

“NOTHING ABOUT US WITHOUT US”

The Convention on the Rights of Persons with Disabilities and its influence on Legal Capacity and Disability Rights in Canada.

Brett Ryan Book*

Published by The Canadian Bar Association

Winner of the 2022 CBA Health Law Student Essay Contest

<https://www.cba.org/Sections/Health-Law/Resources/Resources/2022/HealthEssayWinner2022>

Brett dedicates this paper to his great aunt Linda Crabtree, CMT survivor and international disability advocate.

‘Nothing about us without us’ is a slogan that signifies the belief that disability rights should not be created without including the voices of persons with disabilities and their representative organizations. It was this belief that allowed for the contributions of disabled persons in drafting the United Nations Convention on the Rights of Persons with Disabilities (the “CRPD”). The CRPD, with its overarching ideal of equality, seeks to create a new international norm in disability rights by encouraging state parties who are signatory to adopt legislation that promotes the right to equal recognition, legal capacity, and supported decision-making. Canada has signed and ratified the treaty with its own reservations. However, as this paper argues, despite these reservations, the CRPD has the ability to transform disability rights in Canada through the influence of law reform agencies, disability advocates, and legal challenges through courts of competent jurisdiction.

*Brett Ryan Book is from Hamilton, Ontario, Canada which sits on the traditional territory of the Haudenosaunee and Anishinaabe First Nations. He is a graduate of the Juris Doctor program at Thompson Rivers University School of Law in Kamloops, British Columbia in the unceded territory of the Secwepemc First Nation. Brett is a trained mediator and graduate of the Alternative Dispute Resolution program at Humber College as well as a former Support Staff member of the Hamilton Community Legal Clinic. Brett is also a Policy Officer with CanAge and sits on the Canadian Bar Association National Elder Law Committee as a Member-at-Large and the Social Media & Communications Coordinator. Brett is currently Articling with Whaley Estate Litigation Partners in Toronto, Ontario, a boutique firm providing expertise in Trusts and Estates litigation. In his spare time, he enjoys travelling with his partner Maggie and their adventurous beagle Ziggy and spending time with his parents Marcia and Phil and four brothers.

“NOTHING ABOUT US WITHOUT US”

The Convention on the Rights of Persons with Disabilities and its influence on Legal Capacity and Disability Rights in Canada.

INTRODUCTION: A NEW PROMISE FOR EQUALITY 3

I. DISABILITY RIGHTS AND RATES IN CANADA..... 4

 I. A: *Equality Rights in Canada*..... 4

 I. B: *Responding to Rising Disability Rates*..... 5

 I. C: *Justin Clark’s Fight for Independence* 6

II. SHIFTING PARAGIDMS 7

III. THE CRPD AND CANADA’S RESERVATIONS 9

 III. A: *Understanding the CRPD* 10

 III. B: *Understanding Canada’s Reservation on the CRPD*..... 13

IV. AREAS OF INFLUENCE: THE CRPD AS A CATALYST FOR CHANGE 13

 IV. A: *Law Reform Agencies and the CRPD*..... 14

 IV. B: *Guiding the Responsibilities of Legal Professionals*..... 16

V. EMERGING AREAS OF IMPROVEMENT: CASELAW ANALYSIS 17

 V. A: *The Rights of Incarcerated Persons with Disabilities in Canada* 17

 V. B: *Advancing the Rights of Institutionalized Persons with Disabilities*..... 20

 V. C: *Protecting the Right to Medical Assistance in Dying*..... 21

VI. IMPLEMENTING CRPD COMPLIANT LEGISLATION IN CANADA..... 25

VII. CONCLUSION 27

Table of Authorities 28

INTRODUCTION: A NEW PROMISE FOR EQUALITY

‘Nothing about us without us’ is the slogan that was adopted by the International Disability Caucus¹ during negotiations surrounding the creation of the international treaty, the United Nations *Convention on the Rights of Persons with Disabilities*² (“CRPD”). It signifies the belief that disability rights should not be created without including the voices of persons with disabilities and their representative organizations. In Canada, this fight for equal recognition began behind closed doors in 1980, when a law student named David Lepofsky argued for the inclusion of disability rights in section 15 of Canada’s new constitution (the *Charter*)³, and first received widespread public attention in 1982, when a courageous young man with cerebral palsy named Justin Clark, started his successful claim to make decisions that impact his future care and living arrangements.

The CRPD, with its overarching ideal of equality, seeks to create a new international norm in disability rights by encouraging state parties who are signatory to the treaty to adopt legislation that promotes the right to equal recognition, legal capacity, and supported decision-making. Article 12 of the CRPD has been interpreted to promote the adoption of supported decision-making legislation. As a result, Canada has signed and ratified the treaty with its own reservations. Despite these reservations, this paper will demonstrate that the CRPD, as an international treaty, has acted

¹ See Maria Veronica Reina, “[How the International Disability Caucus worked during negotiations for a UN Human Rights Convention on Disability](#)” February 6, 2008, online, where the authors write that, “The IDC was the representative voice of persons with disabilities in the process of the Ad Hoc Committee, made up of government delegates. The IDC was composed of more than 70 world-wide, regional, and national Disabled People’s Organizations (and allied NGOs) who had decided to work together and coordinate their efforts. The IDC included all the different disability groups and had organizations from all regions of the world.”

² Convention on the Rights of Persons with Disabilities, GA Res 61/106 UNGAOR, 61 st Sess, Supp No 49, UN Doc Annex: Convention on the Rights of Persons with Disabilities A/Res61/106 (2007) 2 [CRPD].

³ See Accessibility for Ontarians with Disabilities Act Alliance, “What Did Disability Advocates Tell Canada’s Parliament 40 Years Ago This Fall to Help Win an Historic Amendment to the *Charter of Rights* to Protect Equality for People With Disabilities?” Where it is revealed that “the proposed Charter of Rights was to include an equality rights provision, section 15. However, the wording of section 15 did not include equality rights for people with disabilities.” On November 21, 1980, a Joint Committee heard from what is now known as Inclusion Canada; on November 25, 1980, a Joint Committee heard from what is now known as the Council of Canadians with Disabilities (CCD); and on December 12, 1980, the Canadian National Institute for the Blind (CNIB) presented through lead presented, David Lepofsky, then a law student and now the chair of the AODA Alliance.

as a catalyst for changing social norms on disability rights through important areas of influence, and as such, will continue to have positive implications for the rights of persons with disabilities in Canada.

While this paper does not purport to be exhaustive, it aims to provide an assessment of the CRPD and its implications for Canada, especially where it concerns the legal capacity of persons and groups of persons with disabilities and the provision of legal services by professionals.

I. DISABILITY RIGHTS AND RATES IN CANADA

I. A: Equality Rights in Canada

People with disabilities are among the most marginalized Canadians. Despite this assertion, Ravi Malholtra argues that the Supreme Court of Canada has come a considerable distance in embracing a social model of understanding disablement.⁴

In Canada, section 15 of the *Charter of Rights and Freedoms*⁵ ensures that “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.”⁶ Arlene Kanter argues that “the *Charter* does not merely provide individuals remedies; it also requires the immediate invalidation of any law or government policy or program that is found to violate the *Charter*.”⁷ In the decision of *Eldridge v. British Columbia*⁸, the Supreme Court of Canada (“SCC”)

⁴ Ravi Malholtra, “Has the Charter Made a Difference for People with Disabilities?: Reflections and Strategies for the 21st Century” (2012) 58:10 *S.C.L.R.* 273 at 274 [Malholtra].

