Some people with disabilities are prohibited from obtaining a driver’s licence because of their impairments. The employer’s policy will therefore indirectly screen out some people with disabilities, adversely effecting them because of their disability. The employer may not have intended to discriminate against people with disabilities, but the policy had that effect. Similarly, a requirement that an applicant pass a written examination will adversely affect people whose disability impairs

discriminated on the basis of age, raised the issue of adverse effect discrimination rather than direct or intentional discrimination.
their ability to complete written tests. A policy or practice that disproportionately adversely affects people with disabilities will constitute discrimination on the basis of disability even if there is no causal link between the policy or practice and the disability.

Canadian law also recognizes "systemic" discrimination. This type of discrimination was first recognized in the Supreme Court of Canada in the *Action Travail* case. Dickson, C.J.C. cited with approval the *Abella Report* on equality in employment:

... Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the *Abella Report*:

*Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ...*

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. This is why it is important to look at the results of a system.

In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief,

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8 In *Canada (Attorney General) v. Green (No. 1)* (1998), 34 C.H.R.R. D/166 (C.H.R.T.), aff'd with minor variations to the order (2000), 38 C.H.R.R. D/1 (F.C.T.D.), the complainant was screened out of a competition because of her performance on tests that were designed to assess her ability to learn French. Those tests required an ability to process auditory information which, due to dyslexia, was a problem for the complainant. The Tribunal ruled that she was discriminated against because of her disability.

9 *Supra* note 7.

both within and outside the group, that the exclusion is the result of “natural” forces, for example, that women “just can’t do the job” ...

In the *Action Travail* case, the discriminatory practices were evident in widespread and diverse practices that permeated the organization. Conduct such as this, that is pervasive and self-reinforcing within an organization, is what Abella appears to mean by systemic. I take a somewhat different view. In my view, systemic discrimination may also be the result of a single policy with narrow application. Discrimination is systemic when it is embedded in an organization’s operations. It occurs when mainstream norms that exclude or distinguish particular groups are incorporated into an organization’s policies and practices. The norms may by applied consciously or unconsciously. The norms may be widespread in society, such as physical barriers that exclude people with disabilities, or they may be confined to a particular organization or sector. Systemic discrimination can operate directly or by adverse effect, or by a combination of practices including both direct and adverse effect discrimination. I will consider systemic discrimination within the context of those types of discrimination rather than as a separate category.

(b) Burden of Proof

Whatever, the nature of the discrimination, under Canadian anti-discrimination law, the initial burden is on the complainant to establish a *prima facie* case. If that burden is met, the burden shifts to the respondent to lead evidence of a legitimate non-discriminatory explanation for the conduct or to provide evidence to support a statutory defence. The complainant may lead evidence to demonstrate that the proffered non-discriminatory explanation is pretextual; that is, the complainant may demonstrate that the non-

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discriminatory explanation is not genuine – it disguises a discriminatory intent. Or the complainant may lead evidence to rebut the statutory defence.\textsuperscript{12}

(i) The \textit{Prima Facie} Case

The Supreme Court of Canada has described a \textit{prima facie} case as "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the respondent-employer."\textsuperscript{13} Courts and tribunals recognize that, in cases of direct discrimination, it is often difficult to prove a discriminatory motive; therefore, the burden on the complainant is relatively light.\textsuperscript{14} Moreover, in such cases there is rarely direct evidence of discrimination. That is, there are no documents or public statements that expressly demonstrate direct discrimination. Instead, direct discrimination is proven by inferences from circumstantial evidence. In \textit{Shields v. Cameron},\textsuperscript{15} Council Member Williamson observed:

\begin{itemize}
  \item \textsuperscript{12} For a discussion of the burden of proof in Canadian discrimination cases, see Béatrice Vizkelety, \textit{Proving Discrimination in Canada} (Toronto: Carswell, 1987) at 120-130.
  \item \textsuperscript{13} O'Malley, supra note 3 at para. 28.
  \item \textsuperscript{14} Some recent decisions impose a heavier burden by requiring that complainants establish, as part of the \textit{prima facie} case, that the alleged conduct affected their dignity. In \textit{Law v. Canada (Employment and Immigration)}, [1999] 1 S.C.R. 497, the Court held that an analysis of a claim under s. 15 of the \textit{Canadian Charter of Rights and Freedoms}, Part I of the \textit{Constitution Act, 1982}, being Schedule B to the \textit{Canada Act 1982} (U.K.), 1982, c.11 [Charter] required a contextual consideration of the claimant’s dignity interests. In \textit{British Columbia Government and Service Employees Union v. British Columbia (Public Service Employee Relations Commission)}, 2002 BCCA 476, 216 D.L.R.(4th) 322, the Court of Appeal held that the \textit{Law} analysis was applicable when analysing complaints before the Human Rights Tribunal. However, the applicability of \textit{Law} analysis remains contentious (see, for example, \textit{Vancouver Rape Relief Society v. Nixon}, 2003 BCSC 1936, 22 B.C.L.R. (45th) 254 and the Supreme Court of Canada has recently indicated that, even in the \textit{Charter} context, the \textit{Law} analysis is not to be applied mechanically: \textit{Auton (Guardian ad litem of) v. British Columbia (Attorney General)}, [2004] 3 S.C.R. 657 at para 22-25. In my view, it is unlikely that the \textit{Law} analysis will be routinely or mechanically applied by human rights tribunals and I will not consider it further in this thesis. For further discussion of the issue, see Christine Boyle, "The Anti-Discrimination Norm in Human Rights and \textit{Charter} Law: \textit{Nixon v. Vancouver Rape Relief}" (2004) 37 U.B.C. L. Rev. 31.
  \item \textsuperscript{15} (1993), 20 C.H.R.R. D/222 at D/227, para. 42 (B.C.C.H.R.). Similarly in \textit{Basi v. Canadian National Railway Co. (No. 1)} (1988), 9 C.H.R.R. D/5029 (Can.Trib.), the Tribunal put it this way (at D/5038, para. 38481): “Discrimination is not a practice which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practised.”
\end{itemize}
... discrimination often does not occur through direct, unequivocal acts, but must be inferred from circumstantial evidence. Accordingly ... it is often relatively easy for a complainant to make out a prima facie case, i.e., persuade the tribunal that the respondent has engaged in conduct that requires explanation.

How is that inference drawn? According to Béatrice Vizkelety, "an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences."\(^{16}\) A number of tests have been proposed for establishing a prima facie case. One such test in the context of employment applications is described in Israeli v. Canadian Human Rights Commission\(^{17}\) as follows:

The complainant must show: 1. that he belongs to one of the groups which are subject to discrimination under the Act, e.g., religious, handicapped or racial groups; 2. that he applied for and was qualified for a job the employer wished to fill; 3. that although qualified he was rejected; and 4. that thereafter the employer continued to seek applicants with [the] complainant's qualifications.

In other words, if a qualified job applicant is a member of a protected group, is rejected, and the employer continues to look for qualified job applicants, it is reasonable to infer that membership in the group was the determining factor. This test is based on one developed a decade earlier in the United States in McDonnell Douglas Corporation v. Green.\(^{18}\) The test is appealing because it is based on information to which the complainant would have easy access: the first three points would be directly known to the complainant, and the fourth would be in the public domain. Nevertheless, in most cases, even in the employment context, the test is not helpful. Although the first three points are simple to establish, they do not lead to a logical inference that membership in the protected group is the likely reason for

\(^{16}\) Vizkelety, supra note 12 at 142.
the rejection: the complainant may have simply lost out to a better candidate. The fourth point is what makes the inference of discrimination reasonable. However, in an employment market in which there is surplus labour, it is rare that there is evidence that an employer continued to seek applicants after the complainant was rejected as the job will normally be filled through the competition. In *Shakes v. Rex Pak Ltd.*, 19 an Ontario Board of Inquiry modified the test to address this reality:

In an employment complaint, the Commission usually establishes a *prima facie* case by proving: (a) that the complainant was qualified for the particular employment; (b) that the complainant was not hired; and (c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint ... subsequently obtained the position.

Failure to meet the requirements of the *prima facie* tests described above is not fatal to a complaint of discrimination. This test is merely one method to infer that a *prima facie* case has been established. If a *prima facie* case is established, the evidentiary burden shifts to the respondent.

These tests address cases in which direct discrimination is alleged. The same burden of proof applies to cases alleging adverse effect or systemic discrimination. With adverse effect discrimination, the *prima facie* burden is met by providing evidence from which it is reasonable to infer that a rule or practice disproportionately affects the complaint because of his/her membership in the protected group. Systemic cases may involve direct or adverse effect discrimination, or a combination of them (as in the *Action Travail* case). But the burden of proof is the same: has a *prima facie* case of discrimination been established?

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(ii) The Respondent’s Defence

There are two approaches that a respondent may take in its defence. The first is to lead evidence rebutting the *prima facie* case. That is, a respondent may lead evidence to establish that the impugned conduct did not occur as alleged by the complainant or that, if it did occur, it was for reasons unrelated to the prohibited ground of discrimination. So, for example, in a case alleging discrimination based on disability, the employer might lead evidence to show that the complainant was not treated any differently than other employees, or that the adverse treatment was related to factors such as the complainant’s performance or qualifications that were not directly or indirectly related to the disability.

Alternatively, the respondent may lead evidence to show that the impugned conduct did not contravene the law because it is covered by a statutory exception. In cases of disability, the most commonly used exception is that the discrimination was based on a bona fide occupational requirement (“BFOR”) (or “bona fide justification” in the context of services). Canadian anti-discrimination legislation permits employers to discriminate when the discrimination is based on a BFOR. For example, under the current *Code*\(^20\) in British Columbia, s. 13(3) states: “Subsections (1) and (2) [prohibiting discrimination in employment] do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.”

The Supreme Court of Canada addressed the application of the BFOR defence several times through the 1980s and 1990s, at times reversing itself. The Court developed different analytical frameworks for direct and adverse effect discrimination. This distinction caused

considerable confusion and controversy.\textsuperscript{21} The Supreme Court of Canada re-visited the BFOR defence in the \textit{Meiorin}\textsuperscript{22} case. The Court concluded that there should be only one test for assessing a justification defence of discriminatory conduct, whether the conduct was direct discrimination or operated by adverse effect. Now, in all cases in which a respondent claims that its discriminatory conduct is justified, it must establish that:

(1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;

(2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and

(3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.\textsuperscript{23}

Shortly after \textit{Meiorin} was released, the Court released \textit{Grismer},\textsuperscript{24} which addressed exclusionary classifications in the context of disability. Mr. Grismer was denied a driver's licence because of a visual impairment, \textit{homonymous hemianopsia}, which affected his peripheral vision. According to the policy of the Superintendent of Motor Vehicles, such a condition was a bar to issuance of a driver’s licence. So, although Mr. Grismer passed his driver’s test, the Superintendent would not issue him a licence. The Court noted that there is no suggestion that the law requires that people with visual impairments be licensed to drive if they cannot do so safely; rather the question was whether Mr. Grismer should have been


\textsuperscript{22} \textit{British Columbia (Public Service Employee Relations Commission) v. BCGEU}, [1999] 3 S.C.R. 3 [\textit{Meiorin}].


\textsuperscript{24} \textit{Ibid.}
given an opportunity “to prove through an individual assessment that he could drive.”

McLachlin C.J.C., writing for a unanimous court added that the case:

... is also about combatting false assumptions regarding the effects of disabilities on individual capacities. All too often, persons with disabilities are assumed to be unable to accomplish certain tasks based on the experience of able-bodied individuals. The thrust of human rights legislation is to eliminate such assumptions and break down the barriers that stand in the way of equality for all.

The Court reinforces this message later in the decision, stating that employers and service-providers are required:

... to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics. Such characteristics are frequently based on bias and historical prejudice and cannot form the basis of reasonably necessary standards.

In addition to this clear statement that one of the purposes of anti-discrimination legislation is to eliminate barriers to equality that are based on historical prejudice and assumptions, the Court is clear that, to achieve this purpose, it will place the burden on those who seek to justify such discrimination. On the subject of safety, the Court states that, following Meiorin, risk has a limited role in the analysis. It rejects “the old notion that ‘sufficient risk’ could justify a discriminatory standard.” Instead, risk is considered as an issue related to undue

25 Ibid. at para. 2.
26 Ibid.
27 Ibid. at para. 19.
28 Ibid. at para. 30.
hardship. Further, the Court reiterates what it had said as early as the *Etobicoke*\(^\text{29}\) case: the objective element requires reliable evidence; impressionistic evidence will not suffice. For example, on the issue of cost, the Court stated:

While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. This Court rejected cost-based arguments in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 87-94, a case where the cost of accommodation was shown to be modest. I do not assert that cost is always irrelevant to accommodation. I do assert, however, that impressionistic evidence of increased expense will not generally suffice.\(^{30}\)

The courts have defined discrimination and established a burden of proof. If equality is to be achieved through enforcement of anti-discrimination laws, barriers to equality must be identified and proven to constitute discrimination within that legal context. For people with disabilities, that means the barriers identified by Gooding must constitute discrimination as described by the courts. And there must be mechanisms for identifying those barriers when they occur, for proving liability, and for eliminating the barriers. I turn now to consider those mechanisms.


3. **Direct Discrimination**

As discussed above, direct discrimination occurs when a person intentionally differentiates between people because of a distinguishing feature such as disability. That is, the person engaging in the conduct knowingly treats a person adversely because that person is a member of a group or has particular characteristics associated with the group. The conduct is intentional, but not necessarily malicious. Gooding describes two types of direct discrimination encountered by people with disabilities: individual bias and exclusionary classifications. There can be a blurring between these two categories of discriminatory conduct, as will be discussed below. What distinguishes them conceptually, if not always in reality, is the presence of some rational basis for exclusionary classifications.

(a) **Individual Bias**

According to Gooding: “This form of discrimination [i.e. discrimination based on individual bias] involves treating people who are disabled adversely without any rational reason or pretext.”\(^{31}\) That is, the differential treatment is the direct and intended result of an individual’s bias. It is discrimination based on prejudice. The prejudice is not necessarily malicious. It may be rooted in hostility and fear or the result of paternalism and pity.\(^{32}\) Nevertheless, it results in preconceptions, or bias, about the abilities of people with disabilities or their appropriate role in society. Whatever its cause, the prejudice is a barrier to equality. In a recent survey of lawyers with disabilities in British Columbia, over half of the lawyers who responded indicated that they had “experienced prejudice, devaluing and

\(^{31}\) Gooding, *supra* note 2 at 68.

stigma within the legal profession”, and that significantly prejudice came from fellow lawyers and judges. One respondent stated: “It comes down to attitudes and the presumption that, if you have any obvious disability, you are probably more or less incompetent.”

Another described a courtroom incident: “The judge flatly refused to talk to me; he would direct every question to the Crown.”

Differential treatment based on individual bias or prejudice accords with formal conceptions of inequality. It involves treating people with disabilities less favourably or denying them opportunities because of their disabilities. Moreover, as discussed above, the conduct is intentional in the sense that there is an intention to distinguish people with disabilities from others. This form of discrimination, which most closely resembles the popular conception of discrimination, was at the heart of the anti-discrimination legislation that was introduced in the 1960s. Even then, it was recognized that the bias did not necessarily flow from bigotry or malice. In 1968, Walter Tarnopolsky wrote:

[H]uman rights legislation is a recognition that it is not only bigots who discriminate, but fine “upright, gentlemenly” members of society as well. It is not so much out of hatred as out of discomfort or inconvenience, or out of the fear of loss of business, that most people discriminate.

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34 Hill, Ibid.
35 Ibid.
36 Tarnopolsky, supra note 6 at 572.
Discrimination based on individual bias is not always expressed openly; often it is hidden. As discussed above overt and covert discrimination differ only in the way they are expressed. They do not raise distinct theoretical questions; however, they raise different problems of proof so I will deal with them separately.

(i) Overt

As discussed in Chapter I, prior to the enactment of anti-discrimination legislation, differential treatment based on prejudice was often openly expressed. Signs saying “No Jews or Blacks” or “Men Only” were not uncommon. Such overt displays of racial, religious or gender discrimination are now rare. Yet they persist in the disability context. There are no signs saying “No Blind People Allowed” or “Able-Bodied People Only”; however, in many occupations, employees must pass medical screening tests that expressly exclude people because of specified impairments. For example, such screening may expressly exclude applicants whose vision does not meet a prescribed norms or who are diabetic or epileptic. These exclusionary classifications are a form of overt discrimination and may be based on bias. However, they are usually defended as being bona fide occupational requirements and raise different issues of proof than cases in which prejudice is alleged. I will therefore address such exclusionary classifications in a separate section of this chapter. Overt prejudice on grounds such as race or gender is often displayed through the creation of a hostile environment; conduct that is generally referred to as harassment. Such harassment

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37 In Cavallin v. North Burnaby Inn (1984), 6 C.H.R.R. D/2496 (B.C. Bd. Inq.) the respondent did not display a discriminatory sign, but a waitress made it clear that the manager “did not want to serve retarded people.” Such cases of overt prejudice appear to be rare.
may be evident through the use of derogatory racial terms or sexually offensive language. People with disabilities are not immune from such treatment.\footnote{See, for example, Rayland v. Mountainside Lodge Ltd., [1996] B.C.C.H.R.D. No. 18 (QL) in which the deaf complainant was subjected to derogatory remarks including “Are you deaf?” and “Read my lips.” The adjudicator found (at para. 49) that the conduct was analogous to racial or sexual harassment and was therefore discriminatory.}

Identifying a Barrier

What powers or procedures are necessary to remove barriers that are based on overt prejudice or stereotypes? Under anti-discrimination laws, the barrier must be capable of being construed as discrimination within the meaning of the applicable statute. In other words, the law must make freedom from such a barrier an enforceable right. I do not mean to suggest that barriers to equality can never be removed without an enforceable right under anti-discrimination laws. Many barriers are removed through education and persuasion, particularly if the barrier results from ignorance or misunderstanding. However, such change relies on the good will of those who are responsible for the barrier. Reliance only on the good will of individuals whose conduct is driven by prejudice is unlikely to be an effective means to achieve equality.\footnote{Early advocates recognized that, although education and persuasion played an important role in eradicating discrimination, an enforceable right must be available when those techniques failed. This was what Tarnopolsky referred to as “the iron hand in the velvet glove”: Tarnopolsky, \textit{supra} note 6 at 573.}

As discussed in Chapter I, prior to the introduction of anti-discrimination legislation, there was no right to be free from differential treatment based on prejudice.\footnote{See Christie v. York Corp., [1940] S.C.R. 139.} The first anti-discrimination legislation introduced in Canada expressly prohibited statements that indicated discrimination or an intention to discriminate.\footnote{Racial Discrimination Act, S.O. 1944, c. 51.} That language, which prohibits
overt discrimination, remains in some statutes. Beyond that express prohibition, all Canadian anti-discrimination statutes prohibit discrimination based on disability (or handicap). "Discrimination" is generally undefined; however, there is no doubt that it includes differential treatment based on prejudice. Bickenbach describes this as "core" discrimination. It is also generally accepted that it is appropriate to prohibit such conduct through anti-discrimination legislation. Even theorists, such as Bickenbach, who question the value of anti-discrimination legislation as a tool for achieving equality accept that it is an appropriate means to address this type of barrier. Anti-discrimination legislation establishes an enforceable right to be free from this type of inequality.

For a right to be exercised, there must be a means to identify a contravention. Canadian anti-discrimination legislation is complaint-driven. That is, the process is triggered when someone, not necessarily the victim, files a complaint alleging discrimination. In the case of overt differential treatment based on a prohibited ground, this is not generally a heavy burden. The discriminatory act is easily identified and all that is required is for someone to contact the human rights agency to inform it of the alleged contravention. However, for several reasons, that burden may weigh heavily on some people with disabilities. First, a

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42 See, for example, Human Rights Code, R.S.O. 1990, c. H-19, s. 13 [Ontario Code]; BC Code, supra note 20, s. 7.
44 There is an extreme libertarian view that opposes any constraints on individual action: see, for example, Richard A. Epstein, Equal Opportunity or More Opportunity? The Good Thing about Discrimination (London: Civitas for The Institute for the Study of Civil Society, 2000). That view has not been accepted in Canadian law.
46 In Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. 181, the SCC confirmed that anti-discrimination is the appropriate mechanism to exercise a claim for discrimination. In particular, it held that there is no tort of discrimination. There are, however, other mechanisms to address conduct that could be described as discrimination, such as hate crimes or assault. A discussion of those mechanisms is beyond the scope of this thesis.
person may be unaware of the right, either because he/she lacks access to information about
the right or has insufficient cognitive ability to understand the right. Second, the person may
lack the ability to communicate the allegation. And third, the person may be in a position of
relative powerlessness in which he/she is dependent on the assistance of someone in a
position of power who may be the cause of the discrimination. These barriers are reflected in
the under-representation of people with serious disabilities in the pool of complainants in
disability cases that proceed to hearing. For these reasons, reactive complaint-based model
may not be an effective means for the most vulnerable people with disabilities to achieve
equality.

