**2012 Disability and Discrimination Systemic Monitoring in Canada**

**Disability Rights Promotion International**

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### I. Introduction

This chapter surveys laws and policies in Canada that affect the rights of persons with disabilities. It does so as part of a broader project of international disability rights monitoring, and is guided by DRPI’s National Law and Policy Monitoring Template. [1](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note1) The Template is based on the United Nations Convention on the Rights of Persons with Disabilities. [2](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note2) Its purpose is to monitor human rights for people with disabilities at the systemic level, that is, at the level of existing laws, policies, and programs, and to identify and draw attention to the most critical gaps and deficiencies in the legislative and policy framework. [3](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note3) It provides headings and questions based on the articles in the Convention, arranged by category of rights (civil, political, economic, social and cultural) and human rights principles (dignity; autonomy; participation, inclusion and accessibility; non-discrimination and equality; and respect for difference).

Providing an extensive review of disability law and policy in Canada is a large task. This is due to the division of law-making power among federal and provincial legislatures, and the functioning of three distinct branches of government: legislative, executive, and judiciary. Also, measures affecting persons with disabilities are numerous and complex. [4](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note4) Some of these measures directly target some or all persons with disabilities while others are of general application and affect persons with disabilities, sometimes differently or disproportionately compared with persons who do not have disabilities. [5](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note5) Likewise, some laws and policies deal with broad human rights principles, and others are specific to certain sectors of society. In focusing on describing these sources, this chapter is unable to engage in the subsequent steps of disability rights monitoring. These next steps include evaluating the operation of the law on the ground, and drawing conclusions on whether norms of the Convention have successfully been implemented in Canada.

This chapter first briefly outlines the Canadian social and legal landscape with respect to disability. It then examines Canadian law and policy under specific parts of the Template, namely: access to justice and equal recognition before the law; education; health, habilitation and rehabilitation; and work. It discusses the most important law and policy instruments from the following Canadian jurisdictions: federal, British Columbia (BC), Manitoba, Ontario, Quebec, and Newfoundland and Labrador. Its analysis thus reflects the geographic and cultural diversity of law and policy in Canada.

#### **General Statistics and Issues Faced by Persons with Disabilities in Canada**

Over 4.4 million Canadians, or about one in seven, had a disability in 2006. [6](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note6) The disability rate increases with age, and although boys are more likely than girls to have disabilities when younger, women are generally more likely than men to have disabilities as they age. [7](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note7) The 2010 Federal Disability Report states that persons with disabilities “are over-represented within the low-income population” in Canada, with 14.2% of adults with disabilities living in low-income families compared to 10.1% of adults without disabilities. [8](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note8) This is because persons with disabilities are less likely than persons without disabilities to obtain a high school diploma, and are more likely to live alone. [9](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note9) The employment and unemployment rates for working-age adults with disabilities are 53.5% and 10.4%, respectively, compared to 75.1% and 6.8% for working-age adults without disabilities. [10](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note10)Income for working-age adults with disabilities decreases as severity of disability increases and those with developmental disabilities have the lowest average employment income. [11](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note11)26.1% of persons with disabilities who are unemployed believe that they were refused jobs due to their disability. [12](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note12) Persons with disabilities are also more likely to live in “inadequate homes” than persons without disabilities (9.9% compared to 6.4%). [13](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note13) 5.0% of adults with disabilities do not have a needed accessibility feature (e.g. widened hallways or doorways, ramps or visual alarms) for their home. [14](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note14)

Access to appropriate and necessary health care is vital in ensuring the well-being of persons with disabilities. [15](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note15)Between 2005 and 2006, 14.8% of adults with disabilities were unable to obtain the necessary health care or social services, most commonly due to “substantial out-of-pocket costs” and because many adults with severe disabilities do not know where or how to obtain such health care. [16](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note16) Around 12.9% of adults with disabilities were unable to take required medication, or had to take less at least once during 2005 and 2006 because of the cost of medication. [17](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note17)

Families who have children with disabilities face many barriers to ensuring that their children receive proper education. These barriers include costs …, perceptions that children with disabilities are not career-oriented and the notion that it is difficult to educate children with disabilities in a mainstream education system. [18](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note18) The extent of classroom participation by children with disabilities decreases as severity of disability increases. [19](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note19)Aids and devices are necessary to ensure that children with disabilities are able to participate fully in school. [20](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note20)However, 17.9% of children with disabilities do not receive the required aids and devices at school, primarily due to a lack of funding in the school system. [21](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note21)

Participation in the community, political life and cultural activities are important for fully enriched lives. [22](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note22)Between 2005 and 2006, 34.4% of persons with disabilities participated in volunteer activities; however, this rate decreases with increasing severity of disability. [23](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note23) Interestingly, in 2008, the overall voter participation rate for the federal election was 75.8% for adults with disabilities, compared to 72.0% for adults without disabilities. [24](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note24)

#### **United Nations Convention on the Rights of Persons with Disabilities**

Canada was one of the first countries to sign the Convention. [25](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note25) It entered into force on May 3, 2008. [26](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note26)Canada ratified the Convention on March 11, 2010. [27](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note27)Prior to ratification, the federal and provincial governments aimed to ensure that laws, policies and programs in Canada were consistent with the Convention. [28](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note28) The federal government also participated in community and public consultations. [29](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note29) Canada did not sign the Optional Protocol to the Convention on the Rights of Persons with Disabilities,[30](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note30) which allows individuals or groups to make complaints concerning alleged violations of the provisions of the Convention by State Parties. [31](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note31) The remainder of this introduction describes Canada’s legal system generally as it is relevant to persons with disabilities.

#### **National Legal Landscape on Disability**

Canada is a federal state that operates under constitutional supremacy, meaning that The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. [32](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note32) The human rights of all Canadians (including persons with disabilities) are protected through two main legal regimes: (1) the Canadian Charter of Rights and Freedoms [33](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note33) (which is entrenched in the Constitution Act, 1982), and (2) federal and provincial/territorial human rights legislation. These regimes provide a broad guarantee to equality, prohibiting discrimination on a number of grounds, including disability.