⁵ *Canadian Charter of Rights and Freedoms*, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁶ Arlene S. Kanter, “A Comparative View of Equality under the UN Convention on the Rights of Persons with Disabilities and the Disability Laws of the United States and Canada” (2015) 32:2 *Windsor YB Access Just* 65 at 87.

⁷ *Ibid.*

⁸ [1997] 3 SCR 624 [*Eldridge*]; the SCC in *Eldridge* held that the denial of sign language interpreters to deaf individuals in medical settings constituted discrimination under section 15 of the *Charter*.

held that “to promote the objective of the more equal society, section 15 (1) [of the Canadian *Charter*] acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.”⁹ To that end, the Court concluded that in order to ensure equal opportunity, a government “may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15.”¹⁰ Between 1982 and 2012, the Court heard 16 major cases specifically addressing disability rights issues either through section 15 jurisprudence or in the statutory human rights context.¹¹

I. B: Responding to Rising Disability Rates

Close to 3.8 million Canadian adults report some type of disability. This figure represents 13.7 per cent of the Canadian population.¹² According to the Canadian Human Rights Commission (“CHRC”), disability rates also vary between women and men and across age groups. Consequently, the CHRC found that “the disability rates for both women and men progressively increase with age.”¹³ This all leads one to ask; how inclusive is Canada when it comes to advancing the rights of persons with disabilities?

Recently, Deborah Stienstra, applying a critical theory framework, examined some of the nuanced and complicated material inequalities experienced by people with disabilities in Canada. Her research on the intersections of disability, gender, Indigenouness, race, and age reveal that “the collectively held ideas that give context to disability policies [in Canada] are at odds.”¹⁴ Steinstra’s article rightly recognizes that Canada’s disability rights have ultimately been shaped

⁹ *Ibid*, at para. 64

¹⁰ *Ibid*, at para. 79.

¹¹ *Ibid*, at p 279.

¹² Canadian Human Rights Commission, “Left Out: Challenges faced by persons with disabilities in Canada’s schools” (2017) CanLII Docs 3489, at 3.

¹³ According to the CHRC, the disability rate for women aged 75 and over is 44.5 per cent while the disability rate for men of the same age group is close to 40 per cent.

¹⁴ Deborah Stienstra, “Canadian Disability Policies in a World of Inequalities” (2018) 8:36 *Societies* 1.

by human rights. One human rights advocacy effort began in 1982 and concerned one man's fight for autonomy and the right to make decisions that concern his future and care.

I. C: Justin Clark's Fight for Independence

Justin Clark was born with Cerebral Palsy. When he was two, Justin's doctors advised his parents to place him in permanent care. In the Rideau Regional Centre in Smiths Falls, Ontario, Justin Clark began to grow up, isolated from his parents and five older siblings. At the age of twelve, Justin was taught to communicate using Blissymbolics, "a board that allowed users to communicate by pointing at printed symbols."¹⁵ While living in the Rideau Centre, Justin made friends with some of the staff, including French teacher Normand Pellerin who invited him on a camping trip. When Justin's parents refused to grant him permission to attend, Pellerin and Justin consulted a lawyer. They met with Toronto lawyer David Baker, who despite significant resistance, took Justin on as a client. According to Mr. Baker, "the public trustee did contact me and said that he was going to sue me personally for representing someone who is incompetent."¹⁶

Justin Clark's trial began on November 15, 1982, in Perth, Ontario. Justin took the stand as a witness in the sixth and final day, becoming the first Canadian in history to use a Bliss board in a court. Using the board, Justin answered lawyers' questions by pointing to symbols which were interpreted and read aloud. His lawyer, Mr. Baker, remembered how "he was soaking wet from sweat from the physical effort of containing himself. But he was incredibly determined to get his message out."¹⁷ On November 25, 1982, Judge John Matheson declared Justin Clark a mentally competent adult, holding that, "we have, all of us, recognized a gentle, trusting, believing spirit, and very much a thinking human being who has his unique part to play in our compassionate,

¹⁵ CBC Radio, "[How Justin Clark's fight for independence transformed disability rights in Canada | CBC Radio](#)" November 25, 2018, CBC, online.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

interdependent society.”¹⁸ The case was pivotal to Canadian civil society because “following the ruling, guardianship laws were re-examined, and in some provinces, rewritten.”¹⁹ Dulcie McCallum, lawyer and special advisor on Canada’s delegation to the United Nations to prepare the CRPD in 2006, opined that Justin’s case “had an important influence on the Convention,”²⁰ in particular, in helping to inform the development of Article 12 of the CRPD.

II. SHIFTING PARAGIDMS

It is arguable that the most important aspect of the CRPD is its ability to promote and secure the right to legal capacity. To understand what is meant by this, it is critical to explain the evolution of laws which deal with capacity and incapacity throughout history.

Kristen Booth Glen, a New York Surrogates’ Court Judge, has written extensively on issues concerning the concept of guardianship.²¹ For Booth Glen, notions of capacity have dramatically changed over time, starting with the earliest, binary model, which conceptualized “incapacity as a defect that deprived an individual of the ability – and consequently the legal right – to make choices.”²²

In the 19th and first half of the 20th century, “the primary social and legal policy for persons with intellectual and psychosocial disabilities was institutionalism.”²³ This was carried out in well-intentioned but experimental schools and was eventually replaced with a system of “custodial asylums with reduced emphasis on educating residents and returning them to community life.”²⁴

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Guardianship is the legal process which allows a state to deprive a person of the power to make and act on some or all decisions by granting that power to another person or entity upon finding a lack of capacity.

²² Kristen Booth Glen, “Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond” (2012) 44:1 *Colum Hum Rts L Rev* 93, at 94 [Booth].

²³ *Ibid.*

²⁴ *Ibid.*

Advances in medicine and the rise of psychiatry and psychology created the conditions that would lead to guardianship becoming “medicalized,” and incapacity becoming a primarily diagnosis-driven phenomenon. According to Booth Glen, by the second half of the twentieth century, this medicalized model morphed into a “more nuanced and functional approach,” where capacity was seen as inherently cognitive, and incapacity was seen as “the inability both to understand information relevant to making a decision and to understand the potential consequences of making – or not making – that decision.”²⁵ Under this ‘functional’ approach, capacity is seen as varying over time and with regard to specific decisions that are to be made. The opposite of these models of incapacity is what this section began discussing: legal capacity.