One means to ameliorate this problem is to allow other people to file complaints on behalf of
the victims. Legislation may allow individuals to file on behalf of others or allow the
Human Rights Commission to file a complaint. In either case, the overt prejudice must be
identified before a complaint can be filed; therefore, this is only a partial solution. If the
affected individual is unable to recognize the discrimination and it is not observed by anyone
else, permitting others to file a complaint will not assist the victim. Moreover, even if
recognized, the barrier must be communicated to the Commission, which will generally have
no independent knowledge of the discrimination. The ability of a Commission to file
complaints is therefore unlikely on its own to have a significant effect. To achieve equality
for those who are most vulnerable or most seriously disabled, more proactive measures are
needed to identify barriers that are based on individual bias.

48 See, for example, BC Code, supra note 20, s. 21; Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 40 [CHRA].
49 See, for example, Ontario Code, supra note 42, s. 32(2); CHRA, ibid., s. 40(3).
Proving Discrimination

Once a possible contravention is identified, there must be a process for determining whether the complaint has merit. Like all cases, overt discrimination requires determining whether the alleged conduct occurred and, if so, whether it constitutes discrimination. That requires a fact-finding process and a legal determination. Where the allegation is of overt conduct, fact-finding is relatively straightforward. If the conduct is not admitted, evidence from those who were in a position to observe the conduct will be helpful. If there are no witnesses other than the parties, evidence relevant to credibility will be needed. Evidence of similar facts is often led in harassment cases; for example a complainant alleging employment harassment may lead evidence from other individuals who experienced similar harassment while in the respondent’s employ. None of this requires broad investigatory powers. There must be some ability to obtain the evidence of witnesses and to test their truthfulness. A subpoena power and the right to examine and cross-examine will be sufficient for most cases of overt discrimination.

The initial fact-finding need not be quasi-judicial; most Canadian jurisdictions have a preliminary administrative process in which staff with investigatory powers determine whether there is sufficient evidence of a contravention to warrant a more formal process.\textsuperscript{50} Whether an administrative or quasi-judicial process is followed, it must be consistent with the applicable principles of administrative fairness or natural justice.

\textsuperscript{50} See, for example, CHRA, \textit{ibid.}, s. 44.
At some point a determination must be made on the merits of the complaint. This may be done administratively or quasi-judicially. In Canada, the most common approach has been to use administrative procedures to screen out those cases with little or no merit and send the remainder to a formal hearing. Generally that hearing is conducted by an independent tribunal. The nature of the process is not important for the purpose of achieving equality; what matters is its effectiveness. Its effectiveness is determined by its ability to make a fair determination and to provide an effective remedy.

In cases of overt direct discrimination, the determination is relatively straightforward. The contravention is, by definition, apparent. The nature of the conduct establishes both that there was discrimination and that it was on a prohibited ground. For example, in Cavallin, proof that a waitress said that the restaurant did not want to serve mentally retarded people was sufficient to establish a contravention. There was no need to establish why she said it; that is apparent from the conduct. If the trier of fact finds that the complainant has established that the conduct occurred as alleged, there is no legitimate non-discriminatory excuse. The conduct occurred and on its face it is discriminatory. The only defence therefore is reliance on a statutory exemption such as a BFOR. Although such defences may arise in cases where the complaint is based on individual bias or prejudice, they are more likely to arise in the context of exclusionary practices and will be discussed in that section.

51 See, for example, Ontario Code, supra note 42, s. 36.
52 Under the Human Rights Act, S.B.C. 1984, c. 22, the administrative and quasi-judicial functions were conducted by the same body, the Council of Human Rights. The Council established internal procedures to ensure that the person who performed the quasi-judicial function was not involved in the administrative functions. I will return to the issue of independence in the next chapter.
53 Supra, note 37.
Righting the Wrong

Thus, in cases of overt direct discrimination other than exclusionary practices, once the prima facie case is established, there is generally little left to do except consider the consequences of the contravention. In the absence of a defence, the focus turns to remedy. What outcome is necessary to achieve equality? Clearly, part of the desired outcome must be to stop the discriminatory conduct and prevent it from happening again. Additionally, the effects of the unequal treatment must be ameliorated. The Supreme Court of Canada has accepted that the purpose of anti-discrimination legislation is remedial, not punitive.54 So decision-makers must have the power to order that the wrong-doer cease the conduct and not do it again. They must also have the power to make the victim whole. Such powers are routinely granted in anti-discrimination legislation.55 But that is not enough to achieve equality. It is also important to prevent other wrong-doers from engaging in the same conduct. The legislation prohibits such conduct, and in cases of overt discrimination there is no ambiguity about whether the conduct contravenes that prohibition. Therefore, issuing an order prohibiting what is already prohibited would not appear to serve any useful purpose. Moreover, to control the conduct of other wrong-doers, the decision-maker would require the power to make orders affecting parties not before the tribunal. This is an important issue to which I will return in a later section. For now, it will suffice to note that anti-discrimination agencies do not have the power to make orders binding parties that are not before the tribunal. Therefore, if equality requires that non-parties be prevented from engaging in the type of overt direct discrimination discussed here, some other mechanism must be found. Education provides one such mechanism. The publication of the decision, either through the

55 See, for example, BC Code, supra note 20, s. 37; Ontario Code, supra note 42, s. 41.
mainstream media or through other means serves that purpose. Reports of the consequences of a decision, which usually include monetary compensation, may persuade those who engage in overt discriminatory practices to cease those practices. Generally public education is part of the mandate of anti-discrimination agencies, and the publication of decisions is important in fulfilling that mandate.

Most complaints are resolved without a hearing, often through mediation or conciliation. From the early days of human rights commissions, such resolutions have been seen as an integral component of anti-discrimination enforcement. Describing the enforcement of the first Ontario Human Rights Code, Eberlee and Hill stated: "Every effort is made to conciliate the complained-of matter and to obtain a settlement." Mediation continues to be an effective tool for resolving many discrimination complaints. It is less clear that mediation is an effective tool for achieving equality. The parties are not limited in their remedial approach; mediation offers the possibility of wide-ranging and creative solutions to removing barriers to equality. On the other hand, they are not required to agree to any particular measures, and the resolution of the dispute may allow the barrier to remain intact. Most settlements are confidential; therefore, it is difficult to assess whether mediation achieves equality as effectively as it resolves disputes. Further consideration of the

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56 A common complaint about Canadian human rights agencies is that the monetary awards are typically too low to have much deterrent effect. Although damages to compensate for emotional injury remain relatively low ($10,000 is at the high end), damages for lost income are increasing and may exceed $100,000: see Bolster v. B.C. (Min. of Public Safety and Solicitor General), 2004 BCHRT 32 (judicial review petition pending) and Hutchinson v. B.C. (Min. of Health), 2004 BCHRT 58 (judicial review petition pending).

57 S.O. 1961-62, c. 93.


effectiveness of mediation is beyond the scope of this thesis.\textsuperscript{60} It is clear, however, that mediation and other alternate forms of dispute resolution will remain an important part of any anti-discrimination enforcement model. Whatever their merits for achieving equality, their absence would require that systems that now have difficulty managing their caseload in a timely manner carry an even heavier burden.

(ii) Covert

\textit{Identifying a Barrier}

To this point, I have been addressing inequality caused by overt expressions of prejudice. For grounds other than disability, such as race or religion, prejudice is rarely displayed openly. One of the results of public education programs concerning discrimination and of media attention to human rights decisions is that prejudiced individuals now are likely to know that it is unacceptable to express their beliefs openly. Such individuals are more likely to engage in covert discrimination. On grounds other than disability, therefore, discrimination complaints frequently address covert discrimination. However, a review of Canadian human rights decisions reveals few cases that address covert discrimination against people with disabilities. It is possible that this is because, contrary to the views of disability rights advocates, prejudice against people with disabilities is relatively rare.\textsuperscript{61} A more likely explanation, in my view, is that prejudice against people with disabilities is more acceptable than on other grounds and, therefore, more likely to be expressed openly. For example, employers frequently admit that they deny opportunities to people with disabilities based on

\textsuperscript{60} The ongoing study of Professors Bryden and Black may shed light on the question of the effectiveness of mediation in achieving substantive equality.

\textsuperscript{61} It is also possible that Commissions tend to dismiss such cases on the ground of inadequate evidence rather than refer them to hearing. An assessment of this possibility would require an empirical analysis of the Commission screening process that is beyond the scope of this thesis.
their perceived (in)ability to perform a particular job. Such expressions of discrimination against people with disabilities do not bring the immediate public condemnation that a similar expression based on race or religion would bring. Covert discrimination on the basis of disability is rare because it is unnecessary.

Though rare, covert discrimination on the basis of disability certainly exists. Moreover, as the reality of the burden of the justification defence, as described in Meiorin, becomes clearer, there may be greater motivation to disguise a discriminatory intent behind covert practices. Therefore, it is important to consider the powers and procedures necessary to remove barriers created through covert discrimination against disabled people. The challenge raised by covert discrimination is one of proof. In cases of direct discrimination, it is necessary to establish that the conduct was motivated by an intention to discriminate on a prohibited ground. In overt cases, that motivation is evident by the conduct itself; in covert cases it must be unveiled. In the following section, I address the administrative powers and procedures required to expose covert discriminatory barriers.

**Proving Discrimination**

The burden, as in other discrimination cases, is on the complainant to establish a *prima facie* case. As discussed above, the test described in *Shakes v. Rex Pak Ltd.* is commonly used for establishing a *prima facie* case. That test illustrates a problem of proof in covert discrimination cases. The test requires that the complainant establish that he/she was

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62 Gooding, *supra* note 2 at 68, refers to an American case, *Smith v. Barton*, 914 F.2d 1330 (1990), in which the judge noted that there are few cases in which defendants deny that they relied on the complainant's disability, claiming instead that the disability rendered the person unsuitable for the job.

63 Supra note 22 and accompanying text.

64 Supra note 18.
qualified for the position, was rejected, and that the person hired was no better qualified but
without the complainant's distinguishing feature. The third part of the test requires evidence
of the successful candidate's qualifications and personal characteristics (such as race,
disability or gender). That is not information that would normally be in the possession of the
complainant. Nor is it information that an employer is likely to divulge unless compelled to
do so. 65 Therefore, to be effective, this test requires a mechanism to compel employers to
disclose information about the competition process and, in particular, the qualifications and
characteristics of the successful applicant(s). In most Canadian jurisdictions investigators
have sufficiently broad legislative powers to compel production of this information. For
example, under the *Canadian Human Rights Act*:

... an investigator with a warrant ... may, at any reasonable time, enter and
search any premises in order to carry out such inquiries as are reasonably
necessary for the investigation of a complaint 66

... [and] may require any individual found in any premises entered pursuant to
this section to produce for inspection or for the purpose of obtaining copies
thereof or extracts therefrom any books or other documents containing any
matter relevant to the investigation. 67

There are other sources of evidence from which an inference can be drawn that
discriminatory practices occurred. In some cases, it may be drawn from statements that do
not express a discriminatory act, or intention to act, but indicate a prejudiced attitude. 68

Evidence of such an attitude does not directly prove the discriminatory act; however, it is
circumstantial evidence consistent with discrimination. Similarly, questions of an applicant

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65 In a growing number of circumstances, an employer is prohibited by freedom of information and privacy laws
from divulging private information unless compelled to do so.
66 *Supra* note 48, s. 43(2.1).
67 *Ibid.* , s. 43(2.4).
68 Sometimes the statements may themselves be evidence of direct discrimination, such as when harassment is
alleged. However, here they are being used as circumstantial evidence of another discriminatory act such as a
refusal to hire.
related to a proscribed ground do not prove that the person asking the questions engaged in
discrimination;\(^69\) rather, they are circumstantial evidence of a discriminatory intent. If the
statements were made to the complainant, or are otherwise within the complainant’s
knowledge, the complainant can provide this evidence to the fact-finder without difficulty
and investigatory powers are not required. However, sometimes statements are made to
personnel unknown to the complainant or are recorded on or in documents. That information
will likely remain undisclosed unless there is some mechanism to compel production of it
through an investigation or discovery process.

One of the earliest methods of demonstrating a discriminatory practice was “testing”. This
involves setting up a situation in which people who are similarly situated except for some
distinguishing characteristic, such as disability, seek the same opportunity at about the same
time. For example, researchers Frances Henry and Effie Ginzberg used testing to assess
racial discrimination in employment in Ontario.\(^70\) They ran two tests. In one, two teams of
testers, matched for age, sex, education and employment experience, applied for advertised
positions. The only major difference between them was race. In the second test they used
testers with “non-Canadian accents” and “ethnic sounding names” to determine whether they
would be treated differently over the phone by employers. The tests provided “clear
evidence of significant levels of racial discriminations.”\(^71\)

\(^69\) However, such questions may be defined as discrimination in the applicable anti-discrimination legislation: see, for Ontario Code, supra note 42, s. 23(2).


\(^71\) Ibid. at 5. In a related project, researchers who surveyed employers to elicit management perspectives on
discrimination, found further evidence of racial discrimination: Brenda Billingsley and Leon Muszynski, “No
discrimination here?: Toronto employers and the multi-racial workforce” (Social Planning Council of
Metropolitan Toronto and Urban Alliance on Race Relations, 1985).
Testing can be described as follows:

Testing can be considered as a controlled experiment. For example, if an employer is suspected of discrimination, two black persons might be assigned to apply for the job advertised. If the blacks are told the job has been taken, two white persons would be sent immediately to make application. If all relevant factors – such as qualifications, dress, manner, age, etc. – are uniform among blacks and whites but only a white is hired or allowed to file an application, it is clear that a legitimate complaint exists.\(^\text{72}\)

The results of such a test, as with any experiment, are most persuasive if the test has been properly conducted.\(^\text{73}\) In situations where it is possible to act quickly, if a person with a disability is refused an opportunity, a simple test could be conducted by having someone apply with the same qualifications and no discernible disability.

In practice testing is rarely done by Canadian human rights agencies. That may be partly due to perceptions that tests are deceptive, and therefore a practice with which government agencies might not want to be associated. Tarnopolsky addresses that concern:

[Although test cases may involve deception to the extent that the person attempting to obtain the evidence may not want the accommodation or the employment which he asks for, the deception does not diminish the veracity of the fact of discrimination. “The proponents of test cases are not trouble-makers. They are trouble finders.” If the trouble were not there in the form of a discriminatory act, they would not find it.\(^\text{74}\)

It may also be that testing is rarely a viable option for human rights agencies. To be useful as evidence to prove an individual complaint, a test must be conducted very soon after the


\(^{73}\) Testing may be accepted as evidence even if the process falls short of the standard of a controlled experiment: see, for example, in *Najari v. Cook* (1992), 18 C.H.R.R. D/232 (B.C.C.H.R.). The quality of the test may be related more to probative value than admissibility.

alleged discriminatory act. It must be done while the opportunity is still available, and before the wrong-doer has notice of the complaint. It would be an unusual case in which a human rights agency could respond to a complaint quickly enough to obtain useful results. Testing may, however, be a useful technique if an agency wishes to be more proactive. For example, in *Davis v. Fankowski*, the respondent was suspected of refusing to rent cottages to Blacks. The Ontario Human Rights Commission supported the complainants in running a test, the results of which were accepted by a Board of Inquiry (with some misgivings about the propriety of testing) as proof of racial discrimination. Such evidence could either be used to support a complaint, including one filed by the commission in those jurisdictions having such a power, or to launch a public education program. Testing can be conducted by advocates as effectively as by agents of a government agency. Whether conducted by advocates or government agents, testing requires no legislated powers.

An inference sufficient to establish a *prima facie* case may also be drawn from statistics showing a pattern or standard practice of discrimination. In *Blake v. Min. of Correctional Services*, the Board of Inquiry observed: “Because discrimination is often covert and intent to discriminate difficult to prove, a trier of fact must be sensitive to obvious inferences that may be gleaned from statistics.”

Statistics can be powerful circumstantial evidence from which an inference of discriminatory practices can be drawn. They are used either to infer that an individual or group is the

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75 This unreported decision is described in Vizkelety, *supra* note 12 at p. 147, n. 55.
77 For a discussion of the use of statistics to prove direct discrimination in Canadian law, see Vizkelety, *supra* note 12 at 156-162. For an American analysis, see Baldus & Cole, *supra* note 4 generally.
victim of direct discrimination based on a prohibited ground, or to demonstrate that a policy has an adverse effect on an individual or group because of their membership in a protected category. Later in this chapter, I will return to the use of statistics to prove adverse effect discrimination. When used to prove direct discrimination, statistics are led to show a difference between the number of members of the protected group that successfully obtain the opportunity — usually employment — and the number that, statistically, would be expected to succeed if the opportunities were fairly distributed. The outcome statistics will be compared to some comparator such as the applicant pool, the available workforce, or the community generally. A difference in the representation of members of the protected group is indicative of discrimination. However, considerable caution must be used in assessing the weight of such evidence, and the reliability and significance of the statistics must be considered. Expert evidence is usually necessary to assist in interpreting the statistics. Statistics will be most persuasive when they are supported by other evidence of discrimination. It is open to the respondent to contradict such statistics by providing other more reliable statistics or by proving that factors other than discrimination may explain the differences.

Statistics are generally more useful to prove discrimination against a group than an individual. Where the statistics demonstrate that a group is significantly underrepresented among successful candidates, all else being equal, it is logical to infer that membership in the group was a factor contributing to the difference. However, it is not logical to infer that, because a group is being discriminated against, a decision affecting a particular individual is influenced by that discriminatory factor. It is not sufficient for an individual to prove that

78 Baldus & Cole, ibid. at 5 and 34.
he/she belongs to a group that is being discriminated against; there must also be evidence that
the individual was similarly victimized. If, for example, the individual was screened out of a
competition for failure to meet *bona fide* minimum qualifications that were consistently
applied, that person is unlikely to succeed in an individual complaint of discrimination
regardless of the statistics. Nevertheless, even in individual cases, statistics are useful.
Statistics demonstrating a significant under-representation of a particular group in an
employer's workforce may be sufficient to justify a full investigation by an agency of a
complaint by a member of that group. In the context of a hearing, such statistics might be
sufficient to call for an explanation by the employer. Moreover, statistics in combination
with other circumstantial evidence are useful evidence from which to infer discrimination in
the absence of other apparent reasons for the distinction.\(^{79}\)

For people with disabilities, however, statistics are of limited value. There is little
information available about the representation of people with disabilities in the workforce.
What information there is generally groups people with disabilities together; they do not
distinguish degrees of impairment or categories of disability. People with disabilities are a
diverse group, and the social response to impairment will vary based on the degree and type
of impairment.\(^{80}\) An employer may be comfortable hiring people with spinal cord injuries
but not blind people, or will hire people with cerebral palsy unless the impairment affects
their speech. Because the social response to impairment will vary based on the degree and


\(^{80}\) For a discussion of the diversity of disability, see Chapter III above at note 116 and accompanying text.
type of impairment, finding appropriate samples from which meaningful inferences can be drawn is difficult if not impossible.\(^81\)

To the extent that statistics are useful to identify inequality, all of the necessary data is not generally available to complainants. Complainants will have access to any public (or "stock") data concerning the workforce or community-wide representation of their group. They will not normally have access to the demographics of applicant pools for specific opportunities or of those who have succeeded in the opportunity. Access to the applicant-flow data will require some power or authority to gather the information. That power may be provided through the investigatory powers in anti-discrimination legislation, or it may be addressed in other legislation such as employment equity legislation.\(^82\) In either case, if the data is available, the analysis of the data requires special skills but not special powers.

Similar fact evidence is frequently admitted as circumstantial evidence of differential treatment, particularly in harassment cases. Similar fact evidence is evidence of conduct on other occasions that is similar to the conduct that forms the basis of the complaint. For example, evidence that other disabled employees were subjected to derogatory name-calling may be admitted to prove a pattern of discriminatory conduct towards people with disabilities. The admissibility of such evidence is often in dispute; however, generally its

\(^{81}\) For a discussion of the problem of using statistics to demonstrate bias against people with disabilities, see Gooding, *supra* note 2 at 68-69.

\(^{82}\) Typically, employment equity legislation requires employers to compile data on the representation of target groups in its workforce and to publicly report that data. For example, under federal employment equity legislation, employers must provide reports on the numbers of employees in each of the target groups, one of which is people with disabilities: *Employment Equity Act*, S.C. 1995, c. 44, ss. 17 & 18.
admissibility will turn on its probative value.\textsuperscript{83} For people with disabilities, the same problems of comparison arise in finding similar fact evidence as in finding statistical evidence. That is, to have much probative value, the similar conduct must have happened to people with similar impairments.\textsuperscript{84} Producing similar fact evidence does not require any powers beyond those necessary to obtain information from any witness. However, locating such witnesses may be challenging for a complainant who does not have any access to a respondent’s records or personnel. Often, such evidence is from former employees. Unless an employer is compelled to produce lists of past employees, or other employees can be asked for such a list, those witnesses are likely to remain unknown.

\textit{Righting the Wrong}

If a contravention of the legislation is established, covert discrimination raises the same remedial issues as overt discrimination.

(iii) Summary

There can be no doubt that one of the purposes of Canadian anti-discrimination legislation was, and is, to eliminate discriminatory barriers that are based on individual prejudice. When displayed overtly, such barriers are relatively easy to identify, prove and remedy. When the discrimination is covert, identification and proof are more difficult. Some process is necessary to enable the complainant to obtain the information needed to prove the complaint.