The Charter is a constitutional document, and applies to federal and provincial governments and matters within their legislative authority. [34](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note34) In unclear situations, courts determine whether an entity is a government actor, or whether an act is governmental for the purpose of deciding if the Charter applies. [35](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note35) The Charter will notapply in cases of civil litigation with private parties where no act of government is relied upon to support the action. [36](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note36) Such a litigant can, however, argue that the common law is inconsistent with Charter values and should be modified. [37](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note37)

Section 15(1) of the Charter states,

*Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*[*38*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note38)

In a s 15(1) challenge, a court is to apply the following two-staged test:

*(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?*[*39*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note39)

The purpose of section 15 has been described as preventing

*the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.*[*40*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note40)

Section 15(1) promotes substantive rather than formal equality, a concept that rejects the mere presence or absence of difference as an answer to differential treatment but rather focuses on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. [41](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note41)

The Supreme Court of Canada has recognized that the history of disabled persons in Canada is largely one of exclusion and marginalization and because of this, persons with disabilities face persistent social and economic disadvantage. [42](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note42) The recognition of this wider historical context informs a court’s inquiry into disability discrimination claims made under section 15(1). [43](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note43) The Supreme Court has also stated generally that in analysing differential treatment based on disability, it is,

*useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not located in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks.*[*44*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note44)

While s 15(1) of the Charter aims at preventing governments from engaging in discrimination, s 15(2) enables governments to actively combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. [45](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note45) Section 15(2) states that

*any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of … mental or physical disability*

is not precluded by s 15(1). [46](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note46) The Supreme Court of Canada has recognized that legislatures need to treat different individuals and groups in different ways in order to govern effectively and that accommodating differences, which is the essence of true equality, frequently requires distinctions to be made. [47](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note47)

If a law does not fall under the ambit of s 15(2) and is found to violate s 15(1), a court will consider under s 1 of the Charter whether the measure in question is a reasonable limit[] prescribed by law as can be demonstrably justified in a free and democratic society.[48](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note48) Where a Charter violation is not justified under section 1, a court of competent jurisdiction is allowed to give such remedy as the court considers appropriate and just in the circumstances. [49](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note49) However, a breach of a Charterright does not necessarily entitle the victim to a remedy. [50](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note50)

While the Charter applies only to governmental action, human rights legislation applies to both the public and private sector. Enacted at the federal and provincial/territorial levels, this legislation prohibits discrimination on several grounds (including disability) in various social spheres, such as employment and the provision of services to the public. [51](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note51) The legislation is enforced through a complaints mechanism. Individuals or groups that encounter discrimination can file a complaint, at no charge, describing the harm they have experienced. [52](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note52) Complaints may be investigated, [53](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note53)settled through mediation, [54](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note54) or adjudicated before a panel. [55](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note55) Where a complaint resolved by adjudication and discrimination has been found, the panel may provide remedies including compensation or an order to redress or prevent discrimination. [56](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note56)

Canada has developed a rich jurisprudence establishing key human rights principles. Of particular importance to persons with disabilities is the duty to accommodate. This principle requires governments and the private sector to restructure their policies, practices and standards to include the needs of persons with disabilities. [57](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note57) For example, urban transportation systems must accommodate persons who use wheelchairs or other mobility aids. [58](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note58) The duty to accommodate does not apply to those situations where the accommodation required would cause undue hardship such as extreme cost, significant business disruption or serious safety risks. [59](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note59) Special programs to prevent disadvantage or relieve hardship are not considered discriminatory, but the requirements and implementation of such programs differ depending on jurisdiction. [60](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note60)

### II. Equal Recognition before the Law and Access to Justice

#### Equal Recognition before the Law

Under article 12 of the Convention, persons with disabilities must be recognized as persons before the law [61](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note61) and enjoy legal capacity on an equal basis with others in all aspects of life. [62](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note62) State Parties must provide support to persons with disabilities to exercise their legal capacity, and implement safeguards to prevent abuse of the support provided. [63](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note63) They must also take measures to ensure that persons with disabilities have an equal right to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit and that they are not arbitrarily deprived of their property.

A survey of Canadian law reveals many examples of legislative provisions relating to civil capacity and incapacity. For example, in BC, adults are presumed capable of

*“making decisions about personal care, health care and legal matters and about the routine management of the adult’s financial affairs.”*

An adult is also presumed capable of making a representation agreement which allows the adult to name an individual to help make decisions regarding various matters, such as the routine management of financial affairs and obtaining legal services. [66](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note66) The Civil Code of Québec states that every human being possesses juridical personality and has the full enjoyment of civil rights [67](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note67) and that every person is fully able to exercise his civil rights. [68](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note68) More generally, the Québec Charter of Human Rights and Freedoms states,

“Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.”

In Manitoba and Ontario, a person is incapable of managing property where the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. 70

“A capable person may appoint a substitute decision-maker under a power of attorney. 71 Where it is believed that a person is incapable of managing property, an individual can apply 72 or be appointed as a guardian of the incapable person’s property.”

The relevant statutes also lay out the duties and powers of the substitute decision-maker. They are those of a fiduciary, meaning their powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith for the benefit of the person with a disability. 74 A breach of duty may not lead to liability if, in BC, the representative complies with the relevant statute, 75 and in Manitoba and Ontario, if the representative acted honestly, reasonably and diligently. 76 A decision-maker must encourage the participation of the person with a disability in the making of a decision. 77 In all five provinces, there are provisions regarding the termination of a decision-maker, which typically occurs when an agreement ends or a decision-maker is discharged. 78 The duties and powers of a substitute decision-maker in Québec depend on whether a tutor, curator or adviser is appointed, and are laid out in Chapter III of Title Four of the Civil Code of Québec. 79The provinces have similar regimes for addressing the appointment, obligations and rules regarding decision-makers for personal and/or health care. 80

#### **Access to Justice**

Under article 13 of the Convention, State Parties are required to ensure

*effective access to justice for persons with disabilities on an equal basis with others*

through appropriate accommodations in order for persons with disabilities to participate directly and indirectly in all legal proceedings. [81](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note81) To carry out this obligation, State Parties are to provide appropriate training for those who work in the field of the administration of justice. [82](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note82) Corollary obligations include ensuring that accommodation is not seen as discriminatory, and that women and children with disabilities have full and equal enjoyment of all human rights and fundamental freedoms. [83](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note83) Finally, access to justice obligations would not be fulfilled unless persons with disabilities were able to obtain an effective remedy for a human rights violation through a competent authority provided by the legal system of the state. [84](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note84)

There are various accommodations federally and provincially that enable persons with mental or physical disabilities to participate in legal proceedings both directly and indirectly. A litigation guardian may bring or answer a proceeding on behalf of a person under a disability, whose definition includes minors and those who are mentally incompetent or incapable. 85 A court can remove, appoint or substitute a litigation guardian if it is in the best interests of the person with a disability. 86 In claims involving a person under a disability, the court must approve a settlement before it is binding.