The concept of legal capacity was first mentioned in Article 15 of the United Nations *Convention on the Elimination of All Form of Discrimination against Women* which opened for signature on December 18, 1979 and was entered into force on September 3, 1981. Gerard Quinn has written extensively on legal capacity and argues that:

legal capacity is the epiphenomenon. It provides the legal shell through which to advance personhood into the lifeworld. Primarily, it enables persons to sculpt their own legal universe – a web of mutual rights and obligations voluntarily entered into with others ... Legal capacity opens up zones of personal freedom. It facilitates uncoerced interactions.²⁶

The old paradigm embodies the idea of incapacity as an illness or a defect that renders the person suffering it to an object of mere charity and protection and ultimately, subject to plenary guardianship.²⁷ We are already living in a paradigm that supports a functional, cognitive understanding of incapacity. Booth Glen argues that in this current paradigm, tailored or limited guardianships are the norm, representing “the least restrictive means of protection, the promotion

²⁵ *Ibid.*

²⁶ Gerard Quinn, “Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD” Paper presented at Harvard Law School, February 20, 2010, reprinted in NIU Galway Centre for Disability Law & Policy, Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality app. 6, at 73.

²⁷ *Ibid.*

of greater autonomy for the incapacitated person, and robust procedural protections in the determination of incapacity and appointment of a guardian.”²⁸

Two decades after the emergence of the functional model, a new paradigm has once again emerged; one that is premised on international human rights and universal legal capacity. Booth Glen argues that this new paradigm sees incapacity as a socially constructed concept and insists on the full legal capacity of every person with intellectual disabilities, essentially doing away with substituted decision-making altogether in favour of society’s obligation to make every effort to provide adequate and appropriate supports to allow everyone to make their own decisions.²⁹ On the subject, Margaret Isabel Hall’s research conceptualises mental capacity as a medico-legal construct, and one that only works well in certain circumstances.³⁰ However, Hall proposes that “the idea of mental capacity, for the purposes of adult guardianship, should no longer be treated as a real or true description of the world and its workings, allowing instead for the construction of a new and more workable truth in this context.”³¹

III. THE CRPD AND CANADA’S RESERVATIONS

Canada ratified the CRPD, however, it only did so after expressing its reservations. Much of this surrounds the fact that in most Canadian jurisdictions, substitute decision-making legislation remains the standard. The CRPD, through the General Comment’s interpretation of Article 12, requires that state parties amend legislation in favour of supported decision-making.

²⁸ Booth, *supra* note 22 at 98.

²⁹ *Ibid.*

³⁰ Hall argues that for determinations on the mental capacity to make decisions about property and certain personal care decisions, the concept of mental capacity has served a useful purpose.

³¹ Margaret Isabel Hall, “Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability” (2012) 58:1 *McGill LJ* 61 at 64.

III. A: Understanding the CRPD

In Beijing in 2000, a summit of international and national disability organizations committed “to strive for a legally binding international convention on the rights of all people with disabilities to full participation and equality in society.”³² The CRPD was born out of these discussions. The treaty was adopted in 2006 and came into force in May 2008, but only after two years of rigorous negotiation sessions on drafting. Perhaps the most important thing to know about the creation of the CRPD is that “persons with disabilities and their representative organizations played a central role throughout drafting and adoption, as is reflected in IDC’s 2006 motto of ‘nothing about us without us.’”³³ According to Lucy Series, the most contentious part of the debates surrounded whether ‘substitute decision-making’ should be permitted under the new Convention and whether legal capacity concerned the capacity to hold a right, or the capacity to hold and exercise a right. As a result, “the text of Article 12 was deliberately silent on the question of substitute decision-making, as state parties could not reach agreement.”³⁴

The CRPD features a 25-paragraph preamble and 50 Articles which address the obligations of state parties, enumerate the rights of persons with disabilities, and outline the implementation and monitoring processes of the Convention. It also features an Optional Protocol which allows individuals to bring complaints against the states that have ratified the Convention. Arlene S. Kanter argues that the CRPD is the most comprehensive effort by the United Nations to ensure substantive equality for people with disabilities; protecting rights not previously applied to people with disabilities under international law.³⁵ The overarching ideal of the CRPD is equality. At

³² Lucy Series, “Comparing Old and New Paradigms of Legal Capacity” [2014] 2014:1 *Elder LJ* 62 at 63.

³³ Cliona de Bhailis & Eilionoir Flynn, “Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD” (2017) 13:1 *Intl JL Context* 6 at 7 [Flynn].

³⁴ Series, *supra* note 32 at 64.

³⁵ Kanter, *supra* note 6 at 73.

Article 1, the CRPD aims to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities.”³⁶

The heart of the CRPD, Article 12, “builds on existing international provisions to apply the right to equal recognition before the law to persons with disabilities.” The Article consists of five paragraphs, all “modelled on previous treaties to set out a right to legal capacity on an equal basis with others for persons with disabilities,”³⁷ which provide the right to legal capacity encompassing both legal standing and legal agency. But what does Article 12 mean for State Parties like Canada?

The General Comment on Article 12 not only provides interpretive guidance on the theory but also addresses the normative content, providing practical direction on how the article should be implemented. The General Comment “calls for an overhaul of all existing laws in the area of legal capacity.”³⁸ De Bhailis and Flynn “describe it as a roadmap for legal capacity law reform, clearly stating that a person cannot be denied her right to recognition as a person before the law based on an assessment of mental capacity, and that instead people should [be] supported to exercise their legal capacity.”³⁹

Pursuant to Article 12 (3), State Parties must ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’ While these kinds of programs are few and far between, Lucy Series has identified several which have examined systems for supporting people with intellectual and psychosocial disabilities in decision making.⁴⁰ In Canada, there are currently four legislative regimes that offer formal

³⁶ *Convention on the Rights of Persons with Disabilities*, GA Res 61/106 UNGAOR, 61 st Sess, Supp No 49, UN Doc Annex: Convention on the Rights of Persons with Disabilities A/Res61/106 (2007) 2, Art. 2 [CRPD].

³⁷ Flynn, *supra* note 33 at 8.

³⁸ *Ibid.*

³⁹ *Ibid.*, at 12.

⁴⁰ *Ibid.*, where the author discusses one project in South Australia that “was so successful that people were able to avoid welfare guardianship and to apply for forms of guardianship for property and affairs to be lifted.”

recognition of supported or ‘assisted’ decision making.⁴¹ Accordingly, the UN Department of Economic and Social Affairs recognizes that British Columbia has supported decision-making in practice, allowing Representation Agreements with a support network⁴², noting that the province is “one of the leading jurisdictions incorporating supported decision-making into law, policy and practice.”⁴³

The CRPD also offers ground-breaking and important attention to accommodation, establishing it for the first time under international law as a free-standing human right. Article 5 of the General Principles of the CRPD requires that “State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”⁴⁴

The CRPD has an Optional Protocol which Canada agreed to follow in 2018. As a result, in some situations, people in Canada can make complaints to the UN Committee on the Rights of Persons with Disabilities. If someone believes their CRPD rights were violated, they can make a complaint (known as “Individual Communications”). However, they must be personally and directly affected by the violation. Additionally, an Individual Communication can only be made if it has not already been made to the UN Committee or another UN body and only after the person has already gone through all relevant complaint procedures available in Canada. If the CRPD finds

⁴¹ *The Adult Guardianship and Trusteeship Act*, SA, 2008, Ch. A-4.2 (Alberta); *The Adult Guardianship and Co-decision-making Act*, SS, 2000, c A-5.3 (Saskatchewan); *Adult Protection and Decision Making Act*, SY, 2003, c 21, Sch A (Yukon); and the *Representation Agreement Act*, RSBC 1996, Ch. 405 (British Columbia).