\textsuperscript{83} For a discussion of cases in which the issue of admissibility was discussed see Vizkelety, \textit{supra} note 12 at 148-156. See also \textit{Holmes v. LBE Holdings Inc.} (1996), 30 C.H.R.R. D/231 (B.C.C.H.R.).

\textsuperscript{84} In practice, adjudicators may be willing to accept evidence that falls below this standard. In \textit{Legge v. Princess Auto \& Machinery Ltd.} (1983), 4 C.H.R.R. D/1339, a Manitoba Board of Inquiry accepted evidence that the employer had employed other employees who had “various disabilities” to rebut evidence that it had discriminated against a person with asthma.
In most Canadian jurisdictions, that is achieved through broad investigatory powers. Under the direct access model in British Columbia, it is achieved through disclosure rules. (I will consider that model more closely in the next chapter.) Remediation of barriers based on individual prejudice will generally require the power to order the wrong-doer to cease and desist and to return the victim to the position he/she would have been in if the discrimination had not occurred. These powers are routinely granted to anti-discrimination adjudicators. Although the powers necessary to address barriers based on individual prejudice are incorporated into most Canadian anti-discrimination systems, for people with disabilities, that may not be sufficient to have a significant effect on equality. First, their diversity raises particular problems of proof; and second, people with disabilities are more likely to encounter other forms of barriers to equality, such as exclusionary classifications.

(b) Exclusionary Classifications

Cases involving covert prejudice against people with disabilities are rare; cases addressing classifications that expressly exclude people with disabilities are common. “Exclusionary classifications” are rules that, on their face, deny opportunities to people with disabilities. Typically they are policies, written or unwritten, that describe specific impairments that, if identified, will lead to exclusion from an opportunity. For example, licensing standards may exclude people with poor peripheral vision, or police officers may be required to meet specific vision standards. Such standards directly discriminate against people with visual impairments. For the purpose of this section, I am referring only to those classifications that refer explicitly to specific impairments. Neutral policies, such as a requirement for a driver’s

85 See Grismer, supra note 23.
licence, may have the same exclusionary effect; however, they raise some different issues which I will address in the next section.

Exclusionary classifications are a form of overt direct discrimination. They constitute express differential treatment and, therefore, are an inequality even within a formal conception of equality. The motive behind such classifications may not be malicious – it may be based on a sincere belief in the operational requirements of the business. On the other hand, that belief may be based on prejudice or stereotypes, in which case it is conceptually no different than the discrimination discussed in the previous section. As discussed above, to succeed with a BFOR defence, a respondent must show that the classification was implemented in good faith. Proof of prejudice would therefore vitiate the defence. Proving prejudice in the context of an exclusionary classification would have the same requirements as for other cases involving individual bias. For the purpose of this section, I will assume the exclusionary classification is implemented in good faith.

The term “exclusionary classifications” suggests standards that are designed with some forethought to apply to a group of people; nevertheless, I will include situations where the classification appears to have been developed to address one particular complainant. For example, in Cameron v. Nel-Gor Castle Nursing Home\(^8\) the complainant, who had three fingers on her left hand that were shorter than normal, was denied a nursing job because of concerns about her ability to lift patients safely. The requirement that nurses not have fingers shorter than normal was created to address the employer’s safety concerns about Ms. Cameron. It is, of course, possible – even likely – that such “one-off” classifications are

manifestations of individual bias or prejudice. However, as discussed above, courts and tribunals have been generally willing to accept that such classifications are implemented in good faith and apply a BFOR analysis to the defence. Therefore, although a classification was created in response to a particular situation, the analysis and proof required are the same as for classifications that exclude all members of a group, some of whom may be unknown or unidentified at the time the classification is introduced.

In *Cameron*, the Board of Inquiry, Peter Cumming (now Cumming, J.), identified the equality issues raised by that complaint, and by other exclusionary classifications:

First, there is an objective of securing for the handicapped person equality of opportunity with respect to employment. Everyone deserves the same opportunity and chance to make the most of life, regardless of physical or mental handicap.

A corollary is to require an employer to make a decision respecting employment of a handicapped person based upon a fair and accurate assessment of her true ability, and not based upon a stereotype or misconception about her handicap. Having a handicap means not being able to do one or more important things that most people can do. The law cannot make a person's handicap disappear, of course, but it does insist that every person receive a fair chance to show what she is able to do, taking into account her ability. The law now protects every person from being pre-judged because of handicap by an employer. Equal opportunity for someone with a handicap means equal opportunity to do the things she can do effectively and safely. The law does not impose any undue hardship upon the employer, or require that a person who presents a danger to the safety of the employee or others, or the employer's property, be employed.\(^{88}\)

In other words, the law recognizes that exclusionary classifications are barriers to equality for people with disabilities. However, the law also recognizes that sometimes such barriers are necessary despite their discriminatory impact.

\(^{88}\) *Ibid.* at paras. 18390-18391.
Identifying a Barrier

Identifying exclusionary barriers to equality is rarely difficult. Generally, the exclusionary classification is provided to the complainant as the reason for the denial of opportunity. The person or organization making the denial will, in most cases, admit that it is based on the disability. However, that admission is usually accompanied by a claim of justification or BFOR.

Proving Discrimination

Because exclusionary classifications are generally admitted or are readily apparent, proving a prima facie case is simple. Generally, it can be established without any powers of investigation or discovery. However, as discussed above, the law allows exclusionary classifications that are necessary for, among other things, reasons of safety or efficiency. The burden of proof of a justification defence is on the person seeking to justify the exclusionary classification.\(^{89}\) That person will have access to the information that it needs to do so, assuming such information is available. Therefore, no powers or procedures are necessary to facilitate that process. Frequently, some expert evidence will be required. The person seeking to justify the classification is able to retain and instruct an expert without any powers of compulsion.

Some mechanism must be available to determine whether the information supporting the justification is sufficient to meet the legal test.\(^{90}\) There must be an opportunity for the

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\(^{89}\) *Etobicoke*, supra note 29 at para 6893. The burden is the ordinary civil standard. (See also *Zurich Insurance Co. v. Ontario (Human Rights Comm.)* (1992), 16 C.H.R.R. D/255 at D/263 (S.C.C.) in which the Court stated that exceptions to the legislation are to be interpreted narrowly.)

\(^{90}\) That test is described above at note 23 and accompanying text.
respondent to advance its justification and for an independent assessment of the merits of the justification. In most Canadian jurisdictions, that is done initially through an inquisitorial process in which a commission investigator gathers information that either supports or contradicts the defence. In those jurisdictions, the legislation provides the investigatory powers needed to obtain information to respond to the justification. The commission then decides whether the matter should proceed to a formal hearing where the justification defence is tested through an adversarial, quasi-judicial process. For that process to be effective, there must be an opportunity for someone to present evidence to rebut the justification evidence. In most jurisdictions, the human rights commission has carriage of the case if it goes to hearing.\footnote{See, for example, Ontario Code, supra note 42, s. 39(2).}

In jurisdictions such as British Columbia which operate on a direct access model, the person alleging discrimination (or a representative) is responsible for mounting the response to the defence.\footnote{The direct access model is discussed in the next chapter. There are now two Canadian jurisdictions, British Columbia and Nunavut, operating under a direct access model.} The direct access model raises several challenges for those seeking to achieve equality by challenging exclusionary barriers. They have two goals: to demonstrate that the classification is unnecessary; or, in the alternative, to demonstrate that accommodation such as individualized assessment is possible without imposing an undue hardship on the respondent. To achieve those goals, they need to know the basis for the justification. Where the respondent relies on an expert report, disclosure may be provided for in the agency’s rules or in separate legislation.\footnote{See, for example, Evidence Act, R.S.B.C. 1996, c. 124, ss. 10 & 11.} In the absence of such legislation, administrative tribunals
have inherent power over their procedures. A process requiring disclosure of the expert report, or any other evidence supporting the justification defence is, therefore, within the inherent powers of most tribunals. However, the complainant must also be able to challenge that evidence. To be effective, that may require an understanding of the history, purpose and structure of the organization that has the classification, the process leading up to the classification, and the motives of the people involved. Much of that could be obtained through cross-examination; however, cross-examination will be most effective when it is done by a well-informed cross-examiner. Further, an expert opinion may be necessary in response to the justification. The expert may require information about the history, purpose and structure of the organization. So, under an adversarial model, discovery or disclosure mechanisms are needed to ensure an even playing field.

Most experts charge for their opinions. And if lawyers or investigators must be hired to obtain evidence to respond to the justification or to represent the complainant, they too will charge for their services. One of the features that identifies people with disabilities is their relative poverty. Most will not have the funds to mount a serious challenge to an exclusionary classification. To be effective, the issue of cost must be addressed. In most Canadian jurisdictions complainants are spared this cost. Human rights commissions will bear any costs incurred during the investigation phase, and if the commission refers the matter to hearing it will assume carriage, and therefore the costs, of the complaint. In British Columbia, as discussed in Chapter V, the costs are addressed through the equivalent of legal aid funding.

95 If, however, the commission does not refer the case to hearing and dismisses it, the complainant may face costs if he or she decides to seek judicial review of the commission’s decision.
Righting the Wrong

To be effective, the legislation must provide a remedy for the inequality. That means striking down the rule if its necessity has not been justified or requiring some accommodation, such as individual assessment, if that does not create an undue hardship. Under anti-discrimination legislation tribunals generally have sufficient powers to do either.\textsuperscript{96}

Compensation to make the individual victim whole is provided for in Canadian legislation.\textsuperscript{97}

In addition to compensating the victim, the victim must be given the opportunity that was lost if the victim still seeks it.\textsuperscript{98} However, an individual remedy may not remove the barrier for other people with disabilities. If the exclusionary classification remains but with a required individual assessment, each person with the excluded disability will be entitled to an individual assessment under that classification. However, if the assessment is not given, or is unfairly given, often the only recourse is to file a complaint and seek another determination and order.\textsuperscript{99} Moreover, the determination only applies to the particular classification. The organization may continue to apply other exclusionary classifications until they too are the subject of complaints. A series of cases involving driver’s licences is illustrative: In \textit{Grismer},\textsuperscript{100} the Supreme Court of Canada determined that the respondent had not established

\textsuperscript{96} For example, in \textit{Etobicoke}, supra note 29, the Board of Inquiry found that a mandatory retirement rule was not a BFOR and ordered reinstatement, and in \textit{Grismer}, supra note 23, the Human Rights Council required an individual assessment. Both decisions were upheld by the Supreme Court of Canada.

\textsuperscript{97} In contrast, compensation is not available to individuals under Title III of the \textit{Americans with Disabilities Act}. This was part of a “fragile compromise” necessary to obtain Congressional approval of the Act: Ruth Colker, “ADA Title III: A Fragile Compromise”, in Leslie Pickering Francis & Anita Silvers, eds., \textit{Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions} (New York: Routledge, 2000) 293.

\textsuperscript{98} In many cases, due to the passage of time, the complainant is no longer interested in the opportunity that was lost.

\textsuperscript{99} The order may require that the respondent refrain from committing similar infractions. However, in most cases, enforcement of the order requires an application to court, which may be expensive and cumbersome. Moreover, the court will require some proof that the conduct is sufficiently similar to contravene the order.

\textsuperscript{100} \textit{Supra} note 23.
that individual assessment of a particular visual impairment was an undue hardship and uphold the order that such an assessment be conducted. In *Hussey v. British Columbia (Ministry of Transportation)*,\textsuperscript{101} the complainant was denied a licence by the same respondent because he could not meet the applicable hearing standard. No individual assessment was offered. The complaint was upheld. Arguably, at the time there was some doubt about the legal requirements due to an appeal of *Grismer*. However, in *Bolster*,\textsuperscript{102} the same respondent was again before the Tribunal to defend its medical standards, this time because the complainant was unable to meet the visual acuity standards for a driver's licence. Under a complaint-driven model, it is difficult to imagine an order that could be crafted that would prevent this case-by-case approach. Since the justification for each standard is different, fairness requires that in each case the respondent be given an opportunity to present evidence of its justification for each practice to the adjudicator.

Moreover, an order that requires one organization to either eliminate an exclusionary classification or conduct individual assessments does not apply to organizations that are not before the tribunal. A fundamental principle of administrative justice is that a tribunal cannot issue an order affecting the interests of a party unless that party has been given an opportunity to be heard.\textsuperscript{103} Absent an express authority to add a party, a human rights tribunal does not have the power to add a party to a complaint.\textsuperscript{104} Although non-party organizations may decide that the principles apply equally to them and voluntarily apply the

\textsuperscript{102} Supra note 56.
\textsuperscript{103} See, for example, *G.V.R.D.E.U. v. British Columbia (Council of Human Rights)* (1993), 21 C.H.R.R. D/171 (B.C.S.C.) in which the Court held that the Council of Human Rights could not issue a consent order affecting the interests of union members without giving their union an opportunity to be heard.
decision, they are not required to do so. In fact, it may not be in their interests to do so. They may learn from the outcome of one case what evidence is necessary to justify their own conduct. For example, in *Etobicoke*, a mandatory retirement requirement was struck down by the Supreme Court of Canada because a BFOR was not established; in a subsequent case with similar facts, the Supreme Court of Canada accepted, based on less impressionistic evidence, that a similar standard was a BFOR. 105

**Summary**

Exclusionary classifications are clearly a form of barrier that is intended to be covered by anti-discrimination legislation. If they were not, there would be no need for the statutory BFOR defence. Moreover, it is a type of barrier that is of particular importance to disabled people. Many, perhaps most, reported human rights decisions on the ground of disability address such classifications. The discrimination is overt and direct, and therefore relatively easy to prove. However, the defences are often technical. And the evidence required to rebut them may be difficult and costly to acquire. The information can be obtained through powers of investigation or disclosure. The cost must be addressed, either by providing the commission with the power to prosecute the complaint or by providing funding to the complainant. The issue of cost is therefore not so much a question of administrative powers as one of political will to provide adequate funds to enforce equality rights. The case-by-case, complaint-driven model can result in such classifications being struck down, which benefits all those people who would have been excluded by the classification. However, under this model, the classifications are only considered when they become the subject of a

complaint, and must be considered one classification at a time. This remedial limitation is common to the barriers addressed in the following section.

4. Adverse Effect Discrimination

(a) Neutral Practices and Structural Barriers

As discussed above, adverse effect discrimination occurs when policies or practices that are facially neutral and treat everyone the same have a disparate impact on members of a group because of some characteristic that is related to their membership in that group. Practices such as selection criteria or operational policies may be based on mainstream norms that reflect an unconscious social bias that exclude people with disabilities. These neutral practices are similar to the exclusionary classifications discussed in the previous section, except that they operate indirectly. These practices may be built into the organizational or physical structures of an institution. Whether the barriers are part of the organizational or physical structure, they arise, as Gooding says, "from the fact that tasks and workplaces have been constructed for able-bodied people, and as a result may be unsuitable for a disabled person without some form of alteration." These structures operate in both the physical and social environments and at all levels of society, from individual organizations to the institutions of government.

Barriers that result from adverse effect discrimination do not fit comfortably into a formal conception of equality: the practices or structures do not treat people with disabilities differently than any other group, nor are they intended, at least on their face, to exclude

106 Gooding, supra note 2 at 72.
107 Ibid. at 73.
people with disabilities. Indeed, for Bickenbach, such practices do not constitute discrimination in its core meaning and should not be addressed through anti-discrimination laws.\textsuperscript{108}

Some American theorists have sought to fit adverse effect disability discrimination within a formal conception of equality. One approach is to identify prejudice as the source of inequality. For example, Martha McClusky argues that prejudice is central to the problems people with disabilities face.\textsuperscript{109} She notes that courts view differentiation based on sex and race differently than disability-based differentiation. They are likely to view sex- and race-based differentiation as being caused by prejudice. In those cases, disparate impact (or adverse effect) analysis is used “to reach subtle forms of prejudice and the effects of past unequal treatment.”\textsuperscript{110} She observes that, in contrast, most courts and commentators believe that physical difference related to disability is relevant to the ability to function in society; therefore, the cause of the relative disadvantage is the real physical differences rather than prejudice.\textsuperscript{111} Under this view, when disability is involved, the disparate impact model should be limited in its application “to avoid interfering with legitimate interests.” Applying a feminist analysis, McClusky argues that the disadvantages associated with disability,

\textsuperscript{108} Bickenbach, “Minority Rights”, \textit{supra} note 43 at 109-110.
\textsuperscript{110} McClusky, \textit{ibid.} at 866.
\textsuperscript{111} Such a view may be reflected in \textit{Eaton v. Brant County Board of Education}, [1997] 1 S.C.R. 241. In that case, the court observed that s. 15 of the Charter aims at eliminating discrimination based on stereotypical attitudes. It added, however, that for people with disabilities there was also an objective of fine-tuning society so that their “true characteristics” did not serve as headwinds to their inclusion in the mainstream. The court concluded that segregation may sometimes be protective of equality for people with disabilities and refused to adopt a rebuttable presumption that integration was in a child’s best interests.
including access to transportation, are the result of widespread prejudice and able-bodied norms. Accordingly, the same adverse effects analysis should be used to identify subtle forms of prejudice against people with disabilities.

Anita Silvers does not focus on prejudice; rather, she uses the language of unequal treatment to bring seemingly neutral practices within a formal model of equality.\footnote{Anita Silvers, “Formal Justice” in Anita Silvers, David Wasserman & Mary B. Mahowald, Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy (Lanham, Maryland: Rowman & Littlefield Publishers, 1998) 13 at 126-127. For further discussion of Silvers’ approach, see Chapter III above at note 92 and accompanying text.} As discussed in the previous chapter, she argues that, when assessing equality of treatment, formal equality requires consideration of the “scope of the treatment’s instrumentality”; that is, similar treatment is not equal treatment if people do not have similar instrumental options to pursue the opportunity. For example, an employer advertising a job opportunity is not treating every applicant equally if the competition is held in a location that is physically inaccessible to some potential applicants, or if it can only be reached by public transport that does not accommodate people with disabilities. In these circumstances, although treated similarly, applicants with disabilities do not have the same opportunities to pursue the job. For Silvers, “formal justice is substantive”,\footnote{Ibid, at 123.} it provides people with similar instrumental options.

These attempts to fit an adverse effect analysis into a formal conception of equality may be driven by judicial precedent in the United States. Americans are reluctant to recognize positive rights, such as welfare rights or affirmative action.\footnote{The concept of positive rights is discussed above in Chapter II.} When positive rights, are recognized, such as in the Americans with Disabilities Act,\footnote{42 U.S.C. §12101 (1990).} they are narrowly construed.\footnote{Ibid. at 123.}
There are, therefore, strategic reasons for describing barriers to equality as an infringement on negative rights. American courts have also shown a preference for formal rather than substantive (or "material") equality. As a result, American disability rights advocates ... must justify a material equality statute [i.e., the Americans with Disabilities Act] in formal equality terms. [They] ... must show that the ADA's requirements to remove barriers and provide accommodation were really Congress's attempt to deter future intentional discrimination or remedy past intentional discrimination.

Canadian courts have long recognized that a formal conception of equality is not sufficient to eliminate inequality, and that discrimination, as prohibited by anti-discrimination statutes, includes neutral practices that have an adverse effect based on a prohibited ground. In O'Malley, the Supreme Court of Canada said:

The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

And in Andrews, McIntyre J. said:

118 Ibid. at 291.
119 Supra note 3 at 546-47 [emphasis added].
I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.¹²⁰

This view has been reiterated in a number of decisions including *Meiorin*, which concerned a neutral practice having an adverse effect.¹²¹ Under Canadian law, therefore, anti-discrimination laws provide an enforceable right to be free from such discrimination.¹²² There is no requirement that neutral discriminatory practices fit within a formal conception of equality.

Similarly, it is recognized that structural barriers may constitute discrimination on the basis of disability. In 1980, Michael Huck, who relied on a motorized wheelchair, decided to watch a movie in a local theatre. The theatre had level access into the viewing area. However, once inside, he found that there were no areas in the normal seating that could accommodate a person in a wheelchair. He was told that he could either transfer out of his wheelchair into a regular seat or sit in an area in front of the seats closest to the screen. He did not consider either option acceptable and filed a human rights complaint. Eventually, his complaint reached the Saskatchewan Court of Appeal.¹²³ Vancise J.A., writing for himself and Hall J.A., held that “[a]cts which are neutral on their face i.e., treating one as equal, are

¹²⁰ *Andrews*, *supra* note 5 at 174.
¹²² For a comparison of the Canadian and American approaches, see Mayerson & Yee, *supra* note 117. The distinction between the two approaches was expressly noted by the Supreme Court of Canada in *Eldridge*, ibid., in which the Court observed (at 616) that under the s. 15 of the *Charter* it “has staked out a different path than the United States Supreme Court, which requires a discriminatory intent in order to ground an equal protection claim under the Fourteenth Amendment of the Constitution.”
prohibited if they have the effect of continuing discriminatory practices"; and determined that:

The failure to provide Mr. Huck with a choice of places from which to view the movie is prejudicial treatment because of the complainant's disability and handicap. It makes little sense to provide access ramps and bathroom facilities for the physically handicapped and not to make provision for them to view the movie itself.

The Court upheld the Board of Inquiry's decision, which included an order that the theatre be renovated to include wheelchair seating in different areas of the theatre.