In Ontario, the Human Rights Legal Support Centre provides advice and assistance, legal and otherwise regarding the making of an application to the Human Rights Tribunal. [88](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note88) The Centre was implemented as a result of the Ontario government’s decision to remove the default public investigation and prosecution of human rights complaints and to leave it to victims to investigate and bring their cases privately before the Tribunal. [89](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note89) In contrast, in Newfoundland, the Human Rights Commission is required to

*“co-operate with and help a person, an organization or a group concerned with human rights, whether within or outside the province.”*[*90*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note90)

There are a variety of other provisions that assist persons with disabilities to take part directly or indirectly in various legal proceedings. Section 14 of the *Charter*states that a party or witness to any proceeding who is deaf has the right to the assistance of an interpreter.[91](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note91) Under the *Canada Evidence Act*, where a witness has a physical or mental disability and has difficulty communicating, the court may permit him or her to give evidence by any means that enables the evidence to be intelligible, provided that he or she has the necessary capacity. [92](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note92) The *Act* also states that a person whose mental capacity to testify as a witness is challenged may testify if he or she can communicate the evidence and promises to tell the truth. [93](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note93) In 2012 a majority of the Supreme Court of Canada held that the individual need not explain that he or she understands the duty to tell the truth. [94](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note94)

The Criminal Code provides for supports and accommodations for disabled witnesses and jurors. [95](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note95)Unique to Ontario is the Accessibility for Ontarians with Disabilities Act, 2005 (AODA), which applies to *every person or organization in the public and private sectors of the Province of Ontario, including the Legislative Assembly of Ontario.*

The Accessibility Standards for Customer Service regulation states that service provides must provide for training about the provision of services to persons with disabilities. 97 The Ontario Courts Accessibility Committee was developed in 2007 with the goal of making Ontario’s courts more accessible to persons with disabilities. 98 The Rules of Professional Conduct for lawyers in Ontario contains an example of rule-making by a professional licensing body that serves to promote the rights of persons with disabilities. Rule 2.02(6) states that when working with a client under a disability, licensees are to as far as reasonably possible, maintain a normal lawyer and client relationship. 99

#### **Equal Rights to Human Rights and Fundamental Freedoms**

Section 28 of the Charter guarantees the rights and freedoms within the Charter equally to male and female persons. Under the Québec Charter,

*Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights.*[*100*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note100)

The rights in the Québec Charter are also guaranteed equally to women and men. [101](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note101)

##### **Right to Life, Liberty and Security of the Person**

The Convention also requires State Parties to ensure that persons with disabilities have the right to life, liberty and security of the person on an equal basis with others, that they are not deprived of this right arbitrarily or unlawfully, and if liberty is deprived, it is on an equal basis with others and is in compliance with international human rights law and the Convention. [102](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note102) These rights also include freedom from torture or cruel, inhuman or degrading treatment or punishment and freedom from exploitation, violence and abuse. [103](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note103) Finally, State Parties must ensure that persons with disabilities have liberty of movement and freedom to choose a residence and nationality on an equal basis with others. [104](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note104)

The liberty interest in section 7 is engaged

*“where state compulsions or prohibitions affect important and fundamental life choices”*

and is not limited *to mere freedom from physical restraint.* However, this personal autonomy has been found not to be synonymous with unconstrained freedom. [110](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note110) In the Supreme Court of Canada decision in R v Morgentaler, the plurality judgment of Beetz J held that security of the person under section 7 includes *a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction.* The concurring judgment of Wilson J held that the right to liberty grants the individual a degree of autonomy in making decisions of fundamental personal importance. [112](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note112)  In Rodriguez v British Columbia (Attorney General), the Supreme Court interpreted the judgments in Morgentaler as holding that *personal autonomy, at least with respect to the right to make choices concerning one’s own body, control over one’s physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.*

In Rodriguez, the applicant had Lou Gehrig’s disease, and wanted the choice to end her life when she would no longer be able to enjoy it, with the assistance of a physician. [114](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note114) The applicant asked that the prohibition of assisted suicide in the Criminal Code be declared invalid on the ground that it violated her section 7, 12 [115](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note115) and 15(1) Charter rights. [116](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note116) In discussing section 7, the Court stated that

*security of the person, by its nature, cannot encompass a right to take action that will end one’s life as security of the person is intrinsically concerned with the well-being of the living person*

and

*human life is seen to have a deep intrinsic value of its own.*[*117*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note117)

The Court concluded that the assisted suicide provision did not violate any principle of fundamental justice [118](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note118)because

*human life must be respected and we must be careful not to undermine the institutions that protect it.*

##### **Freedom from Exploitation, Violence and Abuse**

The Criminal Code prohibits the sexual exploitation of a person with a disability. [125](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note125) The offence is made out where someone in a relationship of authority or dependency has sexual contact with a person who has a disability and there is no consent. [126](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note126) Under section 215(1)(c), everyone is under a legal duty

*“to provide necessaries of life to a person under his charge if that person … is unable, by reason of … mental disorder … to provide himself with the necessaries of life.”*

Other provisions in the Criminal Code that are of more general application also address exploitation, violence and abuse against persons with disabilities. These include, for example, the criminal negligence, abandoning child, and child pornography provisions.