⁴² Pursuant to the *Representation Agreement Act*, RSBC 1996, Ch. 405, a community-based Representation Agreement Resource Centre such as NIDUS can assist in developing and sustaining support networks by providing information, publications, workshops, and advice and also oversee a registry which a network can post an agreement for other parties to view if required before entering a contract with the individual.

⁴³ United Nations Department of Economic and Social Affairs, “Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities; Chapter Six: From Provisions to practice: Implementing the Convention – Legal Capacity and Supported Decision-making” Online: <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-six-from-provisions-to-practice-implementing-the-convention-5.html> [UN Handbook].

⁴⁴ *Ibid.*

that rights have been violated, the Committee will make recommendations to the Government of Canada regarding the steps it should take to stop or prevent the rights violation.⁴⁵

III. B: Understanding Canada's Reservation on the CRPD

Canada ratified the CRPD in 2010 with the reservation, “to the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards.”⁴⁶ Several organizations have called on the federal government to abandon this reservation including the Law Commission of Ontario, the Council of Canadians with Disabilities, and the Canadian Association for Community Living. Despite the qualification to Canada's ratification of the CRPD, there is great potential for the international treaty leading to positive change.

IV. AREAS OF INFLUENCE: THE CRPD AS A CATALYST FOR CHANGE

Through its usefulness as a behaviour modification tool and social norm regulator, the CRPD can influence the professionals and interest-groups that are concerned with advancing and protecting the rights of persons with disabilities in Canada.

In a recent article, Steven J. Hoffman et al. argue that, while the CRPD may be conspicuously absent from Canadian legislation, public policy, and jurisprudence, “the country's ratification of the Convention has facilitated an important shift in the social and cultural paradigms surrounding psychosocial disability in Canada.”⁴⁷ To this end, the authors believe that the CRPD

⁴⁵ ARCH Disability Law Centre, “[Factsheet – The Convention on the Rights of Persons with Disabilities \(CRPD\) and the Optional Protocol](#)” April 7, 2020, online [Factsheet].

⁴⁶ Mathieu Dufour, Thomas Hastings, and Richard O'Reilly, “Canada Should Retain Its Reservation on the United Nation's Convention on the Rights of Persons with Disabilities” (2018) 63:12 *Cdn J of Psychiatry* 809 [Dufour].

⁴⁷ Steven J. Hoffman et al., “Is the UN Convention on the Rights of Persons with Disabilities Impacting Mental Health Laws and Policies” (2016) 16:28 *BMC Int'l Health and Human Rights* 1, at 2 [Hoffman].

could be helping to reduce some of the barriers faced by persons with disabilities everyday “by facilitating larger changes in social norms and expectations around such disabilities.”⁴⁸ One way legal barriers are reduced in Canada is through Law Reform Agencies (“LRA”) and the legal professionals that provide them with expertise.

IV. A: Law Reform Agencies and the CRPD

LRAs have an important place in the legal profession and civil society. One of the best features of the modern LRA is the manner of engagement and the quality of expertise that goes into inquiries, analysis, and reports. According to S.N. Then et al., LRAs are important to civil society because they are “influential in identifying and elucidating complex legal issues in a social context and relied upon by many within the legal community (including by courts), governments, academics, policy-makers, stakeholders in the area, as well as the general public.”⁴⁹ Even though an LRA is not an extension of Parliament, Then et al. argue that “a law reform can influence the development of the law by the courts, and also by officials and other agencies.”⁵⁰

As Then et al. have shared, the legal standard in most Western jurisdictions is the statutory recognition of forms of substitute decision-making on behalf of an adult who cannot make decisions on their own. The authors concede there is limited empirical evidence on supported decision-making and, despite not yet being embraced as the new norm in the majority of formal legal authorities, many LRAs are recommending legislative change to recognize and allow forms of supported decision-making.⁵¹ As the authors share in their article, LRA reports concerning supported decision-making have similar recommendations and features including:

⁴⁸ Hoffman, *supra* note 47.

⁴⁹ S.N. Then et al., “Supporting decision-making of adults with cognitive disabilities: The role of Law Reform Agencies – Recommendations, rationales, and influence” (2018) 61 *Intl J of Law and Psychiatry* 64, at 66 [Then].

⁵⁰ Then, *supra* note 49, at 65.

⁵¹ *Ibid.*

the adoption of general principles that are more consistent with supported decision-making; an acceptance that decisions will remain those of the supported person (with the exception of co-decision-making arrangements); legal recognition of a category or categories of recognised supporters with formal methods for appointing them; placing legislative duties on supporters; granting explicit powers to supporters; and recognizing the need for public education.⁵²

All LRAs endorsing supported decision-making in Canada have adopted a ‘first principles’ approach when examining existing substitute decision-making legislation with all suggesting the inclusion of guiding principles that are consistent with a legally recognised supported decision-making scheme. In Canada, there is a growing number of organisations who endorse the adoption of supported decision-making legislation, including seven LRAs.⁵³

In its 2017 report *Legal Capacity, Decision-making and Guardianship*, the Law Commission of Ontario (“LCO”), in addition to recommending supported decision-making, also recommends establishing one tribunal with comprehensive jurisdiction to address all dispute resolution and rights enforcement requests under the *Substitute Decisions Act, 1992*; the *Health Care and Consent Act, 1996*, and Part III of the *Mental Health Act*, effectively combining the jurisdiction of the Consent and Capacity Board and the Superior Court of Justice. The LCO also recommends the expansion of the use of mediation and Alternative Dispute Resolution to reduce

⁵² *Ibid*, at 66.

⁵³ The British Columbia Legal Institute (and Canadian Centre for Elder Law) includes supported decision-making in their reports *Elder and Guardianship Mediation*, 2012, and *Report on Common-law Tests of Capacity*, 2013; the Uniform Law Conference of Canada includes supported decision-making in the *Uniform Jurisdictional Recognition of Substitute Decision-Making Documents Act*, 2016; Manitoba Law Reform Commission in its *Substitute Powers of Attorney*, 2017; the New Brunswick Office of the Attorney General in its *Law Reform Notes* #39, 40, and 41 on Powers of Attorney and the Advance Health Care Directives Act, 2017, 2018; Northern Territory Law Reform Committee and its *Report on the Powers of Attorney Act and Medical Enduring Powers of Attorney*; the Law Reform Commission of Nova Scotia in its *Powers of Attorney Act*, 2015; and the Law Commission of Ontario’s *Legal Capacity, Decision-making and Guardianship*, 2017.

the overall cost of addressing disability rights violations and making the process less intimidating while preserving important and often, familial relationships.⁵⁴

IV. B: Guiding the Responsibilities of Legal Professionals

LRAs are able to produce highly sought-after reports because they rely on the expertise of their members. In an article reflecting on what implications the Convention has on the professional responsibilities of Canadian lawyers, H. Archibald Kaiser argues that the primary responsibility for ensuring compliance falls to its individual members, law societies, and federations.⁵⁵ In fact, according to Kaiser, it's not an unreasonable expectation for the public, courts, tribunals, and clients to assume that lawyers will become familiarised with the CRPD. Adhering to this logic, Canadian lawyers are duty-bound to understand how the CRPD impacts the rights of persons with disabilities and how they can best use that to advocate for their client's interests. Kaiser argues that lawyers must, therefore, understand the CRPD as law, requiring the consideration of Articles 12 (equal recognition), 14 (liberty and security), and 17 (protecting the integrity of the person) in cases involving incapacity determinations and involuntary treatment of clients.⁵⁶ Even beyond the direct legal implications, Kaiser argues that the basic principles of the CRPD, equality, participation, and inclusion, must be incorporated in other ethical responsibilities of lawyers.⁵⁷

Lawyers in Canada are members of a professional body known as the Canadian Bar Association ("CBA"). Within each province, lawyers are self-regulated by their respective law societies. While these professional bodies do provide guidance, lawyers must understand that the CRPD, and its ratification by Canada, effectively expands the concept of discrimination. Kaiser

⁵⁴ Law Commission of Ontario, "[Legal Capacity, Decision-making and Guardianship Final Report – March, 2017](#)" Law Commission of Ontario, online.