Identifying a Barrier

As discussed above, the complaint-based system through which the right to be free from discriminatory practices is enforced creates burdens for people with the most severe disabilities. That burden is exacerbated where the practices are neutral. The effect of the neutral practices may not be readily apparent. Some investigation will be necessary to determine whether there are practices that have an adverse effect and to identify those practices. An enforcement system that is entirely complaint-driven and that provides for no proactive measures will fail to identify many barriers arising from adverse effect discrimination, particularly those affecting people who are most vulnerable.

Proving Discrimination

If a complaint alleges adverse effect discrimination, the complainant must establish a *prima facie* case that the practice has an adverse effect because of disability. In some cases, that is

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easily established. A policy requiring a driver's licence will have an adverse effect on a blind person because of the disability. All that is required is evidence that blind people cannot obtain driver's licences. In such cases, statistics are unnecessary to prove an adverse effect. In many cases the effect will be less clear. A particular practice may not adversely affect all members of the protected group, or it might affect some more than others.

In many cases statistics will be helpful. Statistics may be used to demonstrate that a rule or practice disproportionately affects a particular group. In such cases, statistics show that the impugned rule or requirement selects applicants in a pattern that relates to a ground of discrimination. In the landmark case of *Griggs v. Duke Power Co.*,\(^{127}\) the U.S. Supreme Court considered the application of Title VII (the “Equal Employment Opportunity” part) of the *Civil Rights Act* of 1964.\(^ {128}\) Chief Justice Burger stated (at pp. 429–30) that the objective in the enactment of Title VII was

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\text{... to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices.}
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Statistics were used to establish that a high school completion requirement and standardized tests had a disproportionate effect on Blacks.\(^ {129}\)

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\(^{127}\) 401 U.S. 424 (4th Cir. 1971).


\(^{129}\) For a similar use of statistics in a Canadian case, see *Chapdelaine v. Air Canada* (1987), 9 C.H.R.R. D/4449 (Can.Trib); appeal of order at (1991), 15 C.H.R.R. D/22 (Can. Rev.Trib.), in which statistics were used to show that a rule requiring pilots be at least 5'6'' tall disproportionately affected women.
Statistics may also be used to establish systemic discrimination. In *Action Travail*, statistics establishing a disparity between the representation of women in the Canadian workforce and the representation of women in the employer’s workforce played a key role in establishing systemic discrimination. There was also considerable evidence of prejudicial attitudes within the workplace and their effect on women.

In systemic cases, statistics are used to show that an organization’s system of rules and practices has a disproportionate affect on a protected group. They may, for example, show that a disproportionately low number of members of the protected group have been hired or promoted by an organization, or that they have been disproportionately excluded from the organization’s services. The disproportionately low representation may be caused by rules or practice that discriminate directly or by adverse effect, or a combination of both. The statistics may not identify the barrier (or barriers) that is causing the under-representation, merely that there is a systemic problem that has resulted in the disproportionate exclusion of the protected group. In a disparate impact analysis, statistics are used to show that a particular rule or practice disproportionately disqualifies members of the protected group.

Whether they are used to establish the disproportionate effect of a rule or to suggest systemic discrimination, statistics require interpretation. In the words of Béatrice Vizkelety:

> ... statistical proof is not without its share of drawbacks. There is the risk of misuse and even the abuse of this type of evidence. An oft-quoted criticism is that “too many use statistics as a drunk man uses a lamppost — for support, and not illumination”. The use of statistical evidence is not an end in itself nor

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130 *Supra* note 7.

131 For an extensive discussion of the use of statistical proof in discrimination cases, see Baldus & Cole, *supra* note 4.
is it a substitute for legal reasoning. In the barrage of statistics and conflicting expert evidence one ought not to lose sight of the substantive law when determining the usefulness, the relevance, and the weight of statistical evidence ... Not surprisingly, this evidence will most often call for the assistance of expert testimony.\textsuperscript{132}

To be effective, therefore, anti-discrimination legislation must enable investigation of the effect of facially neutral practices, which must include gathering statistics. In most jurisdictions, that can be accomplished, in theory, by providing investigators with sufficient powers to obtain that information. In practice, although most human rights statutes provide those powers, pressures caused by chronic delays and backlogs may result in superficial investigations that do not probe deeply into these types of complaints. However, that is a problem of resource allocation rather than administrative authority. If legislation, such as the current BC \textit{Code}, does not include an administrative power of investigation, complainants will have to conduct their own investigation. Even with legal representation, that will be challenging. If the issue is a neutral rule or practice that has disproportionate effect, statistics may be generally available. For example, a complaint that an employer’s requirement that applicant’s possess a university degree adversely affects people with learning disabilities may be supported by stock data available through public sources on the educational achievements of people with learning disabilities. However, where systemic discrimination is alleged, the complainant may require evidence of the employer’s workforce composition. The data may not exist or, if it does, the employer may not voluntarily disclose it. A requirement to disclose documents will assist if the document exists; a requirement that a document be created requires some other procedure and resources. The complainant may also require information about the internal practices and attitudes affecting employment.

\textsuperscript{132} Vizkelety, \textit{supra} note 12 at p. 175.
decisions. Obtaining that evidence will be difficult, particularly if the complainant is outside the organization.

Inequalities arising from structural barriers may, in general, be easier to identify and prove than neutral practices that are embedded in the organization’s operations. Often it will be apparent that structural barriers are preventing access. For example, statistical evidence will not be needed to establish that, if the only access to an organization is up a flight of stairs, people who cannot climb stairs will be adversely affected with respect to any opportunities for which access to the organization is required. Organizational barriers may be more difficult to identify. For example, an employer’s expectation that its employees work full-time may reflect broader societal norms.\(^{133}\) To demonstrate discrimination on the basis of disability, evidence would need to be led proving that a full-time work requirement adversely affected a person or persons because of their disability.

If the complainant establishes a *prima facie* case, the burden shifts to the respondent to justify the practice. Prior to *Meiorin*, respondents were required to demonstrate that the discriminatory rule was rationally connected to the work involved and, if so, that the complainant could not be accommodated without undue hardship to the employer.

Following *Meiorin* the same three-part test is applied to all justification defences, whether they relate to exclusionary classifications that discriminate directly or to neutral practices having an adverse effect. The powers needed for determining the merits of justification

\(^{133}\) Another such norm is the “hale and hearty worker”, who is energetic, has high concentration abilities, is alert to adapt to changing conditions, and can withstand a variety of stresses in good humour: Iris Marion Young, “Disability and the Definition of Work”, in Leslie Pickering Francis & Anita Silvers, eds., *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions* (New York: Routledge, 2000) 169.
defence of discriminatory neutral practices are the same as those required for exclusionary classifications.

Righting the Wrong

If a justification defence fails, what is the appropriate remedy? Prior to Meiorin, the rational connection test was an easy burden to meet; therefore, most cases turned on the duty to accommodate. If the employer could not demonstrate undue hardship, the rule or practice was allowed to stand but accommodation of the complainant was required. This result led to a concern, discussed in the previous chapter, that the duty to accommodate was not an effective tool for achieving equality. Accommodating the individual provides an opportunity for that individual; however, it leaves in place practices that may be based on able-bodied norms.\textsuperscript{134} The Court attempted to address that concern in Meiorin. Under the new test, neutral practices that have an adverse effect will undergo the same scrutiny as those that discriminate directly. In either case, the practice or rule may be struck down or modified if it is not shown to be objectively necessary. Accommodation is still considered, but as part of the determination of necessity. This test offers the possibility that, where it can be shown that people with disabilities are victims of neutral practices, the rule will be changed rather than merely requiring accommodation of the disabled person to a norm that reflects historical discrimination or prejudice.

To be effective at eliminating neutral practices, anti-discrimination must be able to strike down or vary the rule or practice. For example, in *Hutchinson* the B.C. Human Rights Tribunal found that a government policy that prohibited disabled people who qualified for long term care from hiring family members as care-givers was discriminatory. The Tribunal ordered “that the Ministry allow for exceptions to its policy” and that it “develop a set of criteria, within nine months of the date of this decision, to allow for the hire of family members, on a case-by-case basis”.

The “exceptions” portion of the order is akin to a requirement to provide reasonable accommodation; the “new criteria” portion goes further by requiring the government to rewrite its rules.

Discriminatory practices may result from neutral provisions in legislation. Under Canadian law, human rights statutes have primacy over other non-constitutional legislation. If a human rights tribunal is unable, through application of principles of statutory interpretation, to interpret the discriminatory provision so as to remove the conflict with the anti-discrimination statute, the anti-discrimination statute will prevail.

Where a specific rule is identified that is having an adverse effect, changing the rule to eliminate its discriminatory effect will eliminate the barrier. However, where the discrimination is systemic, there may be a number of practices which combine to discriminate against a particular group. Rather than attempting to address each practice in isolation, a systemic remedy (i.e., one that is targeted at broad systemic inequality, rather

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135 *Supra* note 56.
138 The primacy of human rights statutes may be codified in the legislation: see, for example, BC Code, *supra* note 20, s. 4.
than at specific practices) may be the most effective response. For example, in *Action Travail*\(^{139}\) there were a number of practices, not all of which were neutral, that prevented women from achieving equality within the employer’s workforce. The Tribunal ordered, among other things, that the employer implement an employment equity program. On appeal, the employer challenged the Tribunal’s authority to issue such an order. The Court held that the Tribunal had authority under the legislation to order a “special program” to remedy the effects of systemic discrimination, and that its order was such a program.\(^{140}\) It is not clear that, in the absence of express statutory authority, a tribunal could order an affirmative action program. Although such remedies are incorporated in some Canadian statutes,\(^{141}\) the practice is not universal.\(^{142}\)

A systemic remedy, such as an employment equity policy, holds the potential to transform discriminatory norms within an organization, partly by forcing the organization to scrutinize its policies and practices, but also by changing the composition of the organization to include people whose norms are more likely to vary from the mainstream. The remedy, however, is limited to that organization. As discussed previously, a tribunal cannot order an organization to implement systemic remedies unless the organization is before the tribunal. As a result, under a complaint-driven model, elimination of neutral practices will only occur one organization at a time.

\(^{139}\) *Action Travail*, supra note 7.

\(^{140}\) Ibid.

\(^{141}\) See, for example, *CHRA*, supra note 48, s. 53(2)(a); *BC Code*, supra note 20, s. 37(2)(c); *Manitoba Human Rights Code*, C.C.S.M. c. H175, s. 42(2)(e).

In theory, a systemic remedy is an appropriate response to systemic discrimination against people with disabilities.\textsuperscript{143} However, to be effective, such a remedy would have to be carefully designed. That is, it must be designed to ensure that it provides a remedy to those people with disabilities who are being excluded. It would have to clearly describe the disabilities being targeted; otherwise, given the scope of "disability", the organization could comply with the order by including employees with relatively minor disabilities among those counted as disabled. For example, broadly defined, disability could include managers suffering from hypertension or secretaries with carpal tunnel syndrome. While such impairments may be the basis for discrimination complaints, in most cases they should not be included as disabilities for the purpose of systemic remedies. The challenge of designing appropriate systemic remedies for people with disabilities is compounded by the lack of useful statistics; the problem of remedying disability-based systemic discrimination mirrors the problem of establishing it.

Clearly, in addition to compensating the victim, an effective remedy requires removal of the barrier. As with neutral practices, that can involve either removing the barrier or accommodating the individual. The \textit{Huck} case illustrates the authority of tribunals to make orders requiring barrier removal under anti-discrimination legislation.\textsuperscript{144} However, it also illustrates the limitations of the remedial authority of such tribunals. The aim of the order in \textit{Huck} was not merely to accommodate him and other patrons using wheelchairs by allowing

\footnotesize
\begin{itemize}
    \item In practice, such remedies are rare on any ground. I am unaware of any cases in which such a remedy has been ordered to address disability-based discrimination. I am aware that parties have negotiated systemic remedies as part of a mediated resolution. Unfortunately, the results of those discussions are confidential and, therefore, are not helpful examples.
    \item Similarly in \textit{Quesnel v. London Educational Health Centre} (1995), 28 C.H.R.R. D/474 (Ont. Bd.Inq.) the Board of Inquiry ordered the respondent to build a ramp, at a cost of $20,000, to provide wheelchair access to his chiropractic office.
\end{itemize}
them a space to view the movie. Indeed, the Court did not rely on the duty to accommodate in its decision. Instead, the Court aimed at providing wheelchair-users with the same viewing experience as other patrons, which includes some choice in seating location, and therefore ordered that seats be removed at more than one location in the theatre. But the decision in *Huck* did not reach beyond that particular theatre. I am unaware of any surveys related to wheelchair-accessible seating in theatres. As a wheelchair user, however, in my experience most theatres limit such seating to a few spaces in the back row. Although this accommodates people with disabilities by enabling them to view the movie, it does not meet the goal of equal viewing experience. Moreover, despite *Huck*, issues of access to movie theatres continue to be litigated.  

The *Huck* case illustrates the limitations of tribunal orders, as discussed in previous sections. That is, the order does not extend beyond the circumstances of the particular case. Most importantly, the order in *Huck* does not get at the root issue: the design norms that create theatres and other buildings that, by application of a vision of society that does not include people in wheelchairs, excludes that segment of the population. To achieve equality for disabled people that vision must be changed, or alternatively, designers must be forced to comply with an inclusive vision.

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So far, I have been discussing physical and organizational structural barriers that cause inequalities for people with disabilities. There are other structural barriers that run deeper and reflect the historical exclusion of disabled people. As a consequence, even if one imagines a world in which physical and organizational barriers were suddenly removed, people with disabilities would not be in a position to compete equally. They are poorer and less educated than their able-bodied peers. In the barrier-free world I have imagined, education will also be barrier-free. However, even in that world, it would take years for people with disabilities to catch up to the rest of society, and it is likely that some people with mental disabilities will never catch up even with discrimination-free access. Moreover, we do not live in that world. We live in a world in which the employment prospects for people with disabilities are grim even with improving access to education.¹⁴⁶

Under even the most optimistic view, disabled people will continue to face barriers to employment for years to come. They will continue to experience inequalities related to income. Further, there will likely always be people with disabilities that are so severe that they will never be able to participate fully in society.¹⁴⁷ What can be done under anti-discrimination legislation to ameliorate these deep-rooted inequalities? Tribunals can and have issued orders requiring the removal of barriers to equal education.¹⁴⁸ They can require that an individual educational institution make changes to enhance access. They may also be

¹⁴⁶ For example, although access to a legal education has improved for people with disabilities, lawyers with disabilities face significant barriers to employment within the legal profession: Hill, supra note 33; McCarthy, supra note 33.
¹⁴⁷ My failure to provide an example of such a disability is intentional. With technological developments and changing attitudes about disability, people that would a decade or two ago have been considered to have disabilities too severe to allow participation are now gainfully employed.
able to require that governments distribute their funding in a non-discriminatory manner.\textsuperscript{149} Such changes are clearly beneficial. But can tribunals do anything to direct a proactive societal response to the educational deficit among people with disabilities? In my opinion, they cannot. At best, human rights agencies can put pressure on governments through public statements that address the issue. The broad-based re-distribution of educational opportunities that would be required to effect change must come through government policy.

Similarly, chronic poverty is a barrier for many people with disabilities, particularly those whose income is from a government welfare program.\textsuperscript{150} Tribunals, may redistribute funds within those programs to remedy the effects of discrimination.\textsuperscript{151} However, it is doubtful that a tribunal could order that government re-distribute general revenue to increase welfare to poor disabled people to ameliorate the effects of poverty.\textsuperscript{152}

(b) Summary

Under Canadian law, neutral practices that have an adverse effect on the basis of disability constitute discrimination under anti-discrimination legislation. If they are identified and there is no bona justification for them, tribunals are able to provide remedies that will

\textsuperscript{149} See, for example, \textit{Hutchinson, supra note 56}. However, there is now some doubt about the extent to which tribunals can remedy discrimination through direct government expenditures. Recent decisions of the Supreme Court of Canada suggest an increasing reluctance to interfere in the discretionary funding decisions of government: see \textit{Newfoundland (Treasury Board) v. N.A.P.E.}, 2004 SCC 66; \textit{Auton (Guardian ad litem of) v. British Columbia (Attorney General)}, [2004] 3 S.C.R. 657.

\textsuperscript{150} In 2001, 29% of people with disabilities derived most of their income from government transfers: Government of Canada, “Advancing the Inclusion of People with Disabilities 2004”, available online at Social Development Canada website, 

\textsuperscript{151} See, for example, \textit{Hutchinson, supra note 56}.

\textsuperscript{152} To date, the legal system has been ineffective in dealing with poverty issues. See, for example, \textit{Gosselin v Québec (Attorney General)}, [2002] 4 S.C.R. 429; \textit{Federated Anti-Poverty Groups of B.C. v. Vancouver (City)}, 2002 BCSC 105; \textit{Vancouver (City) v. Maurice}, 2003 BCSC 1271.
eliminate or ameliorate the particular inequality. Those remedies may go beyond providing equality for a particular individual by ensuring that the practices do not deny opportunities to other people with disabilities. But neutral practices can be difficult to identify, particularly in the absence of helpful data related to workers with disabilities. A complaint-driven model is an unreliable means to identify neutral practices that operate as barriers. Moreover, although anti-discrimination models provide administrative and quasi-judicial mechanisms for determining whether such practices are unjustified discrimination, the case-by-case approach limits the effectiveness of any remediation and unequally distributes the cost of remediating such practices.

Structural barriers are an important source of inequality for people with disabilities. In Canada, they are recognized as a form of discrimination under anti-discrimination legislation. Such barriers are often easily identified and their effect on people with disabilities is apparent and requires little proof. Courts and tribunals have established tests to determine whether such barriers are justified. Tribunals have the power to remove barriers or, if that is not possible, to require accommodation. Those powers include the ability to require some forms of re-distribution. However, as with other barriers, under a complaint-driven model the barriers must be removed on a case-by-case basis. Achieving equality under that model will be a very slow process. Moreover, anti-discrimination agencies are ill-equipped to address the societal norms and attitudes that underlie the barriers or to bring about the large-scale re-distribution of opportunities and income that are necessary to achieve equality for disabled people.
5. Conclusion

Canadian anti-discrimination laws provide broad powers to investigate, determine, and remedy barriers to equality. Despite these powers, disabled people continue to be excluded from equal participation in society; they are disproportionately poor, unemployed and under-educated. Part of the explanation is that equality rights for disabled people are relatively new. It is reasonable to expect that the broad changes needed to achieve equality for people with disabilities will take time. This analysis reveals that the failure to effect that change more quickly is also attributable to the design of anti-discrimination enforcement mechanisms.

When anti-discrimination legislation was introduced into Canada, the conception of equality was formal. The basic model of enforcement has changed little since then. It is therefore not surprising that the model appears to be best suited to address formal inequalities. Except for people whose impairments limit their ability to be informed of their rights or access the complaint system, the complaint-driven, reactive model provides sufficient powers to identify, determine and remedy cases of direct discrimination against individuals or groups. The farther the inequality moves from the formal model, the more limited is the ability to address it under anti-discrimination legislation. Neutral practices and structural barriers within an organization that have adverse effects on people with disabilities can be identified and addressed. However, tribunals are not able to reach beyond the particular organization to remove barriers that reflect broader societal norms, or to address the norms themselves. As a result, despite the efforts of advocates to bring disability within the protective umbrella of anti-discrimination legislation, and despite a history of successful claims under that
legislation, people with disabilities continue to be marginalized. The barriers that were identified at the outset of this chapter remain widespread.

Clearly, although anti-discrimination laws have been an effective tool to eliminate, or lower, many individual barriers, those laws, at least as they have been designed in Canada, appear to be limited in their capacity to effect the broad systemic transformations that are necessary to achieve substantive equality for people with disabilities. This chapter has demonstrated the influence of administrative powers and procedures on the effectiveness of anti-discrimination laws. It seems clear that the effectiveness of such laws can therefore be enhanced by strengthening those powers. However, even with enhanced powers, anti-discrimination laws, as they are currently conceived, will likely remain an incomplete solution to the inequalities experienced by people with disabilities.

This chapter, has addressed anti-discrimination legislation generally. In the next chapter, I will examine more closely how administrative powers and procedures affect the effectiveness of anti-discrimination laws by looking at two recent models of anti-discrimination enforcement. In the concluding chapter I will consider some tools to achieve equality that do not rely on general anti-discrimination legislation.
Chapter V: The Structure of Equality

[A]ll governments support rights protection, both in theory and in practice. They extol the importance of human rights society and the role governments play in establishing and maintaining human rights commissions and promoting their work. ... No government, no matter how conservative, has ever considered eliminating human rights policy outright.¹

1. Introduction

In the first two chapters, I reviewed the introduction and development of Canadian anti-discrimination legislation and the evolution of equality theory. The legislation evolved from the early quasi-criminal statutes, in which victims of discrimination carried the burden of eliminating barriers to equality, to comprehensive legislation, in which the state took an active role in the pursuit of equality through public education and by providing mechanisms to investigate and prosecute complaints of discrimination. Generally, that evolution was a process of incremental growth rather than radical revision. The scope of legislation was gradually enlarged and new mechanisms established to make it more effective. During the same period, equality theory evolved from the formal theory of equality that prevailed at the time anti-disrimination legislation was introduced, to substantive theories of equality that developed in the 1980s. In Chapter III, I discussed disability rights theory and concerns about the effectiveness of anti-discrimination legislation as a tool for achieving substantive equality for people with disabilities. In Chapter IV, I considered the powers and procedures that are necessary for anti-discrimination agencies to remove barriers to equality for disabled people.