In BC, the *Adult Guardianship Act* provides support and assistance to

*adults who are abused or neglected and who are unable to seek support and assistance*

due to physical restraint or a physical handicap. [129](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note129)Community care facilities (defined as premises in which a person provides care to three or more persons who are not related by blood or marriage) are governed by the regulations of the *Community Care and Assisted Living Act*. [130](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note130) A licensee of a community care facility must ensure that a person in care is not subjected to financial abuse, emotional abuse, physical abuse, sexual abuse or neglect. [131](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note131) Legislation in other provinces similarly protects persons with disabilities against abuse or neglect. [132](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note132) Statutes of more general application, such as those that protect persons from family violence, may be applicable in preventing exploitation, violence and abuse of persons with disabilities. [133](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note133)

##### **Freedom of Movement and Nationality**

The Charter provides that

*Every citizen of Canada has the right to enter, remain in and leave Canada.*[*134*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note134)

Every citizen and permanent resident of Canada also has the right to move to and take up residence in any province as well as to pursue the gaining of a livelihood in any province. [135](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note135) The Supreme Court of Canada has ruled that

*“[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.”*

Under section 38(1)(c) of the Immigration and Refugee Protection Act, a foreign national will generally be inadmissible to Canada on health grounds if his or her health condition might reasonably be expected to cause excessive demand on health or social services. [137](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note137) An individualized assessment must be made where

*“the medical officers must necessarily take into account both medical and non-medical factors, such as the availability, scarcity or cost of publicly funded services, along with the willingness and ability of the applicant or his or her family to pay for the services.”*

### III. Education

#### Inclusive Education System with Accommodation

Article 24 of the Convention requires State Parties to recognize the right of persons with disabilities to education without discrimination. In particular, State Parties must ensure that persons with disabilities are not excluded from the general education system and have access to an inclusive, quality and free primary and secondary education on an equal basis with others. [139](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note139) There must also be reasonable accommodation and support measures provided to persons with disabilities in an environment that maximize[s] academic and social development to ensure an effective education. [140](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note140)

Education is a service under human rights legislation. [141](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note141) Also, the Charter applies to the public education system. [142](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note142) Thus, any potentially discriminatory action taken by a school or school board is reviewable through the human rights complaints process or through Charterlitigation. In addition, legislation [143](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note143) and policy [144](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note144)specific to education sets out the right of every child between certain ages to free education, [145](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note145) and aims to accommodate students with disabilities. The BC Supreme Court has stated that all students are entitled to an appropriate educational program and that a specialized, varied and dynamic program might be necessary. [146](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note146) The Special Education Policy in that province states:

*All students should have equitable access to learning, opportunities for achievement, and the pursuit of excellence in all aspects of their educational programs.*[*147*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note147)

BC aims for an inclusive education system which does not necessarily mean full integration in regular classrooms, but includes meaningful participation and the promotion of interaction with others. [148](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note148) School boards may also make use of resource rooms, self-contained classes, community-based programs, or specialized settings. [149](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note149)Students will only be placed in a setting other than

*a neighbourhood school classroom with age and grade peers*

where the school board

*has made all reasonable efforts to integrate the student, and it is clear that a combination of education in such classes and supplementary support cannot meet their education or social needs, or when there is clear evidence that partial or full placement in another setting is the only option after considering their educational needs or the educational needs of others.*[*150*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note150)

An Individual Education Plan is to be developed for students with special needs, which must be reviewed every year. [151](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note151)

In Manitoba, school boards are required to ensure that

*as far as reasonably practicable, appropriate educational programming is available to a pupil in a regular class of his or her peers.*[*152*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note152)

Manitoba endorses inclusive education to allow

*every individual to feel accepted, valued and safe.*[*153*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note153)

School divisions are required to provide reasonable accommodation for all students. [154](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note154) A pupil may be referred to a specialized assessment which may identify

*other methods of differentiated instruction and adaptations that can be used to assist the pupil in meeting the expected learning outcomes,*[*155*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note155)

and if those adaptations are insufficient, an individual education plan is to be prepared, setting out the learning outcomes that can be reasonably expected and what the pupil requires to meet those outcomes. [156](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note156) School divisions are also required to

*make reasonable efforts to plan with community agencies, organizations and associations, other education authorities, and regional health and children’s services authorities to support appropriate educational programming for students.*[*157*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note157)

Newfoundland supports an inclusive school culture, meaning that

*everyone in the school … should feel that they belong, realize their potential, and contribute to the life of the school.*[*158*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note158)

65 schools have entered the Inclusive Schools Initiative since 2008, which supports the learning of inclusive practices, differentiated instruction, and co-teaching methods for educators. [159](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note159) However, inclusive education

*does not mean that every student is required or expected to be in the regular classroom 100% of the time.*[*160*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note160)

Students will start out in the regular classroom and the learning needs of students will be accommodated through Instruction Resource Teachers and Classroom/Subject Teachers. [161](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note161)

In Ontario, school boards must provide special education programs and services for exceptional pupils. [162](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note162) The Minister must also ensure that all exceptional pupils in Ontario have appropriate special education services without payment of fees. [163](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note163) Where a program is not feasible within the public school system, the Minister does not fail to comply with this provision. [164](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note164) As well, where there are alternative programs, the Minister is not required to provide any specific program but only to ensure that appropriate special education programs and services are available. [165](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note165) An Individual Education Plan must be developed for each exceptional student, and should describe the program or services required by that student. [166](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note166)

In Québec, an individualized education plan must be developed for handicapped students. [167](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note167) Every school board must have an advisory committee on services for handicapped students which helps create policies on how to organize the provision of educational services required by these students. [168](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note168) The school board must then put these policies into place to ensure that the needs of handicapped students are met and to encourage integration into a regular classroom where possible. [169](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note169)Under An Act to Secure Handicapped Persons in the Exercise of Their Rights with a View to Achieving Social, School and Workplace Integration (SSWI), every handicapped person can apply to the Office des personnes handicapées du Québec for a service program to assist in his or her education, school integration or rehabilitation. [170](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note170)

In Eaton v Brant County Board of Education, the Supreme Court of Canada recognized that disability, as an enumerated ground of discrimination in section 15 of the Charter, is different from the other grounds because it varies depending on the individual and the context. [171](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note171)This creates a difference dilemma because segregation can either be protective or violative of equality depending on the specific individual. [172](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note172) The Court held that

*[w]hile integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality.*

Therefore, when the integrated setting is unable to meet a child’s needs, a special education placement outside of this setting will be required for accommodation. [174](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note174)Moreover, accommodation must be in the child’s best interests and considerations of equality must be examined from the child’s point of view. [175](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note175) In that case, the Court found it important that the tribunal whose decision it was reviewing had held that integration resulted in the child being isolated in a disserving and potentially insidious way. [176](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note176)