⁵⁵ H. Archibald Kaiser, "The Convention on the Rights of Persons with Disabilities: Beginning to Examine the Implications for Canadian Lawyers' Professional Responsibilities" (2012) 20:2 *Health L Rev* 26 [Kaiser].

⁵⁶ *Ibid*, at 28.

⁵⁷ *Ibid*.

argues that the CRPD in Canada should spawn a review of advocacy standards, mandating that lawyers conduct themselves in a manner which is consistent with the Convention.⁵⁸

V. EMERGING AREAS OF IMPROVEMENT: CASELAW ANALYSIS

While there are, in fact, many areas of emerging improvement on the rights of persons with disabilities in Canada, this paper will focus on three prominent examples. The first two areas, the rights of incarcerated persons with disabilities and the rights of institutionalized persons with disabilities, feature claims which directly address systemic discrimination. The third, however, is a contentious area, and while its subject matter may in fact be contrary to the goals and principles of the CRPD, legislation granting the right to medical assistance in dying to disabled persons is a long and hard-fought victory for disabled persons and advocates in Canada and should be recognised as such.

V. A: The Rights of Incarcerated Persons with Disabilities in Canada

In a study conducted by Whittingham et al., the prevalence of individuals with developmental disabilities in Ontario prisons was revealed to be 2.2 per cent of the population. This is in comparison to a prevalence rate of 0.7 per cent in the general population of Ontario, leading the authors to conclude that “people with development disabilities are overrepresented in provincial prisons and have a high burden of disease.”⁵⁹

⁵⁸ Kaiser actually goes further arguing at pages 28-29 that, “additional training is to be provided for lawyers and judges as ordered by the CRPD, but other changes are commended too, such as: accessibility audits, both with respect to physical barriers, but also, for this purpose, with a view to removing social and attitudinal obstacles that might discourage the use of legal services; rethinking codes of professional responsibility; greater investment in legal aid services for citizens with disabilities; improvement of standards for serving persons experiencing mental health difficulties or cognitive impairments; and more thorough supports for citizens with disabilities “they may require in exercising their legal capacity.””

⁵⁹ Whittingham L. et al., “The prevalence and health status of people with developmental disabilities in provincial prisons in Ontario, Canada: A retrospective cohort study.” (2020) 33:6 J Appl Res Intell Disabil 1368.

In August of 2020, the Ontario Human Rights Commission (OHRC) filed a motion with the Human Rights Tribunal of Ontario (HRTO) for an order to hold Ontario accountable for failing to meet its legal obligations under both its *Jahn v. MCSCS* settlement and the 2018 *OHRC v. Ontario* consent order to keep prisoners with mental disabilities out of segregation. The OHRC's contravention motion is asking the HRTO to order a full prohibition on segregation for anyone with a mental health disability, a strict limit on any segregation placement beyond 15 continuous days and 60 total days in a year, and the creation of an independent monitor role to provide oversight of Ontario's correctional system.⁶⁰ This motion comes on the heels of Christina Jahn's 2012 human rights application against Ontario's Ministry of Community Safety and Correctional Services ("MCSCS"). During Jahn's 2011 and 2012 incarcerations at the Ottawa-Carleton Detention Centre, Ms. Jahn, who suffers from mental illness, substance dependency, and cancer, "alleged that she was placed in segregation for the entire period of her incarcerations (approximately 210 days) and experienced brutal and humiliating treatment because of her gender and mental health disabilities."⁶¹ In 2013, the government of Ontario reached a landmark settlement to address the use of segregation and treatment of prisoners with mental health disabilities. As part of that agreement, the government agreed to prohibit the use of segregation for any individuals with mental illness, except as a last resort. Unfortunately, as demonstrated in decision below, Ontario did not implement this prohibition immediately.

The criminal case of *R v. Capay*⁶² concerns the issue of isolating individuals with mental health issues in administrative segregation. While the case deals with the rights of persons with disabilities in prison, there is a notable cross-over of the experience of Indigenous persons and

⁶⁰ Ontario Human Rights Commission, "[Segregation and mental health in Ontario's prisons: *Jahn v. Ministry of Community Safety and Correctional Services*](#)" (2020) Ontario Human Rights Commission, online.

⁶¹ *Ibid.*

⁶² 2019 ONSC 535 [*Capay*].

Canada's mental health laws. Adam Capay, an inmate at the Thunder Bay Correctional Center ("TBCC"), was scheduled to be released in August 2012. On June 3, 2012, Adam was placed in segregation following a fatal knife attack on fellow inmate, Sherman Quisses.⁶³ Adam Capay was granted a stay on first degree murder charges after bringing an application pursuant to s. 24 (1) of the *Charter* due to the fact that "from June 4, 2012, until December 6, 2016, a period of four years, six months, and two days (1,647 days), the accused was continuously held in segregation in a cell by himself."⁶⁴ During his extended segregation he only saw the psychologist, Dr. Stambrook, for a total of 80 minutes, and psychiatrist, Dr. Schubert for a total of 9 hours.⁶⁵ It is arguable that Adam Capay wouldn't have been released from segregation were it not for a chance meeting with Ms. Renu Mandhane, Chief Commissioner of the Ontario Human Rights Commission, who toured TBCC in 2016. After meeting Adam at TBCC and learning of his conditions, Ms. Mandhane was angered and sent a letter to Minister David Oraziotti on October 14, 2016. In the *Capay* decision, the Court looked at the adoption of the Convention, specifically looking at Article 14 which provides that State Parties should ensure that "the existence of a disability shall in no one case justify a deprivation of liberty," and that persons with disabilities who are deprived of their liberty "shall be treated in compliance with the objectives and principles in the present Convention, including by provision of reasonable accommodation."⁶⁶

⁶³ *Ibid*, at para. 1.

⁶⁴ *Ibid*, at para. 4.

⁶⁵ In *Capay* at para. 43 it is revealed that "between April 12, 2015, and December 6, 2016, the accused engaged in various self-harming behaviour, including pushing a pencil through his right cheek and through his foreskin, slashing his forearm with a razor blade, and banging his head against his cell door repeatedly causing himself to bleed."

⁶⁶ *Capay*, *supra* note 62 at para. 156.