In this chapter, I draw some of these themes together by looking closely at the enforcement of equality through anti-discrimination legislation in one jurisdiction – British Columbia. In particular, I will examine how shifting visions of the role of the state in achieving equality are reflected in the structure and powers of the institutions charged with addressing discrimination, and I will consider the effectiveness of those institutional mechanisms as a tool for achieving substantive equality for people with disabilities.

I chose to consider the legislation in British Columbia in part because it is the jurisdiction with which I am most familiar. But there are other reasons. British Columbia was one of the first Canadian jurisdictions to recognize disability as a prohibited ground of discrimination. Yet British Columbians with disabilities continue to be disproportionately poor, unemployed and undereducated. According to a recent report, the average income for BC males with disabilities is $28,074, compared to $36,053 for those without disabilities; the employment rate for British Columbians with disabilities is 44%, for those without disabilities it is 72%; and British Columbians with disabilities complete high school and go on to post-secondary education at lower rates than those without disabilities. Despite almost thirty years of legislation prohibiting discrimination on the basis of disability, disabled people continue to be victimized by discrimination. This report concluded:

Persons with disabilities make up 13.8% of the British Columbia population. Many have the capacity and desire to actively participate in the labour force, but

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2 "Disability" was, in effect, read into the legislation in 1976: Jefferson v. British Columbia Ferries Service (unreported, 29 September 1976, B.C. Bd Inq.).
are restricted by barriers to their employment or re-employment that prevent them from participating to their full ability. With future employment projections for British Columbia pointing to greater labour demand amid shrinking labour supply, there are potentially many employment opportunities for persons with disabilities and other non-traditional labour market groups. However, systemic issues and historical biases in labour practices must be examined and corrected in order for these labour groups to have access to these employment opportunities.4

Legislative developments in British Columbia are also instructive because, for at least two decades, anti-discrimination legislation has been an important expression of changing political visions and consequently has been the subject of often heated debate. With successive changes of government have come dramatic and sometimes radical amendments to anti-discrimination legislation. Governments have been reluctant to alter substantive protections. They are aware that such changes, whether they derogate from established rights5 or introduce new rights,6 provoke controversy. Instead, they have generally expressed their vision of equality through changes to the institutional model used to enforce the legislation.7 So, while the concept of equality has evolved along a similar path in British Columbia as in other provinces, the development of policies and procedures to enforce that equality has been aptly described as “turbulent”.8 The dramatic changes to the administrative structures, responsibilities and powers contained within the legislation reflect radically different visions of the role of the state in achieving equality.

4 Ibid. at 7.
5 Such as when the Socred government dismantled the B.C. Human Rights Commission and Branch in 1983: see infra note 18 and accompanying text.
6 Such as amendments by the NDP government in 1992 to include several new grounds of discrimination including sexual orientation: Human Rights Amendment Act, 1992, S.B.C. 1992, c. 43.
7 This is not to suggest that by focusing on institutional change governments are shielded from controversy. On the contrary, debate inside and outside the legislature is often fierce. However, governments are able to frame the debate around institutional effectiveness rather than principles of equality.
8 Howe & Johnson, supra note 1 at 65.
As clear expressions of legislative intent through procedural rather than substantive change, the legislative changes in British Columbia illustrate how modifications to the administrative powers in an enforcement model can affect the utility of that model as a tool for achieving equality. Further, the legislation follows intense review and consultation. The two most recent enforcement models represent the cutting-edge of Canadian anti-discrimination legislation, albeit from different political perspectives. They are therefore instructive as case studies in analyzing whether any anti-discrimination statute can effectively achieve equality for people with disabilities.

I begin with a review of the history of anti-discrimination legislation in British Columbia. My focus is on the tendency to express legislative intent through procedural or structural change rather than by revision of the substantive provisions of the legislation. By “substantive provisions” I mean those provisions that grant or restrict rights, or that define or interpret them. I will then consider the two most recent enforcement models in British Columbia – the model created in the 1996 Human Rights Code, which with its bifurcated commission/tribunal structure was similar to models in other jurisdictions, and the model created by the 2002 amendments to that Code, which eliminated the commission and provided complainants direct access to the tribunal. In particular, I will consider whether, given their administrative responsibilities and powers, either model is likely to be able to address effectively the barriers to equality faced by people with disabilities.

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9 The development of substantive provisions is discussed above in Chapter I.
2. **A Brief History of the Legislation**

As in other Canadian jurisdictions, anti-discrimination legislation in British Columbia is a post-World War II phenomenon. Initially, British Columbia's legislators followed a path that was similar to other Canadian jurisdictions. Through the 1950s and 1960s B.C. governments introduced a series of fair practice statues.\(^{10}\) In 1969, these were consolidated and a human rights commission created to administer them.\(^{11}\) However, the Commission had almost no staff and heard few complaints.\(^{12}\) In 1973, the newly-elected and left-leaning New Democrat Party (NDP) replaced the *Human Rights Act* with the *Human Rights Code*.\(^{13}\) The new legislation, which did not depart radically from the trend in other jurisdictions, reflected frustration at the ineffectiveness of the legislation then in place. Emery Barnes, an NDP M.L.A. and long-time human rights activist, described the need for the legislation:

> I think the Human Rights Act of the past was a mockery and a sham. It was mainly very well-written rhetoric that gave the impression of being a concerned document. But I'm here to tell you that after five years or more of working with community groups that were concerned about individual rights, I never saw a case prosecuted successfully under the old Act. I am no lawyer and I'm no expert in this field but just one who cared and who tried in vain over the years to get the chairman of that Act to implement some of the sections contained within it.\(^{14}\)

Introducing the legislation, the Hon. William King informed the Legislature that the legislation was a more positive approach to human rights enforcement. The agency responsible for enforcing the legislation, the Human Rights Branch, would no longer be...

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\(^{13}\) S.B.C. 1973, c. 119 [*Code*].

limited to a responsive role. In addition to providing education on equality, the Branch could come to grips with violations without waiting for a complaint.\textsuperscript{15} The thrust of the administrative changes was to advance equality by providing the human rights agencies (the Commission and the Branch) with powers that enabled them to be proactive in addressing discrimination through public education programs and the ability to initiate complaints. Despite some substantive changes,\textsuperscript{16} the legislation was supported by all parties.\textsuperscript{17} However, within a decade it had lost the support of the political right. Human rights became the focus of heated political debate, particularly following the re-election of the right-leaning Social Credit (Socred) party in the spring of 1983.

Beginning in 1983, British Columbia began to chart a course that was independent from other Canadian jurisdictions. Human rights legislation became an important expression of the political ideology of the governing party. As successive governments swung from left to right and back again, the legislation was re-written to reflect the vision of equality of the party in power. It is not surprising, therefore, that in the turbulent politics of British Columbia, human rights legislation also has a turbulent history. I turn now to the first of the dramatic departures from the Canadian legislative mainstream.

\textsuperscript{15}Ibid, at 1257 (W.S.King)
\textsuperscript{16}The Code expanded the previous Act by adding the grounds of marital status, political belief, and conviction for a criminal or summary conviction offence in the area of employment, and added sex as a prohibited ground in the other areas of discrimination. Moreover, in the area of employment, the BFOR defence for sex discrimination was eliminated. Instead, the Code prohibited discrimination in employment unless there was "reasonable cause". The reasonable cause clause is discussed in Chapter I, supra note 75 and accompanying text. Generally discrimination on the prohibited grounds did not constitute reasonable cause except in the case of sex if it related to "maintenance of public decency" and in the case of conviction for an offence that related to the employment at issue. The reasonable cause clause was used as vehicle for expanding the grounds covered by the Code. For example, it was used to address discrimination based on disability, despite the absence of disability (or handicap) in the list of proscribed grounds of discrimination: Jefferson v. British Columbia Ferries Service (unreported, 29 September 1976, B.C. Bd Inq.).
\textsuperscript{17}Hansard, supra note 14 at 1257-1260. Indeed, the major criticism of the Bill on second reading was that it did not go far enough. Garde Gardom, then a Liberal M.L.A. but subsequently elected as a Socred, suggested that the legislation was "still pretty thin soup": Hansard at 1257.
(a) The Council of Human Rights

As part of the Socred government's 1983 restraint budget, it introduced a package of legislation that included a bill aimed at repealing the Human Rights Code and replacing it with a new statute. At the same time, the Government dismantled the human rights agencies that had been established under the Code, dismissing the staff and commission members. As a result of intense criticism by human rights activists, unions and others, the proposed legislation did not proceed to second reading. However, the staff and commission were not reinstated. Howe and Johnson observe that “B.C. became the first province to abolish its human rights system.” In 1984, “amidst much controversy”, the Government introduced a new Human Rights Act. This legislation reflected a vision of equality that was a throwback to earlier enforcement models. That is, it retreated from the proactive aims that were reflected in the 1973 Code. The educational mandate was gone, as was the power of the human rights agency to initiate complaints. As Black notes: “[The legislation] continues the focus on individual complaints. Solutions to broader issues of equality are treated, at best, as a by product of resolving these individual complaints.”

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19 The restraint budget and the legislative package accompanied it led to the formation of the Operation Solidarity and Solidarity Coalition which were union- and community-based coalitions that opposed the budget and legislation. They exerted pressure through mass rallies and, in the fall of 1983, strikes. Bill 27, the proposed human rights legislation figured prominently in the protest. For a discussion of the legislative package and the response to it, see Bryan D. Palmer, Solidarity: The Rise and Fall of an Opposition in British Columbia (Vancouver: New Star Books, 1987).
20 Howe & Johnson, supra note 1 at 65.
21 Black Report, supra note 12 at 3.
22 S.B.C. 1984, c. 22 [Act].
23 Black Report, supra note 12 at 3.
When it introduced this legislation, the Government expressed a commitment to protect human rights. The Minister responsible, the Hon. Robert H. McClelland, gave a strong endorsement of the need for anti-discrimination legislation:

Equal rights and equal opportunity are fundamental to the freedoms we enjoy in this province: freedom, without limitation of race, colour or creed, to take part in all of the advantages society has to offer; freedom to make our homes wherever we choose, so far as our means allows us, and to advance in employment as far as our initiative, training and skills will take us; freedom to live without harassment or discrimination based on hatred, prejudice, bigotry, ignorance or fear. These are the basic tenets upon which all human rights legislation should be based. This new bill is the government's reaffirmation of these principles, as well as its dedication to provide direct and effective remedy to people whose human rights have been denied.\(^{24}\)

The Government expressed concerns about “serious defects” in the *Code* and its administration. In particular, it was concerned that under the *Code* the meaning of discrimination was uncertain, that the human rights process was trivialized “by allowing complaints which didn’t deal with substantive discrimination problems”, and that it was slow to resolve legitimate human rights problems.\(^{25}\)

The Government did not directly attack the substantive protections in the *Code*. The substantive prohibitions on discrimination remained generally the same, with two notable exceptions: first, the *Act* expressly prohibited discrimination based on physical or mental disability in all areas covered by the statute; and second, the “reasonable cause” clause was removed and replaced with a BFOR defence on all grounds.\(^{26}\) Moreover, in response to


\(^{26}\) *Act, supra* note 22, s. 8(4).
criticism that the new legislation could be interpreted as prohibiting only intentional discrimination, the Government introduced an amendment to clarify that intent was not required.\(^{27}\)

However, administratively, the Act introduced a structure that differed markedly from previous enforcement models. The Human Rights Commission and Branch were replaced with the Council of Human Rights. The Council consisted of up to five full-time appointees.\(^{28}\) Under the Act, they were responsible for receiving complaints from the victims of alleged discrimination or by someone on that person’s behalf.\(^{29}\) Responsibility for investigation of the complaint rested with the Council. It had the power to dismiss complaints without an investigation in a number of circumstances: if the complaint was not within its jurisdiction; if it could be more appropriately dealt with under another Act; if it was trivial, frivolous, vexatious, or made in bad faith; or if it was not filed within the limitation period.\(^{30}\) The Council was given powers of investigation,\(^{31}\) but no investigative staff. In practice, investigations were conducted by Industrial Relations Officers, who were not employees of the Council. The Council retained staff to receive complaints and perform administrative functions. Upon completion of an investigation, the Council was required to decide what the next step would be. It could decide to discontinue the matter; it could recommend a settlement, and if the recommendation was not accepted by one of the parties, submit a report to the Minister; or it could designate a member of the Council to conduct a

\(^{27}\) *Hansard, supra* note 23 at 4583. The new provision, which became s. 13(2) of the Act, stated: “The council shall not decline to proceed with an investigation by reason only that there was no intent by the person against whom the complaint was made to contravene this act”.

\(^{28}\) *Ibid.* s. 10.

\(^{29}\) *Ibid.* s. 11.


hearing into the merits of the complaint. The discretion to report to the Minister was rarely – if ever – used. The Council’s practice was either to dismiss the complaint or designate a Council Member to conduct a hearing. The fact that the Council was required to investigate a complaint, determine whether it should be heard, and hear it created a possible appearance of conflict. Administratively, this problem was addressed by ensuring that there was always at least one Member available to hear the case who had no prior involvement in the matter. The designated Council Member had powers of subpoena and contempt. The remedial powers available to the Council Member were the same as under previous legislation except that the discretion in the Code to award up to $5000 for aggravated damages was replaced in the Act by a discretion to award up to $2000 in addition to any other order; this award no longer required a finding of aggravated damages.

Although the new legislation did not expressly curtail the substantive rights protected in the 1973 Code, the changes to the structures and powers of the agency responsible for enforcing it reflected a different vision of equality. Under the new legislation, the role of the Council of Human Rights was a reactive one; it had very limited powers to deal with discrimination proactively, but had enhanced powers to screen out “trivial” complaints.

In 1991, the NDP was returned to power. The following spring, the Government introduced amendments affecting primarily the scope of the legislation. The amendments added sexual orientation as a prohibited ground, expanded the definition of age (from 45-65 to 19-

32 Ibid. s. 14.
33 These powers were not included in the Act when it was introduced, but were included in amendments the following year: Miscellaneous Statutes Amendment Act (No. 2), 1985, S.B.C. 1985, c. 51, s.32.
34 Act, supra note 22, s. 17(2)(b).
65), and introduced new remedial options. In particular, the amendments provided that, following a hearing where the Council Member found that the complaint was justified, the Member had discretion to order that the person who contravened the Act:

(i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
(ii) adopt and implement an employment equity program or other special program if the evidence at the hearing has disclosed that the person engaged in a pattern or practice that contravenes this Act.

In addition, the amendments added a section excluding employment equity programs from the definition of discrimination, and authorizing the Council to recommend objectives for or give advice or assistance with respect to the carrying out of employment equity programs or other programs or activities “that have as their objective the amelioration of conditions of disadvantaged individuals or groups.”

These amendments were substantive, not procedural. The government thus bucked the trend in British Columbia that avoided such changes. This may reflect the optimism of a party that was new to its mandate after an extended period in opposition. The thrust of the amendments addressing employment equity and other special programs was to move beyond formal conceptions of equality. The amendments recognized that, to “ameliorate the conditions of disadvantaged groups”, some positive action was required. They also recognized that an individual, complaint-based anti-discrimination model is not the only mechanism for addressing inequality.

36 Ibid. s. 11, amending s. 17 of the Act.
37 Ibid. s. 12, adding s. 19.1 to the Act.
Despite these changes, the legislation and its enforcement continued to be criticized on a number of grounds: there was an inadequate focus on human rights education; the process took too long; investigations were slow and incomplete; a process relying exclusively on individual complaints was not a sufficient strategy to deal effectively with discrimination; the human rights process overlapped with other legal processes, particularly in the workplace; and the human rights agency needed to have stronger links to the community.  

(b) A New Code

In 1993, the government retained Professor William Black to conduct a review of “all aspects of the Human Rights Act and the way that it fits in our legal system.”  In 1994, he released the Black Report. The report recommended wide-scale substantive and administrative changes to the legislation. In 1995, the government introduced a new Human Rights Code.  The new statute incorporated most of the administrative and procedural changes recommended in the Black Report but not the recommendations for substantive change.  Attorney General Ujjal Dosanjh (subsequently Premier Dosanjh) stated:

* [Prof. Black] made many recommendations. He made recommendations for substantive as well as structural and procedural changes. It was the decision of this government at this time to deal with the structural and procedural aspects of the Human Rights legislation only. The substantive aspects of the legislation, we felt, were adequate; we needed to make changes with respect to the structure and procedure embedded in the legislation.*

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38 These concerns are discussed in the Black Report, supra note 12 at 26-28.  
39 Ibid. at 1.  
40 Ibid.  
42 The recommendations for substantive change included, among others, that discrimination be defined to include unintentional discrimination, failure to fulfill the duty to accommodate, and harassment; that the Code incorporate the principle of equal pay for equal value; and that the prohibition on age discrimination be broadened to include all ages.  
43 British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), (22 June 1995) at 16061.
In case the point was missed, later in his speech he repeated that the Government was not touching the substantive provisions and, more specifically, that the Government was not introducing employment equity.\textsuperscript{44}

Although the Government did not proceed with many of Black’s recommended amendments to the substantive provisions, the new \textit{Code} incorporated provisions that articulated a vision of equality that was more substantive and included a greater role for the state than in previous legislation. As discussed later in this chapter, that vision is reflected in both the express purposes and the administrative powers that are incorporated in the legislation. These powers were to be administered by a new structure. The Human Rights Council was eliminated and its responsibilities divided between the Human Rights Commission and the Human Rights Tribunal. The Commission consisted of a Chief Commissioner, a Deputy Chief Commissioner, and a Commissioner of Investigation and Mediation. The Commission was responsible for receiving, investigating and mediating complaints, and for educational and advocacy activities. At the conclusion of an investigation, if the complaint had not been settled, withdrawn or dismissed, the complaint was referred to the Human Rights Tribunal, the adjudicative arm of the process. It was responsible for hearing the complaint, making any necessary determinations, and issuing orders to remedy any conduct that it determined to be contrary to the \textit{Code}. In addition to the Commission and Tribunal, the \textit{Code} created the Human Rights Advisory Council, which was to inform the public on the role of the

\textsuperscript{44} \textit{Ibid.} at 16063.
Commission and bring the concerns of the public to the attention of the Commission.\textsuperscript{45} I will refer to this structure as the “Commission Model”.

In 2001, there was another change in government, with a resulting swing back to the political right. The new Liberal government undertook a widespread review of the administrative justice system in the province (the “Administrative Justice Project”). One component of the Administrative Justice Project was a review of the administration of the Human Rights Code. Lawyers Deborah Lovett and Angela Westmacott conducted the review and released a background paper in December 2001.\textsuperscript{46} The Background Paper reviews the genesis of anti-discrimination legislation in the province and discusses concerns about the administration of the Code that were expressed during stakeholder consultations. Finally, the Background Paper describes a number of different models that could be used to enforce anti-discrimination provisions. Lovett and Westmacott’s mandate did not include making recommendations: the purpose of the paper was “to create a foundation for meaningful and informed consultation, debate and fundamental rethinking of the human rights process.”\textsuperscript{47}

The preface to the document indicates that comments about the Background Paper would be taken into account by the Administrative Justice Project when it drafted a white paper, and that there would be further opportunity for public input after release of the white paper and before the Government decided what steps to take. Despite that assurance, the Government introduced an exposure bill in the spring of 2002, before the white paper was released, that

\textsuperscript{45} 1996 Code, supra note 41, s. 20.  
\textsuperscript{46} Deborah K. Lovett & Angela R. Westmacott, Human Rights Review (Province of British Columbia, 2001) [Background Paper].  
\textsuperscript{47} Ibid. at ii.
radically altered the enforcement model. After a summer of consultation, the Government introduced a new bill, largely the same as the exposure bill, containing sweeping amendments to the Code. As with previous governments, the Liberals were careful not to amend the substantive provisions. Attorney General Geoff Plant, who introduced the legislation, stated:

[T]he law alone will not make us free. There must also be a place and a way to enforce it. That is what this bill is about. The common-law lawyer has an old expression: where someone has a right, the law should give a remedy. The bill before us is concerned not with the substance of human rights, but its processes — that is, with the place and the way in which victims of discrimination can have a remedy.

Later, he reiterated as follows: “Under this new system, the substantive protections afforded by the Human Rights Code will not change. What will change is the method of protecting those rights.”

The amendments significantly altered the Code’s express purposes and the administrative structure empowered to achieve those purposes. The Human Rights Commission and the Advisory Council were abolished and their responsibilities either eliminated or transferred to the Human Rights Tribunal or Attorney General. The new model, which came into effect in 2003, requires that complaints be filed directly with the Human Rights Tribunal. There is no longer any state-supported investigation of complaints; instead, parties must rely on their

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own investigations supported by the Tribunal’s disclosure rules and procedures. This model has come to be described as the “Direct Access Model”.