#### **Delivery of Education in Appropriate Languages and Modes**

State Parties are required to

*enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community.*[*177*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note177)

Therefore, State Parties must ensure that education is delivered in an appropriate manner by facilitating the learning of Braille, sign language, alternative script, and augmentative and alternate modes and means of communication. [178](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note178) In BC, there are a variety of services available to meet the diverse needs of students who require different supports to learn. [179](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note179) School districts may offer speech-language pathology services, which support students who have difficulties in oral communication. [180](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note180) They are also encouraged to obtain an occupational therapist or physiotherapist where students require one for the purpose of learning. [181](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note181) In addition, distributed learning is available as

*an alternative to classroom-based instruction for Kindergarten to Grade 12 students, including those with special needs.*[*182*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note182)

In Manitoba, a team of education consultants work with schools to provide the necessary supports to students who are blind or visually impaired. [183](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note183) The consultants determine needs for special equipment, and then work with schools to obtain the recommended equipment. [184](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note184)Reading materials in audio, Braille, large print and electronic text can be obtained from Manitoba Education Alternate Format Services. [185](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note185) The development of an Individual Education Plan plays a large role in ensuring the student receives the necessary supports for learning. [186](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note186) In Newfoundland, a student with an exceptionality is defined as a student with certain strengths or needs, which may be cognitive, emotional, behavioural, medical, social or physical. [187](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note187) The Department of Education provides various supports and services for students with an exceptionality. General services include alternate format materials, assistive technology, home tutoring, special transportation and a student assistant. [188](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note188)

In Ontario, a student who, because of a visual and/or auditory handicap (that has been certified by a medical practitioner) requires a special educational program, may be admitted to an Ontario School for the Blind or an Ontario School for the Deaf without the payment of fees. [189](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note189) An Ontario court has found that

*once an auditory handicap is established, the placement will follow unless the Committee is satisfied that the applicant would not be able to benefit from the placement.*[*190*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note190)

A teacher may use American Sign Language or Québec Sign Language to communicate with a student in the classroom. [191](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note191) For students where an Individual Education Plan is developed, it will specify the

*appropriate accommodations, program modifications and/or alternative programs as well as specific instructional and assessment strategies.*[*192*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note192)

In Québec, students who have a profound intellectual impairment are provided with various educational, medical and physical rehabilitation services by the school. [193](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note193) A school board can also enter into agreements with another school board, body or person to provide special educational services, literary services or population education services. [194](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note194)

#### **Teachers and Training**

To ensure effective learning, State Parties must take appropriate measures to employ teachers who are qualified in sign language and/or Braille and to train professionals and staff who work at all levels of education. [195](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note195) In general, teachers in the various provinces must meet certification or licensing requirements in order to teach in the public school system. Particular certification is required for those working in specific roles with children with special needs. [197](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note197) More general training is provided to other staff about working with students with special needs. [198](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note198)

#### **Access to General Tertiary Education, Vocational Training and Adult Education**

State Parties to the Convention must ensure that persons with disabilities have access to general tertiary education, vocational training, adult education and lifelong learning on an equal basis with others and that reasonable accommodation is provided. [199](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note199) BC offers adult special education programs and services to assist persons with disabilities in post-secondary studies. [200](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note200)Support services may be technological, physical, or academic (e.g. materials in alternate formats). [201](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note201)Classroom and exam supports (e.g. note taking, interpreter, extra time) are also available. [202](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note202) A report submitted to the Newfoundland and Labrador Minister of Education in December 2004, recognized that many of the supports in the elementary and secondary school system do not follow students to the post-secondary level. [203](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note203) Individual post-secondary institutions may provide necessary accommodations, such as Memorial University, where the Glenn Roy Blundon Centre for Students with Disabilities

*assist[s] students by facilitating access to information, services, and campus facilities in accordance with the university’s Academic Accommodation Policy for Students with Disabilities.*[*204*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note204)

Under the Labour Market Agreement for Persons with Disabilities, funding has been provided to Ontario colleges and universities to assist them in making their programs and services accessible to persons with disabilities. [205](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note205) The Ontario Human Rights Commission has also found that post-secondary institutions

*have developed a wide range of delivery methods and structures*

and nearly all post-secondary institutions

*appear to provide some specialized facilities, policies, equipment or services for students with disabilities.*[*206*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note206)

In Québec, with regard to university, college and secondary level educational institutions as well as organizations that provide vocational training, the Office des personnes handicapées du Québec must promote

*the inclusion of elements dealing with the adaptation of interventions and services for handicapped persons and, at the request of such institutions or organizations, advise them in that regard.*[*207*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note207)

Finally, other areas of law, such as income tax, have relevance to persons with disabilities in the sphere of education. Under the Income Tax Act, a medical expense credit may be claimed where an individual paid for tutoring services that are supplementary to the primary education of the patient who has a learning disability or mental impairment and has been certified by a medical practitioner as someone who, because of the disability or impairment, requires those services. [208](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note208) The Tax Court of Canada has found that this provision should be interpreted compassionately and in favour of the person claiming the credit. [209](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note209) For example, where parents register a child who has severe learning disabilities in a distance education school and hires a tutor to carry out and supplement these studies, the claimant is entitled to the credit. [210](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note210) A medical expense credit may also be claimed for required care, or care and training at a school, institution or other place, by reason of physical or mental handicap. [211](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note211)

### IV. Health

Article 25 of the Convention requires State Parties to recognize

*that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.*[*212*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note212)

Therefore, State Parties must ensure that persons with disabilities have access to gender-sensitive health services. [213](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note213) Under the Canadian constitution, individual and public health are made largely matters of provincial legislative concern; [214](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note214) hence, the legislation, policy and case law discussed will be primarily provincial. [215](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note215)

#### **Standard of Health Care**

Under the Convention, State Parties must ensure that persons with disabilities have access to the

*same range, quality and standard of free or affordable health care and programmes as provided to other persons.*[*216*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note216)

Ontario’s Excellent Care for All Act, 2010 was enacted to ensure that

*health care organizations are responsive and accountable to the public, and focused on creating a positive patient experience and delivering high quality health care.*[*217*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note217)