V. B: Advancing the Rights of Institutionalized Persons with Disabilities

In a recent case that can be heralded as a major victory for Canadians with disabilities, the Nova Scotia Court of Appeal delivered the first ruling in Canada regarding whether it is discrimination to require persons with disabilities to live in institutional settings to receive necessary supports. In *Disability Rights Coalition v. Nova Scotia (Attorney General)*⁶⁷ the Court developed a test for establishing *prima facie* discrimination with reference to s. 4 of Nova Scotia's *Human Rights Act*.⁶⁸ The case started in 2014 when Beth MacLean, Sheila Livingstone, and Joseph Delaney filed complaints with the Nova Scotia Human Rights Commission alleging discrimination in the province of Nova Scotia's provision of service, due to their mental disabilities and financial status. After a lengthy hearing, a Board of Inquiry found the three individual complaints each established *prima facie* discrimination under the *Act*, however, limited this finding to the time periods when these individuals had been housed in a locked psychiatric unit of a Nova Scotia Hospital. The Board dismissed the coalition complaint of systemic discrimination. On appeal, the Court found the Board erred in law in its identification of the "service" at the heart of the three complaints.

A similar set of complaints and legal proceedings are now underway in the province of Manitoba where three human rights complaints were recently filed against the federal government alleging systemic discrimination and a failure to provide proper services to First Nation adults with disabilities. These complaints are being brought by the Public Interest Law Centre on behalf of two First Nations people and a coalition of Indigenous adults with disabilities. The first complaint was brought by Joni Wilson on behalf of her son Aidan, a 19-year-old Anishinaabe man from Peguis First Nation. Aidan was born with six different heart conditions and endured several surgeries before his first birthday. His mother, Joni, shares that "he also had cancer as a baby and

⁶⁷ 2021 NSCA 70.

⁶⁸ Human Rights Act, RSNS 1989, c 214.

suffered a stroke, which paralyzed the right side of his face, arm and leg.”⁶⁹ When Aidan turned 18, he lost significant funding to support his disability. In the second complaint, Carly Sinclair, a 30-year-old Anicinabe woman from Sagkeeng First Nation had an application brought by her mother who says Carly was unable to finish school due to a lack of supports and regular doctor visits regarding her disability. When Carly was 4 years old, she contracted a rare neurological disorder from a mosquito bite. Carly developed a severe form of childhood epilepsy and intellectual impairment, forcing her to have to use a wheelchair and require daily care. Joelle Pastora Sala, lawyer with the Public Interest Law Centre argues that “Canada’s continued failure to provide necessary supports for First Nation adults with disabilities is unconscionable, particularly at a time when reconciliation is stated to be a top priority for Canada.”⁷⁰

V. C: Protecting the Right to Medical Assistance in Dying

The CRPD and Canada’s decision to grant the right to medical assistance in dying to persons with disabilities are seemingly at odds with each other. In particular, the United Nations’ Special Rapporteur takes issue with the eligibility criteria set out in Canada’s federal Bill C-7 to access medical assistance in dying. A report of the United Nations Special Rapporteur on the rights of persons with disabilities references Article 4 (1)(d) of the Convention which provides for States Parties to refrain from engaging in any act or practice that is inconsistent with the Convention. In this report, the Special Rapporteur argues that “the issue really concerns the underlying predicates of the legislation (pivoting as it does on disability) and how it expands the right to cover persons with disabilities who are not themselves close to death.”⁷¹ The Special Rapporteur expressed grave

⁶⁹ Kelly Geraldine Malone, “[Human rights complaints allege First Nations adults with disabilities in Manitoba left behind](#)” July 8, 2021, CBC News, online [Malone].

⁷⁰ *Ibid.*

⁷¹ United Nations Special Rapporteur on the rights of persons with disabilities, “Mandates of the Special Rapporteur on the rights of persons with disabilities; the Independent Expert on the enjoyment of all human rights by older persons, and the Special Rapporteur on extreme poverty and human rights.” OL CAN 2/2021.

concern “that, if assisted dying is made available for all persons with a health condition or impairment, regardless of whether they are close to death, a social assumption might follow (or be subtly reinforced) that it is better to be dead than to live with a disability.”⁷²

The fight for the recognition of the right to access Medical Assistance in Dying (“MAiD”) in Canada predates the CRPD and its negotiations by seven years. In 1993, Canada’s first landmark case was heard before the SCC. In *Rodriguez v. British Columbia (Attorney General)*,⁷³ Sue Rodriguez, a woman suffering from ALS, challenged the *Criminal Code* provisions preventing assisted suicide. The provisions were upheld in a 5-4 decision. Twenty-two years later, in *Carter v. Canada (Attorney General)*⁷⁴ the Court was unanimous, striking down the criminal provisions in sections 241 (b) and section 14⁷⁵ of the *Criminal Code*.⁷⁶ After the *Carter* decision, multiple amendments were made to de-criminalize MAiD through Bill C-14. As a result, people could receive MAiD from a medical practitioner or nurse practitioner. Prior to the decision in *Truchon c. Procureur general du Canada*,⁷⁷ the provision of MAiD required that a patient’s natural death be reasonably foreseeable. In a 2018 article on the subject, Thomas McMorrow argues that “the restriction on access to MAiD would appear to be intended to deter those living with disabilities and illnesses from seeking MAiD; it evinces the willingness to enable those who are at the end of life already – or are close enough – to pass away with the aid of medical and nurse practitioners.”⁷⁸

⁷² *Ibid.*

⁷³ 1993 3 SCR 519 [*Rodriguez*].

⁷⁴ 2015 SCC 5 [*Carter*].

⁷⁵ Section 241 (b) of the *Criminal Code* provides that everyone who aids or abets a person in committing suicide commits an indictable offence; section 14 of the *Criminal Code* says that no person may consent to death being inflicted on them.

⁷⁶ Gloria Taylor was diagnosed with a fatal neurodegenerative disease in 2009. Along with Lee Carter and Hollis Johnson (who assisted Lee’s mother Kay Carter, 89, suffering from spinal stenosis, to travel to Switzerland to receive MAiD) and William Shoicet, a physician who claimed that were it not a crime, he would be willing to provide patients with MAiD, and the BCCLA, challenged the constitutionality of ss 241 (b) and 14 of the *Criminal Code*, arguing the provisions infringed on ss. 7 and 15 *Charter* rights.

⁷⁷ 2019 QCCS 3792 [*Truchon*].

⁷⁸ Thomas McMorrow, “MAiD in Canada: Debating the constitutionality of Canada’s New Medical Assistance in Dying Law” (2018) 44:1 *Queen’s LJ* 69 at 84 [McMorrow].

In *Truchon*, the applicants, Ms. Jean Truchon and Ms. Nicole Gladu challenged the constitutional validity of the new requirements in the *Criminal Code* and subsection 3 of the first paragraph of section 26 of Quebec’s *Act Respecting End-of-Life Care*,⁷⁹ which require their natural death to be ‘reasonably foreseeable’ or that they are at the end of their life to obtain MAiD.⁸⁰ Following the decision, which struck down the language in the new provisions, the federal government consulted with public and industry experts between January and February of 2020. In October 2020, the government introduced Bill C-7. The Bill removes the requirement of a natural death being reasonably foreseeable, creating a two-lane approach for procedural safeguards where some safeguards are eased for those whose natural death is reasonably foreseeable. The Bill also allows individuals to waive final consent if they lose capacity, and permits people suffering from a mental illness to access MAiD starting in 2023.⁸¹ Canadians now have the option to have clinician-administered MAiD or self-administered MAiD.