3. Analyzing the Models

In the remainder of this chapter, I will compare the Commission and Direct Access Models. The Direct Access Model has not been with us long enough to allow for meaningful empirical analysis of its outcomes. Instead, I will examine the administrative tools that are available under each model and the impact those tools may have on removing barriers to equality, particularly for people with disabilities. In Chapter IV, I focused on four types of barriers: individual bias, exclusionary classifications, and neutral practices and structural barriers. I then considered the practices and procedures that are needed to remove the barriers. Within the discussion of each barrier, I considered all stages of the complaint process – identification of a barrier, proof of discrimination, and remediation. In this chapter I turn that analysis inside out. My focus here is on the three stages of the complaint process, which I have labeled “identifying inequality”, “proving discrimination”, and “righting the wrong”. Within that analysis I consider the process as a tool for removing barriers for people with disabilities.

I will analyze the two models separately, beginning with an overview of the model and then turning to an analysis of the complaint stages. I begin with the Commission model.
(a) The Commission Model

(i) Overview of the Model

The 1996 Code, which established the Commission and Tribunal, included a broad statement of purposes reflecting the objectives of human rights legislation identified in the Black Report. For Black, correcting persistent and systemic patterns of inequality is the most important objective of a strategy for achieving equality. Further, redress for individual victims of discrimination must continue to be an objective of that strategy; they deserve a quick and effective remedy. Related to those two objectives for human rights laws, is the need for a fair process that can deliver a remedy that is effective, and expeditious. Other objectives identified by Black include measures to prevent inequality and "to monitor patterns of equality, to identify all the factors contributing to the inequality and to recommend solutions".

The 1996 Code created a structure that clearly defined and separated responsibilities. First, the adjudicative functions were separated from all other functions and given to the Human Rights Tribunal. It operated as an independent agency, hearing cases referred to it by the

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52 Section 3 of the 1996 Code, supra note 41, stated:

3 The purposes of this Code are as follows:
   (a) to foster a society in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
   (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
   (c) to prevent discrimination prohibited by the Code;
   (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by the Code;
   (e) to provide a means of redress for those persons who are discriminated against contrary to the Code;
   (f) to monitor progress in achieving equality in British Columbia;
   (g) to create mechanisms for providing the information, education and advice necessary to achieve all of these purposes.


54 "Independence" is a relative term. The Tribunal reported to the Attorney General and received its funding from the Attorney General. Appointments to the Tribunal were (and are) made by the Attorney General. The Tribunal was therefore less independent than the Ombudsman or the Privacy Commissioner, who report directly to the Legislature. (In a Legislature that is dominated by one party, that distinction may be more theoretical than real.) However, the Tribunal was (and is) not part of any Ministry and was, in that sense, independent of
Human Rights Commission. Second, within the Commission, the neutral administrative functions of investigation and mediation were given to the Commissioner of Investigation and Mediation (CIM). The CIM was also responsible for determining whether a case should be referred to a hearing or dismissed. That left the other two commissioners, the Chief Commissioner (CC) and the Deputy Chief Commissioner (DCC), free to pursue the other objectives of the Code without impairing, or (in theory) being reasonably perceived as impairing, the neutrality of the investigation process. The Code expressly prohibited the CC and DCC from interfering in the work of the CIM. The CC was responsible for public education, and shared responsibility with the DCC for research, and for conducting public hearings and consultation on matters relevant to the Code. The DCC had an express advocacy function, having the power to file complaints, to require that the CIM add the DCC as a party to a complaint, and to require that the Tribunal add the DCC as a party to a hearing.

Did these changes create the powers necessary to achieve equality? That depends, of course, on how equality is defined. I will continue to apply the substantive conception of equality that has been adopted by Canadian courts and tribunals. As discussed in Chapter II, substantive equality considers the effects of laws, practices and procedures in light of their social and economic context. It goes beyond mere formal equality, which requires only that likes be treated alike. Substantive equality seeks to remove systemic factors that created inequality, even if those systems treat all people alike. The courts and tribunals in British Columbia apply the same interpretations and legal tests as I discussed in the Chapter IV.

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government. It was also completely independent of the Human Rights Commission, except that the Commission determined which cases came before the Tribunal.

55 1996 Code, supra note 41 s. 15(8).
In the previous chapter, I considered the powers needed to achieve equality for people with disabilities. I did so by considering categories of barriers: individual prejudice, exclusionary classifications, neutral practices, and structural barriers. All these categories of barriers are recognized as prohibited forms of discrimination and therefore, barring future statutory exemptions or new judicial interpretations, freedom from such barriers is an enforceable right under B.C. anti-discrimination laws. I will now consider the ability of the Commission to address those barriers at each stage of the complaint process.

(ii) Identifying Inequality

To enforce a right to equality, there must be a mechanism to identify inequalities. The Commission Model, as reflected in the 1996 Code, is complaint-based. As discussed in the previous chapter, such a model creates some problems for the identification of inequality. Generally, it disadvantages people who do not know of or understand their rights, have difficulty accessing the system to exercise them, or are in positions of powerlessness. Further, the victims do not always have enough information to know whether discrimination was an issue in a particular decision. These are significant problems for people with disabilities, particularly those whose disabilities are severe.

The 1996 Code contained several provisions that could ameliorate these disadvantages: First, the express educational mandate gave the CC the authority and purpose required to inform people with disabilities about their rights. Second, through its intake staff, the Commission could assist individuals who had difficulty filing complaints due to verbal, cognitive, or other
impairments. Third, those in positions of relative powerlessness could find some protection in a provision of the Code prohibiting retaliation against a person because they had filed a complaint;\(^{56}\) if that was not sufficient protection, another person could file a complaint on behalf of the victim,\(^{57}\) or the DCC could file a complaint.\(^{58}\) Fourth, the power to conduct research and to conduct public hearings and consultations provided an opportunity to identify discrimination without the need for a particular victim to come forward.\(^{59}\) Fifth, the Advisory Council could bring matters to the attention of the Commission.\(^{60}\)

These powers could have been used to identify any of the types of barriers faced by people with disabilities. For example, the DCC could have engaged in a testing program to identify covert discrimination against people with disabilities within the context of large employers, and if *prima facie* discrimination was uncovered, filed a complaint based on the findings. Surveys of the built environment could have been conducted to identify structural barriers. Or public hearings could have been conducted to inquire into the difficulties faced by disabled people in accessing the job market.

In practice, the Commission used only some of its powers to ease the burden of filing complaints on those people who are most disadvantaged or to identify barriers to equality for disabled people. The Commission pursued its educational mandate vigorously. It published numerous pamphlets in several languages describing rights and responsibilities. The

\(^{56}\) 1996 *Code*, supra note 41, s. 43.
\(^{57}\) *Ibid.* s. 21(4).
\(^{58}\) *Ibid.* s. 21(2).
\(^{59}\) *Ibid.* s. 6.
\(^{60}\) According to s. 20(3) of the 1996 *Code*, supra note 41, the Advisory Council was responsible for informing the public about the work of the Commission and bringing the concerns of the public to the attention of the Commission.
Commission also provided some support to potential complainants who were considering filing a complaint. The standard intake procedure was that telephone calls or letters were initially screened to determine jurisdiction. If the complaint appeared to be within jurisdiction, a package of material was sent to the inquirer. The package included a complaint form, which the inquirer was required to complete and return. Commission staff understood that they had an obligation to provide reasonable accommodation to people with disabilities and could vary these procedures if appropriate; when in doubt, front line staff consulted with more senior personnel.

The Commission was less enthusiastic in its use of its proactive powers to identify and redress inequalities. The DCC never filed a complaint, nor did the CC or DCC conduct any public hearings. Nevertheless, the Commission did take some proactive measures. In 1999, the DCC undertook community consultations with members of the disability community. Those consultations were aimed at developing strategies to address discrimination against the disabled. The consultations led, in turn, to further research by the Commission’s public interest program into issues faced by people with disabilities. According to the DCC, the reports that resulted from the research led to some changes in

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61 Among some human rights activists there was concern that the threshold applied by intake staff served to screen out deserving complaints. This was particularly troublesome because, although the CIM could dismiss complaints without investigation for a number of reasons, intake staff had no statutory mandate to screen out complaints. On the other hand, the Commission received many inquiries that were clearly outside the Commission’s jurisdiction. Without this informal screening, the CIM and his/her delegates would have been overwhelmed.

62 Thomas Beasley, former legal counsel to the CIM, personal communication, January 7, 2005.

63 The Commission planned to conduct public hearings into aboriginal issues. Those hearings were cancelled after the change in government in 2001, which led to drastic cuts to the Commission’s budget and the dismissal of the Chief Commissioner.

government policy. The Commission also conducted forums to hear representations on the effectiveness of the provincial government's employment equity program. Among other things, the report noted that between 1994 and 2000 the representation of people with disabilities in the provincial public service had decreased from 6.7 to 5.7 percent. The DCC did not, however, file complaints based on these reports.

(iii) Proving Discrimination

The 1996 Code provided broad powers of investigation to the CIM and to officers with authority delegated from the CIM. These powers included the authority to require production of documents and records, to make inquiries orally or in writing of any person, and to enter premises to obtain information. The Code also provided the power to obtain a warrant if a party was uncooperative. In theory, these provisions provided the CIM's officers with sufficient power to obtain any relevant information that was available. They go beyond the powers provided in civil discovery procedures by permitting officers to enter premises, search for documents and make inquiries of anyone. An officer could attend at an employer's premises and demand to see files for all past job competitions, review all employee discipline files, interview all employees, or demand information about the demographic profile of the workplace. The officer could demand the names of former employees and could interview them. In practice, however, investigations were generally more modest in scope. Typically, an officer would notify the respondent of the complaint and ask for a written response and relevant documents. The investigation might consist of

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67 See 1996 Code, supra note 41, s. 24.
little more than asking for the complainant’s reaction to the respondent’s response, or it might involve interviews with witnesses or a search for additional documents.68

There are a number of factors that may contribute to the Commission’s reluctance to routinely use the full range of its investigative powers. One is purely practical: the Commission received far more complaints than could be effectively investigated if all were investigated as thoroughly as was possible.69 Moreover, Canadian human rights agencies – including those in British Columbia – have been rightly criticized for the delay that has come to be associated with the anti-discrimination enforcement process.70 It is therefore not surprising that those agencies have sought to reduce the time taken to investigate complaints by developing expedited processes.

The Commission developed procedures designed to balance the sometimes conflicting goals of resolving disputes in a timely and expeditious manner while seeking to eradicate deep-rooted and systemic discrimination. It attempted to meet the first goal by developing mechanisms aimed at a quick resolution. These included fact-finding conferences and early mediation. Fact-finding conferences were designed to bring the parties together early in the process. They brought relevant documents with them and had an opportunity to provide information supporting their position to the investigator. The conference could lead to the complaint being dismissed or referred to the Tribunal for a hearing without further

68 Beasley, supra note 52.
69 The compliance section had approximately 30 staff to perform all of its functions. It received approximately 20,000 telephone inquiries annually, which lead to approximately 1500 complaints: Background Paper, supra note 46 at 60.
investigation. The fact-finding conference could also lead to mediation. Alternatively, the parties could go directly into a mediation process before investigation. In conjunction with these processes, which were aimed at speedy dispute resolution, CIM and DCC staff were trained to identify issues of systemic discrimination. Complaints raising systemic issues were brought to the DCC's attention. The DCC then decided whether to ask to be added as a party to the complaint. More resources were devoted to the investigation of systemic complaints.

Another factor that may have contributed to the reluctance to do thorough investigations is the perceived unfairness when the more intrusive investigative powers are used against respondents. Investigations should be neutral in purpose and design: they seek out relevant information that will either prove or disprove the parties' positions, whether complaint or defence. However, although the powers can be used to obtain information from complainants, complainants rarely have much information beyond that which they have given in their complaints. Since almost all of the information comes from the respondent's side, investigators may be seen as favouring the complainant. To compensate for that perception, investigators may request information in the least intrusive manner.

Lovett and Westmacott found that the investigation process was criticized by complainants' advocates and employers' representatives. Both sides questioned the usefulness of

71 Background Paper, supra note 46 at 63.
72 As of March 2001, the DCC had asked to participate in more than 75 hearings: Ibid. at 62, n. 68.
73 Lovett & Westmacott observe that many respondents perceive the complaint processing system as favouring complainants and that "CIM staff use a double standard for document disclosure during the investigation process": Ibid. at 67.
investigations. In provinces in which the human rights commission has carriage of a complaint if it proceeds to hearing, the investigation serves two functions: it is the basis for determining whether the matter should proceed to the hearing stage, and the information it produces provides the evidentiary base used by tribunal counsel to prepare for hearing. In British Columbia, where the Commission did not have carriage of the complaint, the investigation served primarily the first purpose. Although the parties or their lawyers received copies of the investigation report and could obtain the investigator’s file through a request under the Freedom of Information and Protection of Privacy Act, they did not have direct access to the investigator or to any information he or she obtained that was not documented on the file or was exempt under the privacy statute. As a result, much of the investigator’s work was only used to determine whether the complaint should be dismissed without a hearing.

To be an effective mechanism for equality, the process must be credible. To be credible it must be perceived as fair. To be perceived as fair, the agency must be regarded as neutral. The 1996 Code attempted to insulate the CIM from charges of unfairness by isolating that office from interference by other commissioners. That way, the CIM could determine whether a matter should be dismissed or proceed to a hearing based solely on the information obtained through a neutral investigation process.

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74 Ibid. at 68.
75 R.S.B.C. 1996, c. 165.
76 Despite this legislative attempt to insulate the CIM from an appearance of bias, Lovett & Westmacott found that there was a perception that the CC, DCC, and CIM did not “operate at arm’s length from one another”: Background Paper, supra note 46 at 71.
For those cases referred to a hearing, the *Code* attempted to enhance credibility by creating an agency composed of expert adjudicators who were independent of the Commission or the parties to complaints. This was accomplished by creating a Tribunal of primarily full-time members with long-term appointments. The *Black Report* recognized that one of the features of the Council of Human Rights that was worth retaining was that it consisted of full-time adjudicators who developed expertise in discrimination law.\(^77\) Under the Board of Inquiry model that had been in place in British Columbia prior to 1984, and that was in place in most Canadian jurisdictions, hearings were conducted by *ad hoc* appointments of individuals whose level of expertise varied. The *Black Report* recommended appointment of full-time adjudicators\(^78\) and identified the need for fixed-term appointments to ensure independence.\(^79\)

Under the 1996 *Code*, members were appointed for five-year terms\(^80\) with eligibility for one five-year reappointment.\(^81\)

The *Code* provided the Tribunal with broad powers to ensure that complaints could be given a full and fair hearing. It gave Tribunal Members the power to issue and enforce subpoenas requiring persons to attend a hearing to testify under oath or to produce documents.\(^82\) In addition, the *Code* provided that the Tribunal could “make rules respecting the practice and procedure for the conduct of pre-hearing matters and hearings the tribunal considers necessary to facilitate just and timely resolution of complaints.”\(^83\)

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\(^77\) *Black Report*, *supra* note 12 at 31.
\(^78\) *Ibid.* at 65.
\(^80\) 1996 *Code*, *supra* note 41, s. 31(3).
\(^81\) *Ibid.* s. 31(5).
\(^82\) *Ibid.* s. 34(3).
\(^83\) *Ibid.* s. 35.
Tribunal hearings are adversarial and quasi-judicial. As a result, the parties and the process often benefit if the parties are represented by legal counsel. It is typical in Canadian jurisdictions for the human rights commission to assume carriage of a case on behalf of the complainant if it decides a hearing is warranted. The respondent generally must retain its own counsel or proceed without representation by legal counsel. Since 1984, British Columbia has followed a different path. When the Council of Human Rights was created, it was recognized that the Council could not both hear the case and advocate on behalf of a party - it could not be both judge and prosecutor. The solution was to provide the Council with funding, separate from its operational budget, to pay for legal representation for complainants. That representation was provided by private lawyers working under a legal aid tariff. The Black Report found that complainants liked the control this gave them over the presentation of their case; however, concerns were expressed about the quality of legal representation provided under the tariff system.\(^8^4\) Black recommended that legal representation continue to be funded by the legal aid system, but through a Human Rights Clinic.\(^8^5\) The 1996 Code is silent on the subject of legal representation.\(^8^6\) Funding for independent legal representation under the legal aid tariff was, nevertheless, continued under the new legislation. In 1997, the Commission undertook extensive consultation on the issue of legal representation, culminating in a report that found widespread dissatisfaction with the model of legal representation then in place and recommended consideration of alternatives.

\(^{84}\) Black Report, supra note 12 at 131-132

\(^{85}\) Ibid. at 133.

\(^{86}\) The DCC could demand to be added as a party to the hearing; however, the DCC did not appear on behalf of either party, but on behalf of the public interest.
such as a clinical or mixed model.\textsuperscript{87} The recommendations were never implemented by the Commission.

The combination of the Commission’s broad investigative powers and the Tribunal’s powers to compel production of evidence through disclosure rules and/or summons should have been sufficient to obtain any evidence that was available to prove the existence of discriminatory barriers to equality for people with disabilities. The criticisms of the investigation process were not that the Commission investigators had inadequate powers to obtain the necessary evidence to prove discrimination, but that they lacked the institutional will to consistently do so.

(iv) Righting the Wrong

The 1996 \textit{Code} retained the remedial provisions that were added to the \textit{Act} in 1992. Those provisions provided the Tribunal with broad powers to stop discriminatory practices and ameliorate their effects. If it found a complaint justified, the Tribunal was required to order that the discriminatory conduct cease and that the discriminator refrain from engaging in the same or similar conduct.\textsuperscript{88} It also had the discretion to order that the victim of discrimination be given the opportunity or privilege that they were denied, receive the lost wages or expenses caused by the discrimination, or be compensated for injury to their dignity, feelings and self-respect.\textsuperscript{89} The Tribunal could also order that steps be taken to “ameliorate the


\textsuperscript{88} 1996 \textit{Code}, supra note 41, s. 36(2)(a).

\textsuperscript{89} \textit{Ibid.} s. 37(2)(d).
effects of the discriminatory practice”,\textsuperscript{90} or that an employment equity or other special program be implemented “to ameliorate the conditions of disadvantaged individuals or groups” if there was evidence of a discriminatory pattern or practice.\textsuperscript{91}

These remedial powers provided the Tribunal with the authority to address many of the barriers to equality faced by people with disabilities. If people with disabilities faced barriers caused by individual bias, they could be offered the opportunity and/or compensated for the discrimination. Respondents could be ordered to cease applying classifications that unlawfully excluded people with disabilities, or they could be required to take steps to ameliorate the effects to the classification. Exclusionary classifications could be struck down. Similarly, if there was evidence of neutral practices having a discriminatory effect, including structural barriers, the Tribunal could order the removal or modification of those practices. Moreover, the Tribunal could order that positive measures be taken, such as employment equity programs, that would have a future benefit to individuals who were not before the Tribunal.

Although the power to order implementation of employment equity or other special programs was not used by the Tribunal, the provision for such a power indicates a legislative intent to approach issues of inequality as something more than individual disputes. There was, nevertheless, a significant constraint on the Tribunal’s ability to move away from a case-by-case, complaint-driven model. The Tribunal’s remedial powers could only be implemented after it determined that “the complaint” was justified, and only against “the person who

\textsuperscript{90} Ibid. s. 37(2)(c)(i).
\textsuperscript{91} Ibid. s. 37(2)(c)(ii).
contravened" the Code. So, even if a non-party was brought before the Tribunal and given an opportunity state its position, if it was not the subject of a complaint or the Tribunal did not find that it had contravened the Code, it could not be ordered to make any changes to address an inequality. For example, if the Tribunal found that a complaint was justified because the respondent had created a structural barrier that adversely affected people with disabilities, it could order that respondent to remove that barrier. It could also order that the respondent remove other similar barriers. It might even be able to order that the respondent undertake a program to identify and address other structural barriers in the respondent’s organization that were adversely affecting people with disabilities. However, even if there were evidence that this structural barrier was common in the respondent’s industry, and that the barrier was completely unnecessary, the Tribunal could not order other businesses to remove the barrier.

The commission/tribunal structure created by the 1996 Code was similar to the institutional model in most other Canadian jurisdictions, though the division of responsibilities was new. However, the Code introduced innovative powers, particularly through the office of the DCC, that were aimed at more effectively achieving substantive equality by addressing systemic discrimination. The Code also sought to ameliorate some of the shortcomings of a complaint-driven model by creating powers that enabled proactive measures by the Human Rights Commission. The Commission had a relatively short time to experiment with these powers. The substantial changes to the Code that were introduced in 2002 and which introduced the Direct Access Model brought an end to the experiment.
(b) The Direct Access Model

(i) Overview of the Model

The amendments to the Code in 2002 dramatically altered the structure of anti-discrimination enforcement in B.C. That structural change brought with it a change to the administrative powers and responsibilities contained within the statute, and reflected a different vision of the purposes of the statute. Some of these changes are evident from the legislation, others are implied. I turn first to description of the new structure.