The statute applies to every health care organization to ensure that a certain standard of health care is delivered in the province. [218](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note218) In Québec, the purpose of An Act Respecting Health Services and Social Services is to increase the health and welfare of persons in Québec by ensuring that health and social services are available to them. [219](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note219)It sets out the rights of all users of Québec’s health and social services, stating specifically that

*Every person is entitled to receive, with continuity and in a personalized and safe manner, health services and social services which are scientifically, humanly and socially appropriate.*

There is little legislation governing the standard and quality of health care services and programmes provided to persons with disabilities. Complaints of inequality in the health care system have been made under section 15 of the Charter. A private entity that implements a specific governmental policy or program will fall under Charter scrutiny. [221](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note221) When hospitals provide medically necessary services under provincial legislation, they are carrying out a specific governmental objective, and thus will be subject to Charter scrutiny. [222](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note222) The Supreme Court of Canada has found that the failure to provide public funding for sign language interpreters to deaf persons receiving medical services was a violation of section 15(1) and was not a reasonable limit under section 1 of the Charter. [223](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note223)

#### **Specialized Health Services, Habilitation and Rehabilitation**

The Convention requires State Parties to provide

*health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons*

. [224](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note224) Related, under article 26 of the Convention, State Parties must assist persons with disabilities to

*attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects in life.*[*225*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note225)

Therefore, State Parties must

*organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes.*[*226*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note226)

Article 26 requires that habilitation and rehabilitation programs be based on individualized assessments and begin at the earliest stage possible. [227](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note227)

In BC, the Ministry of Children and Family Development offers a variety of individualized early childhood intervention programs for children

*who show signs of, or are at risk of having, a developmental delay or disability.*[*228*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note228)

The provision of these programs resulted in the case of Auton (Guardian ad litem of) v British Columbia (Attorney General), where the autistic infant claimants alleged that BC’s failure to fund Applied Behavioural Analysis or Intensive Behavioural Intervention therapy (ABA/IBI) was a violation of their section 15(1) Charterrights. [229](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note229) The Supreme Court of Canada found that the Canada Health Act,[230](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note230) read in conjunction with BC’s Medicare Protection Act [231](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note231) did not require funding for all medically required services. [232](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note232)Funding is only required for core services provided by medical practitioners, and the province has discretion in terms of funding non-core services. [233](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note233) Therefore, since BC did not legislate funding for ABA/IBI therapy, there was no benefit provided by law that had to be implemented in a non-discriminatory manner. [234](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note234) A variety of programs are offered for children with disabilities in Manitoba, Ontario, and Newfoundland, including ABA and IBI for children diagnosed with autistic spectrum disorder (ASD). [235](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note235) As persons with disabilities reach adulthood, various services and programs in each province are offered that assist with living and participating in the community. [236](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note236) These include residential programs,[237](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note237) day services,[238](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note238) and home and other assisted living services. [239](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note239)

Article 26(2) requires State Parties to promote initial and continued training for professionals and staff working in habilitation and rehabilitation services. In BC, the CLBC provides training and development policies and programs to its staff to ensure continuous learning. [240](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note240) Manitoba Family Services and Consumer Affairs provides various training workshops and professional development opportunities for staff employed in day and residential services under Community Living disABILITY Services, as well as to others who provide support services to persons with disabilities. [241](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note241) In Ontario, the regulations under the Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008 describe quality assurance measures for the services and programs funded under the legislation. [242](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note242)For example, under section 7(4), each service agency must provide proper training to its staff, which addresses the health needs of persons with developmental disabilities who are receiving a service under that agency. The regulations under the AODA also requires every provider of goods or services to properly train members of their staff with regards to the provision of goods or services to persons with disabilities. [243](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note243) State Parties must also

*promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities.*[*244*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note244)

A variety of programs in the provinces aid persons with disabilities in obtaining assistive devices and technologies. [245](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note245)

#### **Accessibility of Health Services**

Article 25 of the Convention requires that health services are provided

*as close as possible to people’s own communities, including in rural areas.*[*246*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note246)

Article 26(b) requires that habilitation and rehabilitation services are accessible to persons with disabilities as close to their own communities as possible. Telehealth, the federal government’s program for offering health services using telecommunication technology, is a major way of ensuring that those who live in rural communities have access to health care. [247](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note247) The Canadian Government report on access to health care in rural Canada warns, however, that

*telehealth must not be a substitute for local expertise.*[*248*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note248)

In the provinces, there are programs encouraging health professionals to practice in rural areas. [249](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note249) Also, regional branches of health-related government agencies are available to serve individuals throughout the provinces. [250](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note250)

#### **Quality of Health Care Professionals**

Under the Convention, State Parties must require health professionals to

*provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent.*[*251*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note251)

To accomplish this goal, State Parties are encouraged to raise awareness

*of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.*[*252*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note252)

The Canadian Medical Association Code of Ethics applies to Canadian physicians, residents and medical students. [253](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note253) It requires physicians to practice medicine by treating

*the patient with dignity and as a person worthy of respect*

and to

*[r]efuse to participate in or support practices that violate basic human rights.*[*254*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note254)

In addition, when providing a medical service, physicians are prohibited from

*discriminat[ing] against any patient on such grounds as… physical or mental disability.*[*255*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note255)

Physicians also have a responsibility to

*promote equitable access to health care resources.*[*256*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note256)

The Code states that physicians should participate in

*lifelong learning to maintain and improve … professional knowledge, skills and attitudes.*[*257*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note257)

Physicians must also give patients the necessary information to make informed decisions about their health and they must answer questions to the best of their ability. [258](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note258) In doing so, physicians are required to

*[m]ake every reasonable effort to communicate with … patients in such a way that information exchanged is understood.*[*259*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note259)

Similarly, legislation sets out the requirement to obtain informed consent. BC, Ontario and Québec have legislation regarding consent to medical care, wherein care cannot be provided without consent, with a few exceptions (e.g. emergency). [260](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note260) It is presumed that an individual is capable of providing consent to health care, from the age of majority in BC,[261](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note261) age 16 in Manitoba,[262](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note262) any age in Ontario,[263](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note263) and 16 in Newfoundland. [264](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note264) As an example of a definition of capacity, Manitoba law states,

*a person has capacity to make health care decisions if he or she is able to understand the information that is relevant to making a decision and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.*[*265*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note265)