Helen Long, CEO of Dying with Dignity Canada, reports that Bill C-7 has “opened up what we call a ‘track two,’ a whole new track for people with a different type of illness who haven’t been eligible in the past, even if they may have been suffering just as intolerably.”⁸² Krista Carr, executive Vice President of the disability rights organization Inclusion Canada, takes a similar position as the UN CRPD Committee, arguing that the law as it stands poses a threat to Canadians with disabilities.⁸³ Writer, artist, and disability advocate Linda Crabtree details the sorrow of watching her mother slowly starve herself to death, suffering from dementia. Linda has also inherited the same neuromuscular disease as her mom and argues that “we need to have the right

⁷⁹ CQLR c S-32.0001.

⁸⁰ *Truchon*, *supra* note 77 at para. 5.

⁸¹ Monika Steger, “[Update on Medical Assistance in Dying in Canada](#)” September 7, 2021, *British Columbia Legal Institute*, online.

⁸² See Richard Raycraft, “[Years after Medical assistance in dying became legal, the debate rages on.](#)” January 2, 2022, *CBC News*, online [Raycraft].

⁸³ *Ibid.*

to make an advance request for medical assistance in dying that indicates that, should we not have the capacity to ask for a dignified death, it can be arranged for us.”⁸⁴ The Canadian Bar Association created an end of life working group in 2022 which adopted resolutions supporting MAiD for persons with mental illnesses, mature minors and advance requests for MAiD.⁸⁵ The working group reported that public consultations⁸⁶ were overwhelmingly in favour of advance requests and that most members of the Canadian Association of MAiD Assessors and Providers (CAMAP) were open to advance requests.⁸⁷

One of the first Canadians to access the right to medical assistance in dying after the new eligibility provisions of Bill C-7 was Chris “Birdie” Gladders, a 35-year-old man from Hamilton, Ontario.⁸⁸ Chris was battling Fabry’s disease, a genetic condition that affects the body’s ability to break down a specific fatty acid and causes several serious side effects. In the months leading up to his death, Chris suffered multiple strokes while staying at St. Joseph’s Hospital in Hamilton. As a result of the COVID-19 pandemic, Chris ended up at Greycliff Manor Retirement home in Welland, Ontario. When Chris’ older brother Shawn came to see him before his death, he told MPP Wayne Gates that “the bedding hadn’t been changed for weeks. There was feces on the bed. There was urine on the bed. There was urine and feces on the floor, the room was absolutely disgusting.”⁸⁹ Shawn was told by Greycliff’s director that “Chris never should have been sent to

⁸⁴ Dying with Dignity Canada, “[Linda Crabtree: Why we are writing Dying with Dignity Canada into our wills.](#)” May 17, 2019, online.

⁸⁵ The working group is a cross-section of members drawn from diverse areas of expertise including constitutional and human rights law, criminal justice, health law, wills, estates and trusts law, elder law, child and youth law, privacy and access to information law, and dispute resolution.

⁸⁶ The Canadian Bar Association reports that in a 2020 federal government questionnaire on MAiD, 79 per cent were in favour of advance requests while 83 per cent of respondents in a 2021 Ipsos Poll supported advance requests for persons with a diagnosis of a grievous and irremediable condition.

⁸⁷ In a member survey, 82 per cent of assessors and providers stated they would be willing to assess patients who had made an advance request but had since lost capacity to make their own healthcare decisions.

⁸⁸ The author is proud to have known Chris as a friend and will always admire his kindness and generosity towards others, his strength and determination in the face of unimaginable pain, and above all else, his *courage*.

⁸⁹ Bobby Hristova, “[Niagara MPP calls for province to take over ‘disgusting’ Greycliff Manor after 35-year-old dies](#)” January 28, 2021, CBC News, online.

the facility because it doesn't have the resources, training or staff to help him.”⁹⁰ While it is a victory for disabled Canadians to be able to exercise their right to MAiD, Chris' story reveals how Canada may not actually be living up to its promise to provide individuals with the right to die with dignity.

According to a Parliamentary Budget Officer report on medically assisted dying, since becoming legal on June 17, 2016, Canada's healthcare costs have dropped by approximately \$86.9 million dollars. These costs represent between 10 per cent to 20 per cent total health-care costs despite those patients representing about 1 per cent of the population.⁹¹ The federal government publishes reports covering MAiD statistics for the past two years. In 2020, they reported 7,595 cases of MAiD, representing a 34.2 per cent increase over 2019, arguably leading to even more savings.⁹² These cost savings could very easily be re-directed into programs which support individuals with serious disabilities in all stages of the lifecycle.

VI. IMPLEMENTING CRPD COMPLIANT LEGISLATION IN CANADA

In a visit to Canada in 2019, the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, lamented that “Canada has yet to undertake a comprehensive review process to harmonize all its legislation with the CRPD.”⁹³ The report was careful to note that it's not just the federal government that is lagging behind, noting that “at the provincial level, only Ontario, Manitoba, Nova Scotia, and Quebec have enacted disability specific legislation, none of which is comprehensive nor fully in line with the CRPD.”⁹⁴ It's one thing to

⁹⁰ *Ibid.*

⁹¹ Katie Dangerfield, “[Health-Care costs in Canada dropped after assisted dying became legal](https://globalnews.ca/news/7407627/health-care-costs-canada-assisted-dying/)” October 20, 2020, *Global News*, online: <https://globalnews.ca/news/7407627/health-care-costs-canada-assisted-dying/>.

⁹² Raycraft, *supra* note 82.

⁹³ United Nations Human Rights Office of the High Commissioner, “[End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to Canada.](#)” April 12, 2019, online.

⁹⁴ *Ibid.*

point out Canada’s lack of CRPD compliant legislation; however, what would it take to implement this regime? To start, any legislative amendments would have to align with the principles of both the CRPD and section 15 of the *Charter*. According to Ravi Malhotra, who was written on the impact of the *Charter* on disability rights in Canada, “future interpretation of section 15 must be carefully considered in light of Canada’s responsibilities under the CRPD, especially as courts have embraced the application of international law in other contexts such as landmark immigration law rulings.”⁹⁵ It might be helpful, before crafting any legislation, to return to the drawing board, ensuring that legislation is free of barriers for persons with disabilities from start.

David Lepofsky and Randal Graham recently discussed the growth of a movement known as ‘Universal Design’ which has developed in the realm of designing consumer products, building, and facilities.⁹⁶ In their 2009 article, Lepofsky and Graham call on “those who craft and review legislation to join the Universal Design movement by ensuring that legislation is free of barriers for persons with disabilities.”⁹⁷ The authors were clear: if legislative drafters want to use the principles of Universal Design to eliminate barriers for persons with disabilities, they must be alert to the typical barriers that persons with disabilities face. In explaining the Universal Design and common legislative barriers, Lepofsky discussed the impact of attitudinal, physical, communication, informational, and legal or bureaucratic barriers, identifying seven typical barriers to incorporating Universal Design in legislation.⁹⁸ Just as the CRPD can be viewed as a roadmap

⁹⁵ Malhotra, *supra* note 4 at 295, where the author references immigration law cases *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3, at paras. 59-65 (S.C.C.).