The amendments replaced the bifurcated commission/tribunal model described in the previous section with a single enforcement agency – the Human Rights Tribunal. This was accomplished by repealing the provisions that created and gave powers and responsibilities to the Commission and Advisory Panel. These included: the power to receive and investigate complaints; to dismiss complaints or refer them to be heard by the Tribunal; to file complaints or to be added as a party to a complaint or hearing; and to prepare special reports. Some of the powers and responsibilities were transferred to the Tribunal. It was given the power to receive complaints or to dismiss, with or without a hearing, all or a part of a complaint at any time in circumstances similar to those that permitted the Commission to dismiss a complaint with or without an investigation.92 It was also given the power to approve “special programs” under s. 42. Other responsibilities were transferred to “the minister” (i.e., the Attorney General). The minister is responsible for providing “public education and information designed to promote an understanding of this Code”93 and has the

92 Amended Code, supra note 49.
93 Ibid. s. 5.
discretion to conduct or encourage research into matters relevant to the *Code* or engage in relevant consultations. The legislation does not provide for investigation of complaints.

As a result of these changes, the statutory enforcement scheme creates the following process:

A person or group of persons, on their own behalf or on behalf of a person or group of persons, may file a complaint with the Tribunal. The Tribunal may dismiss the complaint prior to a hearing in certain circumstances. If the complaint is not dismissed, and is not resolved through mediation or abandoned, the complaint will proceed to a hearing before a Tribunal Member. The powers of a Member to conduct a hearing, make a determination, and order an appropriate remedy were not altered by the amendments.

The scheme described in the statute is, however, only part of the enforcement structure. There is also a Human Rights Clinic that provides assistance to (primarily) complainants. The Clinic is funded by the provincial government; it is not, however, a government agency. The Clinic is currently operated by two different organizations. The B.C. Human Rights Coalition provides advocates to assist people who wish to file complaints. The Coalition then provides advocacy for the complainants through the preliminary stages of the process, generally including mediation. If the matter does not settle, it is transferred to lawyers employed by the Community Legal Assistance Society who will represent the complainant before the Tribunal and, if necessary, through judicial review.

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94 Amended *Code, supra* note 49, s. 6.
95 A clinic in Victoria is available to respondents who meet a means test.
This model, with complaints filed directly with the Tribunal supported by a free-standing human rights clinic, is inspired by the model recommended in the report of a panel appointed to review the *Canadian Human Rights Act.* However, the B.C. model also differs significantly from the panel’s recommendations. The *Background Paper*, prepared by Lovett and Westmacott, included several variants of the Direct Access model among the options to be considered. One such variant was the model recommended in the *La Forest Report*:

Claims would be filed directly with the Tribunal. This process would have a pre-hearing process to ensure that cases without merit would not proceed to a full hearing before the Tribunal. The Tribunal would ensure through its rules and orders that the parties to the case were fully informed of the issues and the evidence of the other side before proceeding to a full hearing. Legal assistance would be provided to ensure that claimants and impecunious respondents had the help needed to present their case.

The *La Forest Report* recommended a continuing role for the Human Rights Commission. The Commission would no longer receive and investigate all complaints, or determine whether they should proceed to a hearing. Instead it would focus its resources on issues of broad systemic discrimination and would have the ability to initiate complaints or to be added as a party to other complaints.

A variation of this model was proposed to Lovett and Westmacott by an *ad hoc* group of human rights advocates, the Committee for the Advancement of Human Rights

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97 *Background Paper, supra* note 46 at 148-149.
98 *La Forest Report, supra* note 96 at 52.
Their model also retained an independent Human Rights Tribunal with the power to receive complaints directly. The CAHRTS model differed from the La Forest Report model in recommending the complete elimination of the Commission. In its place, two new independent bodies would be funded by government. First, a stand-alone human rights clinic would provide free advocacy services to complainants, offering them advice and representing them before the Tribunal. Second, a “Centre for Excellence in Human Rights” would have a threefold mandate: to prevent human rights violations through education and awareness; to research and create a body of knowledge and precedent that would be available to anyone interested in human rights issues; and to monitor the progress of substantive equality in British Columbia, review the effectiveness of human rights delivery mechanisms, and recommend change where needed.

Without further consultation, the Government adopted the proposals for direct access to the Tribunal and for a government-funded human rights clinic. Significantly, however, it did not adopt the proposals for a continuing role for a human rights commission or a centre for excellence. Further, the amendments to the Code repealed the subsections that made it a purpose of the Code “to monitor progress in achieving equality” and to “create mechanisms for providing the information, education and advice necessary to achieve the purposes [of the Code]”.

101 1996 Code, supra note 41, s. 3(f), repealed by S.B.C. 2002, c. 62.
102 Ibid. s. 3(g), repealed by S.B.C. 2002, c. 62.
These amendments do not redefine the meaning of equality, but they do alter the role of government in achieving equality. They reflect a vision that sees enforcement of equality rights as an issue of dispute resolution. The amendments are aimed at creating a model that will provide disputants with a process to adjudicate their differences in a fair and timely manner. When he introduced the legislation on first reading, Attorney General Geoff Plant stated that the amendments would create a new institutional framework that, "unlike the [then] current system, will protect human rights in a way that is fair, efficient, effective and affordable both for the parties involved and for taxpayers." This model does not envision a proactive role for the state in identifying and eliminating barriers to equality. In committee, Attorney General Plant stated that monitoring progress in achieving equality, a purpose that was deleted from the Code, was not an appropriate function of a Human Rights Code. And on the subject of addressing systemic discrimination, he was clear that this was a complaint-driven model:

So how will systemic complaints be raised in the new model? Individuals or groups, including non-governmental organizations, will continue to have the ability to initiate complaints of a systemic nature, including complaints in which government is named as the respondent. That’s all you need. Any complaint raised has the potential to include within it systemic issues, but it has to be a complaint in order for a process to get started. Once it is a complaint, if there are systemic issues, they can be addressed.

What then is the likely effect of this vision on the ability of equality-seekers to identify barriers to equality, prove that they are discriminatory, and redress the inequality? I turn now to a consideration of that question.

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104 Ibid. (24 October 2002) at 4013.
105 Ibid. (23 October 2002) at 3989.
(ii) Identifying Inequality

Under this Direct Access Model, the role of the state in identifying barriers to equality is very limited. The minister is required to “provide public education and information designed to promote an understanding of the Code.”\textsuperscript{106} This requirement could provide members of the public with an enhanced ability to identify barriers themselves, but it does not require the minister to identify inequalities.\textsuperscript{107} The minister’s discretion to conduct or encourage research could be used to identify barriers to equality; however, that discretion is subject to political constraints, including budgetary ones. Further, to be effective, given the government’s role as employer and service provider, this discretion must be used to investigate itself. There are no other provisions in the 2002 Code that encourage a proactive approach to identify barriers to equality.

The Code now provides only a limited role for the state in assisting people with disabilities who think they may have encountered a barrier to equality. Through its intake function, the Commission provided some advice and assistance to members of the public who thought they had been wronged, but who may have been unsure whether they were the victims of prohibited discrimination. Due to its adjudicative function, the Tribunal is more constrained in the information and assistance it can provide to people making such inquiries; it can give information about the process, but it must not be perceived as being an advocate for the

\textsuperscript{106} Amended Code, supra note 49, s. 5.
\textsuperscript{107} This responsibility is currently being met through a contract between the minister and the Human Rights Coalition under which the coalition receives funds to provide a public education program: Susan O’Donnell, executive director of the BC Human Rights Coalition, personal communication, January 10, 2005. In effect, the government has contracted out or privatized this responsibility.
complainant.\textsuperscript{108} The Tribunal refers complainants to the Human Rights Clinic which is able to provide such assistance.\textsuperscript{109} The Clinic does so under its contract with the government, not under any legislative mandate.\textsuperscript{110}

Although the amendments eliminated the role of the state in identifying discriminatory barriers, they did not interfere with the ability of individuals or groups to file complaints on behalf of others. The 2002 Code retains those provisions that enable advocates to pursue complaints based on inequalities that they have identified, whether or not they are victims of discrimination. It allows group complaints and permits complaints made on behalf of another individual or group.\textsuperscript{111} The legislation also retains the prohibition on retaliation against anyone filing a complaint or assists in a complaint,\textsuperscript{112} which provides some protection particularly to those in relatively weak positions.

Under this model, therefore, the responsibility for identifying barriers to equality rests almost entirely on the victims of those barriers or their advocates. This is likely to exacerbate the problems of identification discussed previously in this thesis. That is, those with the most severe disabilities (and therefore the greatest need) will likely experience difficulties accessing the system because of lack of knowledge, powerlessness, or physical impairment.

\textsuperscript{108} The Tribunal has developed detailed formal policy on how to provide information to the public without crossing the line into advocacy: Heather MacNaughton, Tribunal Chair, personal communication, January 10, 2005.

\textsuperscript{109} In only about 35\% of the cases filed with the Tribunal, have the complainants taken advantage of the free services offered by the Clinic: MacNaughton, \textit{Ibid}.

\textsuperscript{110} The contract does not require that the Human Rights Coalition assist complainants to draft and file complaints, it merely requires the Coalition to make its services available to people whose complaint has been accepted by the Tribunal, but they are required to provide information to all potential parties on how to fill out forms. In addition, though it is not part of the contract, the Coalition runs a clinic at the Tribunal offices one day per week to help determine whether individuals have a potential complaint and to help fill in the forms: O'Donnell, \textit{supra} note 107.

\textsuperscript{111} Amended \textit{Code}, \textit{supra} note 49, s. 21(4).

\textsuperscript{112} \textit{Ibid}. s. 43.
Tribunal staff recognize that they have a duty to accommodate people with disabilities who have difficulty accessing the system. They have, for example, completed forms for blind complainants and have provided stenographic assistance for other complainants.\textsuperscript{113} The Tribunal is accessible by e-mail and through its website, and it has provided training to government agents throughout the province to enable them to answer queries about the complaint process.\textsuperscript{114} These policies provide broader geographic access, and ensure that those people with disabilities who contact the Tribunal are not prevented from filing complaints due to their disabilities. They do not, however, reach out to people whose disabilities or dependency prevent them from contacting the Tribunal. Nor do these policies provide any proactive mechanisms to identify barriers that may be preventing people with disabilities from accessing the human rights system.

Moreover, this issue of access to the system is only part of the barrier-identification problem this model presents for people with disabilities. Someone must be aware that a barrier may be limiting the access of disabled people to jobs or services, and a complaint must be filed, before the Tribunal’s powers can be invoked. Those barriers that are difficult to identify under a Commission model – such as covert prejudice or neutral practices – will be more difficult to identify under this Direct Access model. Although advocacy groups are able to research issues of discrimination, their ability to access funds to do so may be limited. Similarly, nothing prevents them from setting up their own public hearings or issuing reports, but they are likely to have difficulty finding the financial and human resources to do so.

\textsuperscript{113} MacNaughton, supra note 108.
\textsuperscript{114} Ibid.
Moreover, the results of research by advocacy groups may lack the credibility of research or reports generated by an independent government agency.

On the other hand, barriers that are relatively easy to identify—such as overt prejudice, exclusionary classifications, or structural barriers—will be just as easy to identify under this model. Once identified, they will not be subject to the informal screening process that was part of the Human Rights Commission’s intake process. As a result, there is a greater chance that such issues will receive a timely public hearing and public attention.

(iii) Proving Discrimination

Under the Direct Access model, discrimination is proven through an adversarial process analogous to a dispute in civil court. The parties are responsible for obtaining whatever information they need to prove their case or disprove their opponent’s. The Tribunal facilitates that process through its disclosure requirements and by requiring witnesses to appear before it.115 The Tribunal also hears applications to dismiss complaints prior to the hearing—a process that may lead to disclosure of further information. Otherwise, the state plays no part in the pre-hearing investigation of complaints.116

This process has some advantages over the Commission Model. For complainants, this model ensures that all cases that are not settled or abandoned will receive some form of

115 Until recently the Tribunal had the power to issue summons and contempt pursuant to the Inquiry Act: R.S.B.C. 1996, c. 224, ss. 15 & 16. These powers were repealed and replaced by provisions of the recently proclaimed Administrative Tribunal Act, S.B.C. 2004, c. 45, which provide that the Tribunal may summons witnesses to attend to testify or produce documents (s. 34) and that failure to comply makes a person liable to court order (s. 39).
116 The Tribunal also arranges mediation conferences that may lead to disclosure of information. However, information obtained during mediation is normally privileged, so to be admissible it would have to be obtained again through some other mechanism.
determination by the Tribunal, though that determination may be a decision to dismiss the complaint without a full hearing. The process also empowers complainants by giving them control of their complaints, rather than relying on decisions by investigators about the scope of investigation. Respondents no longer have to deal with the intrusions of human rights investigators demanding access to their information and personnel. For both parties, the process offers the possibility of a more timely resolution of the dispute. With the elimination of investigations and the Commission’s gate-keeping function, a significant source of delay is removed from the process. Further, the process of obtaining information through disclosure rules is a model with which most lawyers are familiar and therefore comfortable.

In cases that involve proof of overt discriminatory conduct or its effects, sophisticated parties or those represented by able counsel should be able to obtain the evidence they require without the aid of the investigative powers formerly provided to Commission investigators. For example, if a complaint relates to an overt expression of individual bias, such as in a harassment case, the issue will be determined primarily through direct evidence from those who were in a position to witness the event. Those people will generally be known to both parties; they can therefore be interviewed by the parties and/or they can be summoned to a hearing. Although pre-hearing access to witnesses is more restricted than that provided to Commission investigators, similar access to witnesses in civil proceedings has not proven to be an insurmountable hurdle for counsel. Circumstantial evidence, such as similar fact evidence, may be more difficult to obtain under this model, particularly if the complainant has not been part of the respondent’s operation for long enough to know its history or to develop allies who have such knowledge. Such evidence is unlikely to be contained in the
documents that must be disclosed prior to a hearing. The broad powers of Human Rights Commission investigators enabled them to search for such information by interviewing personnel who may have had no involvement in the dispute that led to the complaint. If the complainant has been part of the organization or has the support of others within it, similar fact evidence can be obtained without such investigative powers. Indeed there may be cases where witnesses are more likely to come forward to the complainant’s lawyer or a supportive advocate than to a government investigator.

Similarly, if the complaint relates to a known exclusionary classification or neutral practice, the evidence-gathering process is straightforward. Before filing the complaint, the complainant will generally have knowledge of the existence of the classification or practice. For example, a complainant will generally know if the barrier was a medical standard or an inaccessible structure. If further details of the classifications or practices are required, they can likely be obtained through the disclosure process. Similarly, a sophisticated complainant should have little difficulty in proving the discriminatory effect of a classification or practice. For example, if a person with dyslexia fails a job competition due to poor marks on a written exam, evidence of the discriminatory effect of the exam mode will either be known to the complainant or can be provided through experts, if such evidence is available. In any event, a Commission investigator would be no better position than a sophisticated party to obtain such evidence.

117 This may not be the case where the classification was created in response to a particular situation, as in Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 (Ont. Bd. Inq.). Such “one-off” classifications may be harder to identify as they may not crystallize until after a complaint has been filed.
There are cases in which it is necessary to determine the motive of a decision-maker, such as in cases of covert discriminatory bias, or where there appear to be unidentified practices which have an adverse effect. Such cases may benefit from a more searching inquiry than is available through the Tribunal's disclosure processes. For example, a deaf person who is denied a job may believe that the deafness was a factor in the denial, even in the absence of any express reference to the deafness. That belief may be a reasonable one based on the person's qualifications for the job and on non-verbal cues given during the job interview. However, in the absence of an admission by the job interviewer, any hidden motives will have to be proven through circumstantial evidence. The disclosure rules are unlikely to produce such evidence. Documents relevant to the job competition - and therefore accessible through disclosure rules - might show that the successful candidate was demonstrably less qualified than the complainant. It is also possible that the job interviewer made notes that indicate a discriminatory motive. However, such evidence is rare.

Evidence from which an inference of covert discrimination can be drawn is more likely to come from the testimony of people who work with or for the person responsible for the hiring decision, or from evidence of a history of similar discrimination as reflected in the results of previous competitions and the demographic profile of the organization. There are several reasons why, without broad investigatory powers, such evidence will be difficult to obtain. First, a complainant may be unaware of potential sources of information within the respondent organization, particularly if the complainant was seeking an opportunity from outside the organization. Second, the respondent is not required to provide the complainant with access to its personnel files except to the extent that it is required to do so by the
Tribunal. Third, until the personnel are interviewed or the files are reviewed, it may be impossible to know what useful evidence may exist. The Tribunal’s disclosure process is not to be used as a “fishing expedition”\textsuperscript{118} The information could be obtained by summons. However, calling a witness without knowing what their evidence will be carries considerable risk. Moreover, it is also improper to use summons for fishing expeditions;\textsuperscript{119} the Tribunal may set such a summons aside. Investigators, by contrast, are not prevented from using their powers to determine whether there is some as yet unknown evidence that might be probative. Many investigative paths may lead to dead ends. However, those paths sometimes lead to useful evidence, evidence that would be very difficult to obtain without investigative powers. Proving covert discrimination without the aid of investigative powers is analogous to proving criminal intent without a police investigation.

Similarly, complainants who are not part of the respondent’s organization will have difficulty obtaining evidence of systemic discrimination that is hidden, consciously or unconsciously, within the organization’s practices. The systemic discrimination may be established through evidence of a variety of barriers: some will be overt, others covert; some will discriminate directly, others through adverse effect.\textsuperscript{120} Alternatively, there may be evidence of a long history of adverse decisions, none of which are overtly discriminatory but which show a pattern from which an inference of discrimination can be drawn.\textsuperscript{121} Investigative powers are

\textsuperscript{118} Tannis v. Calvary Publishing Corp. (No. 1), [2000] BCHRT 26 at para. 44.  
\textsuperscript{120} See, for example, C.N.R. v. Canada (Human Rights Commission) (the Action Travail case), [1987] 1 S.C.R. 1114.  
\textsuperscript{121} For example, in National Capital Alliance on Race Relations v. Canada (Health and Welfare) (1997), 28 C.H.R.R. D/179 (C.H.R.T.), there was some evidence of derogatory comments; however, the Tribunal’s conclusions were based primarily on statistics and testimony demonstrating an underrepresentation of visible minorities in the workforce and a history of unsuccessful applications by visible minority applicants.
not a prerequisite to establishing such discrimination; in the *Action Travail*\textsuperscript{122} case, some of the evidence was available in reports prepared by the respondent. In many cases, however, such evidence will not be readily available and will only be obtained through a careful and thorough investigation.\textsuperscript{123} Moreover, the data required to demonstrate systemic discrimination will not usually be contained in existing documents and, therefore, will not be available through the usual rules of disclosure.

(iv) Righting the Wrong

The 2002 amendments did not alter the remedial powers of the Tribunal. Under the Direct Access Model, Tribunal Members continue to have broad powers to remedy past discrimination and to ameliorate its effects through restoration of opportunities, compensation for harm, modification of practices, or creation of special programs. Nor did the amendments affect the constraints on the Tribunal which limit its ability to issue remedial orders to circumstances where there is a justified complaint and against a person who is found to have contravened the *Code*. These constraints are exacerbated under this model because complainants may find it more difficult to prove that certain types of complaints are justified.

4. Conclusion

The Commission and the Direct Access Models superficially incorporate the same conceptions of equality. That is, neither attempts to expressly limit the substantive

\textsuperscript{122} Supra note 120.

\textsuperscript{123} In times of fiscal restraint and pressures on investigators to be more timely, such investigations may be more of a theoretical than practical reality. That may explain, in part, why so few such cases are heard by tribunals and even fewer have a successful outcome for the complainant.
conceptions of equality adopted by the Supreme Court of Canada and consistently applied by the Human Rights Tribunal. Moreover, the purposes section expresses that conception of equality. It speaks of fostering "a society in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia", and of identifying and eliminating "persistent patterns of inequality". However the two models express different visions of the means by which that equality is to be achieved. Under the Commission Model the state plays an active and proactive role in rooting out discriminatory barriers. Under the Direct Access Model, the state's role is limited to providing a mechanism to resolve discrimination-related disputes. With such contrasting visions, it is to be expected that the models will be designed to achieve different results. The purpose of this analysis is not to assess the effectiveness of either model in meeting the goals of the legislators. Rather, it is to consider the likely impact of the models on achieving equality for people with disabilities.

This analysis suggests that, for sophisticated complainants or those represented by able counsel, barriers that are readily identifiable can be effectively addressed under either model. The evidence needed to prove that such barriers are discriminatory can be obtained either through a Commission investigation or through the Tribunal's disclosure provisions, and the Tribunal's broad remedial powers will generally be sufficient to remove or overcome the barrier. In such cases the Direct Access Model has some advantages; without the Commission's investigation and screening processes, all complaints have an opportunity to be heard in a timely manner.

\textsuperscript{124} Amended Code, supra note 49, s. 3.
That advantage, however, depends on the will of the Government to provide adequate resources for both the Tribunal and Human Rights Clinic. The speed with which a hearing can be scheduled is dependent on both the availability of Tribunal Members to hear the case and on the availability of counsel to prepare for and appear on the scheduled dates. Under the current Direct Access Model complainants are entitled to representation by lawyers employed by the Human Rights Clinic.125 The numbers of Tribunal Members and Clinic lawyers is dependent on the financial resources available to pay them. Currently, there are more Tribunal Members than Clinic lawyers.126 As a result, the Tribunal can schedule more hearings than the Clinic lawyers can accommodate. This means either that hearings may have to be delayed to ensure the availability of counsel, or that some complainants will have to appear without legal representation. This issue is not, however, a problem with the model; rather, it is a test of the Government’s will to provide sufficient resources to ensure that the model functions in as timely a manner as the Legislature intended.