Where a person lacks capacity to consent to care, statutes set out the process for substitute decision-making. [266](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note266) In provinces without a statute on capacity or consent to health care, such as Newfoundland, similar common law norms govern consent and capacity. [267](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note267) The Supreme Court of Canada has held that courts’ parens patriae jurisdiction, that is, their power to make decisions in the best interests of minors and mentally incompetent individuals, can never be used to authorize non-therapeutic sterilization. [268](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note268)

#### **Provision of Health and Life Insurance**

The Convention requires State Parties to prohibit discrimination against persons with disabilities with regard to health and life insurance where such insurance is permitted by national law. [269](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note269) Insurance is required to be provided in a fair and reasonable manner. [270](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note270)Canada has a health care system funded publicly by federal and provincial/territorial revenue. [271](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note271) The Canada Health Act dictates the

*criteria and conditions in respect of insured health services and extended health care services*[*272*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note272)

that must be met by the provinces in order for them to receive transfer payments from the federal government. [273](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note273) The CHA requires medically necessary services to be covered by the provincial health insurance plan. [274](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note274) The determination of which services are medically necessary is made individually by the provinces. [275](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note275) Non-medically necessary health services that are not covered by the provincial health insurance plan are to be paid for directly or through an employment or private insurance plan. [276](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note276) The Canada Health Act – Annual Report 2009-2010 generally found that access to insured health services was provided on uniform terms and conditions as required under section 12 of the CHA. [277](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note277)

Each of the studied provinces allows some discrimination for the purposes of determining conditions in contracts for health insurance, life insurance or both. They allow this when the distinctions drawn are reasonable and bona fide [278](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note278) or made on good faith grounds. [279](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note279) The Supreme Court of Canada has held that a discriminatory practice is reasonable if

*(a) it is based on a sound and accepted insurance practice; and (b) there is no practical alternative.*[*280*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note280)

A sound practice is one adopted

*for the purpose of achieving the legitimate business objective of charging premiums that are commensurate with risk.*[*281*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note281)

To be bona fide,

*the practice must be one that was adopted honestly, in the interests of sound and accepted business practice and not for the purpose of defeating the rights protected under the Code.*[*282*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note282)

Whether there is a practical alternative depends on the facts of the case. [283](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note283)

#### **Discriminatory Denial of Health Care or Health Services or Food and Fluids**

Under the Convention, State Parties must prevent the discriminatory denial of health care, health services, or food and fluids on the basis of disability. [284](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note284) Canadian law is varied in determining if and when withholding or withdrawal of treatment is permitted. The Manitoba Court of Appeal found that

*neither consent nor a court order in lieu is required for a medical doctor to issue a non-resuscitation direction where, in his or her judgment, the patient is in an irreversible vegetative state.*[*285*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note285)

The Court went on to say that the decision

*is a judgment call for the doctor to make having regard to the patient’s history and condition and the doctor’s evaluation of the hopelessness of the case.*[*286*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note286)

However, this case only answers the question of when treatment can be withheld and does not answer the question of whether withdrawing treatment should be treated the same way. [287](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note287) The Ontario Court of Appeal considered the removal of life support and the transfer to palliative care to be a treatment package that could not be separated because death is imminent when life support is removed. [288](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note288) Therefore, consent by the substitute decision-maker is required for the entire treatment package – the removal of life support and the transfer to palliative care. [289](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note289) As of April 2012, the case is before the Supreme Court of Canada. [290](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note290)

### V. Right to Work

Under article 27 of the Convention, State Parties recognize the right of persons with disabilities to work on an equal basis with others. State Parties are required to take measures to ensure, that persons with disabilities can earn a living

*by work freely chosen or accepted in a labour market,*

and that work environments are

*open, inclusive and accessible to persons with disabilities.*[*294*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note294)

In Canada, the primary source of law for protecting the rights of persons with disabilities in the employment area is federal and provincial human rights legislation. In addition, the federal and provincial governments have enacted legislation and developed policies to promote employment of persons with disabilities.

#### **Prohibition of Discrimination, Protection of Rights and Accommodation**

State Parties must ensure that discrimination on the basis of disability is prohibited in matters concerning employment,

*including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.*[*295*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note295)

Also, State Parties must ensure that reasonable accommodation is provided to persons with disabilities. [296](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note296) Human rights statutes in Canada provide very broad protection from discrimination with respect to employment. [297](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note297) For example, the human rights legislation in Manitoba states that

*No person shall discriminate with respect to*any aspect*of an employment or occupation (emphasis added).*[*298*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note298)

The definition of any aspect includes the opportunity to participate or continue to participate in the employment; the customs, practices and conditions of the employment; training, advancement or promotion; seniority; any form of remuneration or other compensation received; and any other benefit, term or condition. [299](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note299)

The federal, BC, Manitoba, Newfoundland and Ontario legislation all provide an exception affecting the above prohibition: where discrimination relates to a bona fideoccupational requirement or qualification (BFOR), it does not contravene the legislation. [300](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note300) In each case, to show a BFOR, statute and case law dictates that there must be accommodation to the point of undue hardship. [301](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note301) Québec is the only jurisdiction which does explicitly incorporate this exception into its legislation. Once an employee has shown that something is prima faciediscriminatory on the ground of disability, the onus falls on the employer to show that it is a BFOR. [302](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note302) The common law provides a test from the case of British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees’ Union (BCGSEU) (Meiorin Grievance). [303](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note303) In this case, the Supreme Court of Canada set out the following three-step test for establishing that an employment standard is a BFOR:

1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. [304](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note304)

Under the federal, BC, Manitoba, Ontario and Newfoundland statutes, employment advertisements cannot express any qualification or preference based on a prohibited ground of discrimination. [305](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note305) Québec prohibits distributing, publishing or publicly exhibiting a

*notice, symbol or sign involving discrimination*

or authorizing someone to do so. [306](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note306) The federal, Manitoba, Newfoundland and Ontario schemes also prohibit discrimination on application forms as well as through written or oral inquiries. [307](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note307) In Ontario, there is an exception allowing the asking of questions at a personal employment interview concerning a prohibited ground of discrimination, provided that discrimination on such a ground is permitted in the statute. [308](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note308) In Québec application forms and employment interviews cannot require information regarding any prohibited ground unless it is in regards to a type of employment specified in the statute or for an affirmative action program that exists at the time of the application. [309](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note309)