The differences between the two models is more evident when the discriminatory barriers are difficult to identify. The Commission Model had a number of options which enabled the Commission to identify barriers that might not be apparent to individual complainants. Public consultations, inquiries, research and monitoring all could have been used to identify hidden systemic barriers to equality. The Deputy Chief Commissioner had the authority to file complaints to address those barriers. And the Commissioner of Investigation and Mediation had broad powers to investigate them. These powers were particularly significant for people whose disabilities or social position make it difficult for them to identify barriers

125 The Clinic reserves the right to not represent a complainant even though a hearing has been scheduled.
126 At the time of writing there are ten Tribunal Members, including the Chair, and four Clinic lawyers.
or exercise their statutory rights. The Commission had a short life and did not use all of its powers or did so rarely, so it is difficult to assess the effectiveness of these powers. They did, at least, offer options that do not exist in the Direct Access Model. Moreover, the results of the public consultations on disability issues suggests that they could be useful means to obtain information about inequalities. In the Direct Access Model, such inequalities will only be addressed if members of the community are aware of them and file complaints.

Considering the marginalized status of many people with disabilities, it is likely that many barriers will not be identified or addressed. This problem may be less severe for people with disabilities than for some other disadvantaged groups. As discussed in Chapter IV, discrimination against people with disabilities is more frequently expressed openly and is therefore easily identified. However, as disability discrimination becomes less tolerated and the defences to such discrimination more closely scrutinized, disability discrimination may become more covert.

There are some barriers that neither model addresses effectively. Both are complaint-based models. Although the Commission Model incorporated provisions intended to facilitate identification of discriminatory barriers without a complaint, the remedial provisions were dependent on the Tribunal finding a justified complaint and they could only be applied to the parties to the complaint. The Direct Access Model has similar limitations. This severely restricts the ability of the Tribunal to effect the broad-based transformation necessary to achieve equality. Without such transformation, people with disabilities will continue to be disproportionately poor, undereducated and unemployed. Complaint-based approaches can be effective tools for eliminating particular barriers to equality for individuals with
disabilities. But anti-discrimination statutes, at least as they are currently conceived, are not sufficient tools to enable disabled people to participate equally in all that Canadian society has to offer.
Conclusion

Whether barriers facing persons with disabilities are physical, contractual, technological, bureaucratic, communicational, informational, attitudinal, or of some other kind, they usually don't benefit the service, programme or job they are related to, nor do they relate to the ability of the person to perform the task. These barriers are not necessary. ...

These barriers benefit no one. No one profits from them. They only hurt our society. They are a cruel impediment to persons with disabilities enjoying all that society has to offer.¹

1. Introduction

In this thesis my purpose was to explore that moment where theory and practice intersect. In particular, my goal was to assess, with a focus on disability, whether Canadian anti-discrimination statutes, which are designed to achieve equality, are capable of doing so. I said I would address three questions: First, what theory of equality should be used to measure the effectiveness of human rights agencies? Second, what powers or procedures will enable agencies to bring about the change necessary to achieve that equality? And third, do contemporary Canadian human rights statutes incorporate those powers and procedures?

My answer to the first question was that, for people with disabilities, the disability rights perspective provides a suitable measure of equality. According to that view, disabled people face a wide and complex variety of barriers that must be removed if people with disabilities are to achieve substantive equality. These barriers may result from intended or unintended discrimination. They may be physical or attitudinal. They may be isolated, individual acts or they may reflect widespread societal norms.

The answer to the second question was that, to eliminate such an array of barriers, anti-discrimination statutes must have a range of powers and procedures. First, they must incorporate provisions that protect people with disabilities from such barriers; they must recognize that freedom from such barriers is an enforceable right. Second, they must provide mechanisms to identify such barriers. Third, there must be mechanisms to determine whether the barriers contravene the protected right. And fourth, the statutes must provide effective remedies.

Do contemporary Canadian human rights statutes incorporate those powers and procedures? Not completely. In the introduction to this thesis, I speculated that anti-discrimination statutes may not have evolved to incorporate current theories of equality. What I found was that courts and tribunals, through their interpretations of the statutes, have determined that anti-discrimination legislation is aimed at achieving substantive equality. The statutes can be, and have been, interpreted as giving disabled people the right to be free from the various barriers that are impeding their substantive equality. However, these laws lack the powers and procedures necessary to effectively enforce those rights. First, they are generally reactive and complaint-driven. People with disabilities, particularly those who are most marginalized, may have difficulty recognizing some barriers, or they may be unable or reluctant to bring forward complaints. It is possible to build more proactive options into anti-discrimination statutes. But legislatures have rarely done so. And when they have, such as British Columbia’s short-lived Commission model discussed in Chapter V, human rights agencies seem reluctant to use them. If barriers are identified through a complaint, most such statutes incorporate broad powers to investigate and determine whether barriers discriminate...
against people with disabilities. The direct access model limits investigative powers; however, that reflects a legislative policy decision and is not a necessary limitation of anti-discrimination statutes generally. Remedial limitations, on the other hand, are an inherent problem of such statutes. Although human rights tribunals are given broad remedial powers, those powers can only be applied to the parties to the dispute. Consequently, although tribunals have the powers needed to eliminate the particular barriers that are at issue in the case before them, and they may even be able to transform a particular organization, they are limited to a case-by-case approach. They cannot effectively address barriers that result from the operation of widespread norms. They do not have the powers to achieve the societal transformation that is needed to achieve substantive equality for people with disabilities.

If anti-discrimination statutes cannot be counted on to achieve equality for people with disabilities, are other statutory measures more effective? That is an important question that requires serious analysis. However, a comprehensive comparison of statutory measures to address the inequality of disabled people is beyond the scope of this thesis. Nevertheless, my aim is to provide a bridge from the theoretical analysis of equality to its practical application. Strong anti-discrimination statutes have been a central theme in the strategy of disability rights activists. If such laws cannot achieve the results equality-seekers desire, should that strategy be abandoned? If so, for what? In the remaining pages, I will briefly consider a few alternatives to anti-discrimination statutes. My purpose is not a comprehensive analysis of the various statutes or to draw any final conclusions about their relative merits. Rather, it is merely to illustrate the variety of legislative approaches that have been adopted and to identify some of their more obvious strengths and weaknesses. I conclude with some
discussion of the practical implications of my analysis for those who seek equality for people with disabilities.

2. Some Legislative Alternatives

Many people with disabilities rely on income from government programs such as welfare or workers' compensation. These programs reduce the poverty associated with disability, but they do little to reduce the barriers that must be removed to enable disabled people to participate equally in society.\(^2\) My focus is on laws that seek to remove such barriers.

Equality can only be achieved by eliminating the sources of inequality. It follows that any mechanism designed to eliminate inequality must be able to identify its causes. As discussed above, complaint-driven enforcement models address only those obstacles that become the basis of a complaint. Therefore barriers may remain hidden for a variety of reasons: the victims of the obstacle may be incapable of recognizing the barrier or of filing a complaint; they may be too vulnerable to do so; or the barriers may be systemic and therefore difficult to isolate or recognize. Consequently models that do not rely on complaints may be more effective at identifying the sources of inequalities.

Legislation requiring mandatory monitoring or audits of organizations relieves the victims of inequality from the burden of filing complaints and may also identify neutral barriers that would not likely be known to the victims. So, for example, under federal employment equity legislation, employers must provide reports on the numbers of employees in each of the

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\(^2\) Anti-discrimination statutes may be a tool for those who wish to make welfare or worker’s compensation laws more effective at reducing economic inequality; however, as discussed above in Chapter IV at note 149 and accompanying text, to date the courts have not been receptive to such arguments.
target (or “designated”) groups, one of which is people with disabilities. If those reports indicate a significant under-representation of a designated group, that may indicate the existence of barriers that are preventing their employment. The numbers cannot show what the barriers are, or even if there are barriers; however, they indicate that there may be barriers and therefore that further investigation is warranted. An independent audit may find that the under-representation is caused by neutral practices, individual bias, exclusionary classifications, structural barriers, or a combination of factors. Such information could be used either to develop a plan to eliminate the barriers or to support a complaint of discrimination.

Despite the potential of employment equity legislation, the Canadian employment equity experience is not encouraging for people with disabilities. In 2002, people with disabilities represented just 2.4% of the workforce covered by the Employment Equity Act. That was a slight increase over the previous year, which reversed an eight year trend, but it was still below the highwater mark of 2.7% in 1995. Moreover it is markedly below the 6.5% of people with disabilities in the available workforce.

Employment equity measures the success of people with disabilities, and other designated groups, in accessing employment opportunities in an organization. If disabled people are under-represented, it is up to the organization to implement changes to increase the representation. The speed and nature of the change is generally left up to the organization.

As with anti-discrimination statutes, employment equity statutes bring about change one organization at a time. Other approaches seek more fundamental societal transformation by forcing those who design society’s structures – physical and organizational – to include disabled people in their vision. In Canada, for example, the National Building Code of Canada, 1995 establishes standards for accessibility. If adopted by provincial or municipal authorities, these standards become part of the licensing requirements. Such requirements have considerable appeal. First, they are proactive. They do not rely on complaints from affected individuals to achieve equality; rather, they identify what is needed to remove barriers, albeit within the limited context addressed in the regulations, and they establish a mechanism to ensure compliance with the standards. Moreover, such standards do not operate on a case-by-case basis but apply to all organizations covered by the standards. As a result, more organizations are likely to comply with the standards than under a reactive, complaint-driven system. The complaint-driven model has the added problem of putting at a competitive disadvantage those organizations that expend resources to comply, either voluntarily or under order, with anti-discrimination legislation; licensing requirements do not create the same competitive disadvantage.

Licensing provisions are not without drawbacks. In particular, licensing requirements may be subject to political determinations. These are illustrated in Beeman v. Marlborough Development (1973) Ltd. The case involved a high-rise building with a revolving restaurant

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5 Other laws are directed specifically at standards designed to improve access for people with disabilities. See the Newfoundland Building Accessibility Act, R.S.N.L. 1990, c. B-10 and Building Accessibility Regulations, Consolidated Newfoundland and Labrador Regulation 1140/96.

6 There may, of course, be differing costs as some organizations have more extensive or more expensive barriers to remove.

on the top floor. The restaurant was designed with an inner core and outer ring that initially were intended to be at the same level. However, as a result of problems during construction, the outer ring was raised 14 inches above the inner core. At the time, the applicable building code provided for barrier-free access to public buildings. The building's owner requested that the Superintendent of Building Inspections provide a waiver from the barrier-free access requirement, but was denied. The owner appealed the denial to the City of Winnipeg Committee on Planning and Community Service, but withdrew the application upon learning of the opposition of advocacy groups. The owner's subsequent proposal to the Supervisor of Building Inspections for installation of a mechanical chair lift was conditionally approved. Advocacy groups appealed that decision to the Committee on Planning and Community Service and the decision was reversed. That decision was appealed to the Deputy Minister of Labour of the province who approved a proposal to install a mechanical lift to provide access. Thus, despite the efforts of city officials to enforce the access standards, politicians were able to set the standards aside.8

The Americans with Disabilities Act9 is a hybrid approach: it regulates employers and service providers by identifying standards that require the removal of barriers, but it enforces these requirements through a complaint-driven model. In addition to prohibiting discrimination in employment, services and facilities, its regulations provide detailed accessibility standards that must be met by covered agencies.10 So far, the attempt has been a mixed success. The

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8 The complainant did not fare better under anti-discrimination legislation. The Board found (at para. 119) that the platform lift was discriminatory because it failed to meet the requirements of dignity but accepted (at para. 150) that there was a bona fide justification because the business inconvenience caused by renovating the restaurant after it had opened would be an undue hardship.

9 42 U.S.C. §12101 (1990) [ADA].

10 The requirements of the ADA are available online at U.S. Department of Justice ADA Home Page http://www.usdoj.gov/crt/ada/adahtm (accessed March 18, 2005).
ADA is credited with having dramatically changed the lives of disabled people in the United States. It has changed the self-perception of people with disabilities and has made their everyday lives more accessible. Arlene Mayerson, a lawyer and disability rights advocate, writes: "there has been a burgeoning awareness of, and change in attitude about, people with disabilities. Being disabled now is a different experience than before the ADA." At the same time, judicial interpretation of the ADA has narrowed its scope and impact. Sociologist Richard Scotch suggests that the ADA has fallen short of its goals, noting that disabled people "are still disproportionately unemployed and underemployed, and their incomes are below those of people without disabilities." He notes that employers and service providers have been slow to implement the ADA's requirements. Many "have taken a wait-and-see approach or have responded to individual situations on an ad hoc basis, while others appear to have resisted change unless forced by enforcement agencies or the courts."

Arguably the current state of the art of disability legislation is contained in the Accessibility for Ontarians with Disabilities Act, 2005, which replaced the weak and ineffective Ontarians with Disabilities Act, The new Act requires that accessibility standards for both

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13 See, for example, Sutton v. United Airlines Inc., 527 U.S. 417 (1999); Board of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001), as discussed in Chapter III above at note 119 and accompanying text.
15 Ibid. at 276.
16 S.O. 2005, c. 11.
17 S.O. 2001, c. 32.
the public and private sector be established through a consultation process. The standards will be incorporated into regulations, and compliance will be enforced through mandatory accessibility reports and inspections. The Act also provides that the Director may order that reports be filed, that the organization comply with the standards, or that it pay a penalty.\(^1\) Although this Act appears to have great potential for improving access for people with disabilities, and overcomes the problems inherent in a complaint-based system, it relies on a process of public consultation for the creation of standards. It is too soon to tell whether that process will generate standards that will effect significant change. Moreover, under the new Act, the standards may be phased in over a twenty-year period. Twenty years is a long time to wait for inclusion. Finally, this Act requires the removal of barriers that impair access, but it does not ensure inclusion. It does not require any measurement of the extent to which people with disabilities are participating in an organization. It is an equal opportunity model; it does not ensure equal results.

Each of these alternatives has potential for addressing some barriers to equality that are experienced by people with disabilities. None of them can deal with all inequalities. Further, none of them can completely replace anti-discrimination legislation.

3. **Conclusion**

For about a quarter century, anti-discrimination laws have aimed at achieving equality for people with disabilities, among others. Having lived with a disability throughout that period, I can attest to the significant improvements to the lives of disabled people. The opportunities to participate in work, education and leisure activities have increased dramatically in that

\(^{18}\) *Accessibility for Ontarians with Disabilities Act, 2005, supra* note 16, s. 21.
time. But better is not good enough. Too many people with disabilities still exist in the margins of Canadian society. And those who have greater opportunity to participate continue to face a plethora of obstacles to full participation in all that society has to offer. Anti-discrimination statutes have played an important role in identifying and removing some of the barriers to equality. And decisions related to disability have likely served to educate the public about their legal obligations. But that legislation has failed to transform society to the degree that is necessary for disabled people to be equal participants in Canadian society.

There appears to be a growing consensus among theorists that anti-discrimination legislation, at least as it is currently conceived, is an effective but limited tool for achieving equality for people with disabilities; anti-discrimination legislation should be part of a multifaceted approach to eliminating the inequalities. In a recent article, Jerome Bickenbach continues his critique of the minority rights approach but concludes:

To be sure, none of this provides grounds for moving away from antidiscrimination legislation .... On the contrary, it should be the motivation for supplementing antidiscrimination law with a more vigorous and multisectorial pursuit of equality of participation for persons with disabilities.19

Richard Scotch, whose research into disability as a civil rights issue20 is often cited by advocates of the minority rights approach, has come to a similar conclusion:

Legal protections from discriminatory practice are probably indispensable, but such guarantees cannot be the only strategy toward ending the discrimination

and social exclusion faced by Americans with disabilities. What may be needed as well is a broad-based political mobilization of people with disabilities to educate the public and policy-makers about the actual experience and consequences of disability and to advocate for laws and programs that promote integration, full participation and nondiscrimination.

Anti-discrimination statutes could be made more effective. Some of the programs or models I have discussed as alternatives to the complaint-driven model could be incorporated into anti-discrimination legislation. That would require a re-thinking of the operation but not the purpose of anti-discrimination legislation. However, as a matter of political strategy, advocating for the incremental introduction of programs, policies and legislation separate from anti-discrimination laws may be more effective than advocating for more proactive and more powerful human rights agencies. Whatever the strategy, it is clear that a sustained and determined effort will be required to bring about the change. Despite almost a decade of left-leaning governments in British Columbia, activists failed to persuade legislators to introduce employment equity legislation. And it has taken a decade of determined efforts by activists in Ontario to persuade their government to enact a law that has the potential to ensure accessibility for people with disabilities.

This may be a difficult time for activists to muster an effective campaign for legislative reform. Advocacy groups are still reeling from a decade or more of cuts to government programs, cuts that have hit disabled people hard. The energy of activists is rightly directed at efforts to ameliorate the impact of the cuts or to restore program funding. But those cuts

22 Those efforts are documented in Lepofsky, supra note 1.
underscore the need for laws that seek to enhance the equality of people with disabilities. It is because disabled people are not equal, because their lives are often marginal, because they are denied the opportunities to participate in the benefits of society enjoyed by others, that they are vulnerable to program and service cuts. The disabled have demonstrated an ability to set aside, for a time, their struggle for the daily necessities of life to campaign for social change through law reform. They can do so again. But to do so, they need a vision of how laws should be reformed. This thesis does not provide that vision. It does, however, provide a theoretical basis for a practical strategy for change. It answers some of the questions that activists and law reformers ought to ask when they consider what laws are necessary to enable people with disabilities to participate fully and equally in Canadian society.
Bibliography

Books and Articles


Chunn, Dorothy E. & Lacombe, Dany, eds. Law as a Gendering Practice (Don Mills, Ont.: Oxford University Press, 2000).

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Illingworth, Patricia & Parmet, Wendy E. “Positively Disabled: The Relationship between the Definition of Disability and Rights under the ADA” in Leslie Pickering Francis &


Manfredi, Christopher P. *Feminist Activism in the Supreme Court* (Vancouver: UBC Press, 2004).


254

**Reports and Studies**

Billingsley, Brenda & Muszynski, Leon. “No discrimination here?: Toronto employers and the multi-racial workforce” (Social Planning Council of Metropolitan Toronto and Urban Alliance on Race Relations, 1985).

255

Cases

Bolster v. B.C. (Min. of Public Safety and Solicitor General), 2004 BCHRT 32 (judicial review petition pending).
Federated Anti-Poverty Groups of B.C. v. Vancouver (City), 2002 BCSC 105.
Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R 703.
Hutchinson v. B.C. (Min. of Health), 2004 BCHRT 58 (judicial review petition pending).
Jefferson v. British Columbia Ferries Service (unreported, 29 September 1976, B.C. Bd Inq.).
Newfoundland (Treasury Board) v. N.A.P.E., 2004 SCC 66.
Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000] 1 S.C.R. 665.
Quong-Wing v. The King (1914), 49 S.C.R. 440.
Vancouver (City) v. Maurice, 2003 BCSC 1271.

Constitutions, Statutes, Bills and Treaties

Administrative Tribunal Act, S.B.C. 2004, c. 45.
Age Discrimination Act, S.O. 1966, c. 3.
An Act to prevent the further introduction of Slaves and to limit the term of contracts for servitude within this province, 1793 S.U.C. (2nd Sess.), c. 7.
Building Accessibility Regulations, Consolidated Newfoundland and Labrador Regulation 1140/96.
Canadian Human Rights Act, R.S. C. 1985, c. H-6, s. 11.
Conveyancing and Law of Property Amendment Act, S.O. 1950, c. 11.
Employment Equity Act, S.C. 1995, c. 44.
Evidence Act, R.S.B.C. 1996, c. 124.
Fair Accommodation Practices Act, S.N.S. 1959, c. 4.
Fair Employment Practices Act, S.N.S. 1955, c. 5.
Female Employees Fair remuneration Act, S.O. 1951, c. 26.
Human Rights Act, S.B.C. 1984, c. 22.
Law Against Discrimination, New York Laws 1945, c. 118.
Miscellaneous Statutes Amendment Act (No. 2), 1985, S.B.C. 1985, c. 51.
Ontario Anti-Discrimination Commission Act, S.O. 1958, c. 70.
Ordinance of Labourers, 1349, 23rd Ed. 3.
Ontarians with Disabilities Act, S.O. 2001, c. 32.
Poor Law Amendment Act, 1834, 4 & 5 Wm. 4, c. 76.
Racial Discrimination Act, S.O. 1944, c. 51.
Saskatchewan Bill of Rights Act, S.S. 1947, c. 35.
Unemployment Relief Act, S.B.C. 1931, c.65.
Unemployment Relief Act, S.B.C. 1932, c.58.

Legislative Debates and Proceedings

Ontario, Legislative Assembly, *Journal of the Legislative Assembly*, (March 10, 1944).

**Websites**

Personal Communication

MacNaughton, Heather. Tribunal Chair, BC Human Rights Tribunal, personal communication, January 10, 2005.

Newspaper Articles

“Racial Bill Not the Cure” Globe & Mail March 10, 1944.
“Racial Bill Safeguarded” Globe & Mail March 13, 1944.
“Rights bill smeared Corman tells house” The Leader-Post March 27, 1947.