#### Right to Just and Favourable Conditions of Work

In addition to the general prohibition of discrimination in employment, Canadian human rights legislation includes more specific rules that apply in the employment setting. The federal, BC, Newfoundland and Québec statutes have equal wage provisions. [310](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note310) While the federal and BC legislation requires equal wages between the sexes, Newfoundland and Québec require equal wages generally where employees perform the same or similar work. [311](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note311)In the federal, BC, Manitoba and Newfoundland schemes, wages cannot be reduced to become compliant with the legislation. [312](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note312) In the federal, BC, Newfoundland and Québec statutes, there are exceptions to the equal wage requirement, for example, where there is a reasonable factor that justifies the difference. [313](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note313) In contrast with equal pay legislation, under The Employment Standards Code in Manitoba, an employer may apply for a permit authorizing the employer to pay an employee less than minimum wage where a satisfactory arrangement between the employer and employee with a mental or physical disability is made. [314](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note314) Before a permit can be issued, the employee’s ability to perform the work in the proposed arrangement must have been evaluated. [315](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note315)

Human rights statutes in Canada protect against harassment. [316](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note316) Although BC’s statute does not expressly prohibit harassment, the express prohibition against discrimination has been found to include harassment. [317](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note317)The federal and Ontario schemes specifically prohibit sexual harassment, while Manitoba, Newfoundland and Ontario additionally expressly prohibit sexual solicitation. [318](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note318) Manitoba’s harassment provision is unique as it states that knowingly permitting or failing to take reasonable steps to terminate harassment will also result in liability. [319](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note319) Reprisal for filing a complaint or instituting a proceeding is generally prohibited in the federal, Manitoba and Ontario statutes. [320](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note320) Ontario’s occupational health and safety legislation requires that employers prepare policies with respect to workplace violence and harassment and implement the policies through programs. [321](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note321) Manitoba’s WSHA scheme also requires employers to develop and implement policies to prevent harassment and workplace violence, and ensure that workers comply with the policies. [322](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note322)

#### **Promotion of Employment**

State Parties are required to employ persons with disabilities in the public sector, and to promote employment in the private sector as well as opportunities for self-employment and entrepreneurship. [323](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note323) The federal government has enacted the Employment Equity Act, which has as its purpose

*to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by … persons with disabilities.*[*324*](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note324)

The statute applies to private sector employers and to most public sector employers. [325](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note325) Every employer under the statute is required to implement employment equity by identifying and eliminating employment barriers, instituting positive policies and practices, and making reasonable accommodations to

*ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer’s workforce that reflects their representation*

in the Canadian workforce. [326](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note326) An employer is not required to take a measure that would cause undue hardship. [327](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note327) Employers are required to prepare an employment equity plan specifying measures to be taken and long term goals. Employers must then make all reasonable efforts to implement the plan and monitor its implementation on a regular basis. [329](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note329)

The provinces also have initiatives in place to promote the employment of persons with disabilities. Some of these aim to raise awareness about the benefits of hiring persons with disabilities, and connect employers with persons with disabilities. [330](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note330) Other approaches are compulsory. In Ontario employers will soon be required to notify employees and the public about available disability accommodation, [331](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note331) or in the case of a public body in Québec, to analyze its workforce and take other steps to promote disability employment equity. [332](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note332)

#### **Training, Guidance and Programmes**

State Parties must promote the training and provision of programs in technical and vocational guidance, assistance in finding, obtaining, maintaining and returning to employment, as well as in professional rehabilitation and job retention. [333](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note333) The federal Opportunities Fund for Persons with Disabilities provided by Service Canada funds national, regional and local projects that assist persons with disabilities in finding and keeping employment or self-employment. [334](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note334) The federal government has also entered into agreements with the provinces, known as the Labour Market Agreements for Persons with Disabilities (LMAPD). [335](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note335)The agreements share the costs among the federal and provincial governments for the funding of programs and services that help persons with disabilities participate in the labour market. [336](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note336) These agreements allow the provinces to decide on the best approach to assist persons with disabilities in their respective jurisdictions. [337](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note337) The provinces are required to deliver employment programs within five priority areas: (1) education and training; (2) employment participation; (3) employment opportunities; (4) connecting employers and persons with disabilities; and (5) building knowledge. [338](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note338) Provincial programs offer a variety of employment-related services for persons with disabilities. These include vocational planning, job training and placement, and employment support. [339](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note339) Provincial funds have also been established to create and supplement services and programs that aid persons with disabilities in finding and maintaining employment and self-employment. [340](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note340)

#### **Labour and Trade Union Rights**

State Parties must ensure that persons with disabilities can exercise their labour and trade union rights on an equal basis with others. [341](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note341) The federal and provincial human rights statutes generally prohibit discriminatory membership with reference to organizations. [342](http://drpi.research.yorku.ca/north-america/north-america-publications-resources/2012-disability-and-discrimination-systemic-monitoring-in-canada/#note342)Depending on the jurisdiction, this prohibition may specifically include trade unions, employers’ organizations, occupational associations, professional associations, trade associations, employee organizations, self-governing professions, professional orders or associations of persons carrying on the same occupation.

### VI. Conclusion

This chapter has provided an overview of Canadian legislation, case law, and policy, guided by DRPI’s National Law and Policy Monitoring Template. It has covered the federal and a representative sample of provincial jurisdictions with respect to how Canada implements some of the major substantive norms of the Convention on the Rights of Persons with Disabilities. This analysis is only a starting point. This chapter has not attempted to complete the methodology set out in the Template by asking how Canadian law and policy instruments are functioning in practice, and how well they satisfy the articles of the Convention. It is in fact likely that simply stating the ideals of disability equity contained in Canadian law, paints an overly optimistic picture of life with a disability in Canada. Nonetheless, this chapter takes a step toward addressing larger issues. With a thematic presentation of sources of law and policy, one can proceed to seek input from community organizations and persons with disabilities about their experiences with these regimes, in order to identify gaps and strategies for improvement. The legal framework can also be compared with those in other countries, in order to learn from other approaches. In these ways, national law and policy, through reform and improved enforcement, can become better able to fulfill the requirements of the Convention, and to enrich society and the lives of persons with disabilities.