⁹⁶ The authors argue that universal design calls for products and facilities to be designed so that all people can use them, not just persons without disabilities.

⁹⁷ M. David Lepofsky & Randal N.M. Graham, “Universal Design in Legislation: Eliminating Barriers for People with Disabilities” [2009] 30:2 *Statute L Rev* 97.

⁹⁸ The barriers include provisions giving notice, legislative programs and the internet, limitation periods, communication with the government, government properties and facilities, discretionary powers of regulatory agencies and tribunals, and legislation imposing explicit barriers on persons with disabilities.

for legal capacity law reform, Lepofsky and Graham's application of Universal Design to legislation can be viewed as a guideline for creating barrier free legislation that is inclusive of the principles espoused in the CRPD and ratified by the federal government of Canada.

VII. CONCLUSION

The new paradigm shift, born out of foundational international human rights, and ushered in with the universal guarantee of legal capacity for persons with disabilities, represents a dramatic change in equality rights. While the CRPD has yet to receive the formal reception in Canada its drafters and supporters had envisioned, it is arguable that the impact of the treaty is still significant. The influence the CRPD has in Canada, as a catalyst of social change, empowering persons with disabilities and their representative organisations, is equally as important as the impact on LRAs and the professionals who are tasked with representing clients and protecting their right to legal capacity. As LRAs continue to push for supported decision-making mechanisms, Canada must reflect on its duties and responsibilities as a State Party signatory to the CRPD. In recognising the options available, British Columbia's *RAA*, a world-class example of supported decision-making legislation, is an excellent conversation starter. Above all else though, any attempt at implementing CRPD principles in legislation must be done in a barrier-free manner.

Table of Authorities

JURISPRUDENCE

- Carter v. Canada (Attorney General)*, 2015 SCC 5.
Disability Rights Coalition v. Nova Scotia (Attorney General), 2021 NSCA 70.
Eldridge v. British Columbia, [1997] 3 SCR 624.
R v. Capay, 2019 ONSC 535.
Rodriguez v. British Columbia (Attorney General), 1993 3 SCR 519.
Truchon c. Procureur general du Canada, 2019 QCCS 3792.

LEGISLATION

- Act Respecting End-of-Life Care*, CQLR c S-32.0001.
Adult Protection and Decision-Making Act, SY, 2003, c 21, Sch A.
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
Convention on the Rights of Persons with Disabilities, GA Res 61/106 UNGAOR, 61 st Sess, Supp No 49, UN Doc Annex: Convention on the Rights of Persons with Disabilities A/Res61/106 (2007) 2.
Criminal Code, R.S.C., 1985, c. C-46.
Human Rights Act, RSNS 1989, c 214.
Representation Agreement Act, RSBC 1996, Ch. 405.
The Adult Guardianship and Co-decision-making Act, SS, 2000, c A-5.3.
The Adult Guardianship and Trusteeship Act, SA, 2008, Ch. A-4.2.

SECONDARY MATERIALS: ARTICLES

- Arlene S. Kanter, “A Comparative View of Equality under the UN Convention on the Rights of Persons with Disabilities and the Disability Laws of the United States and Canada” (2015) 32:2 *Windsor YB Access Just* 65 at 87.
Canadian Human Rights Commission, “Left Out: Challenges faced by persons with disabilities in Canada’s schools” (2017) CanLII Docs 3489.
Cliona de Bhailis & Eilionoir Flynn, “Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD” (2017) 13:1 *Intl JL Context* 6.
Deborah Stienstra, “Canadian Disability Policies in a World of Inequalities” (2018) 8:36 *Societies* 1.
Gerard Quinn, “Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD” Paper presented at Harvard Law School, February 20, 2010, reprinted in NIU Galway Centre for Disability Law & Policy, Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality app. 6.
H. Archibald Kaiser, “The Convention on the Rights of Persons with Disabilities: Beginning to Examine the Implications for Canadian Lawyers’ Professional Responsibilities” (2012) 20:2 *Health L Rev* 26.
Katie Dangerfield, “Health-Care costs in Canada dropped after assisted dying became legal” October 20, 2020, *Global News*, online: <https://globalnews.ca/news/7407627/health-care-costs-canada-assisted-dying/>.
Kelly Geraldine Malone, “Human rights complaints allege First Nations adults with disabilities in Manitoba left behind” July 8, 2021, CBC News, online:

- www.cbc.ca/news/canada/manitoba/human-rights-complaints-allege-first-nations-adults-with-disabilities-in-manitoba-left-behind/.
- Kristen Booth Glen, “Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond” (2012) 44:1 *Colum Hum Rts L Rev* 93
- Lucy Series, “Comparing Old and New Paradigms of Legal Capacity” [2014] 2014:1 *Elder LJ* 62.
- M. David Lepofsky & Randal N.M. Graham, “Universal Design in Legislation: Eliminating Barriers for People with Disabilities” [2009] 30:2 *Statute L Rev* 97.
- Margaret Isabel Hall, “Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability” (2012) 58:1 *McGill LJ* 61.
- Mathieu Dufour, Thomas Hastings, and Richard O’Reilly, “Canada Should Retain Its Reservation on the United Nation’s Convention on the Rights of Persons with Disabilities” (2018) 63:12 *Cdn J of Psychiatry* 809.
- Monika Steger, “Update on Medical Assistance in Dying in Canada” September 7, 2021, *British Columbia Legal Institute*, online: <https://www.bcli.org/update-on-medical-assistance-in-dying-in-canada/>.
- Ontario Human Rights Commission, “Segregation and mental health in Ontario’s prisons: *Jahn v. Ministry of Community Safety and Correctional Services*” (2020) Online: <http://www.ohrc.on.ca/en/segregation-and-mental-health-in-Ontarios-prisons/>.
- Ravi Malholtra, “Has the Charter Made a Difference for People with Disabilities?: Reflections and Strategies for the 21st Century” (2012) 58:10 *S.C.L.R.* 273.
- S.N. Then et al., “Supporting decision-making of adults with cognitive disabilities: The role of Law Reform Agencies – Recommendations, rationales, and influence” (2018) 61 *Intl J of Law and Psychiatry* 64.
- Steven J. Hoffman et al., “Is the UN Convention on the Rights of Persons with Disabilities Impacting Mental Health Laws and Policies” (2016) 16:28 *BMC Int’l Health and Human Rights* 1.
- Thomas McMorrow, “MAID in Canada: Debating the constitutionality of Canada’s New Medical Assistance in Dying Law” (2018) 44:1 *Queen’s LJ* 69.
- Whittingham L. et al., “The prevalence and health status of people with developmental disabilities in provincial prisons in Ontario, Canada: A retrospective cohort study.” (2020) 33:6 *J Appl Res Intell Disabil* 1368.

OTHER MATERIALS

- Accessibility for Ontarians with Disabilities Act Alliance, “What Did Disability Advocates Tell Canada’s Parliament 40 Years Ago This Fall to Help Win an Historic Amendment to the *Charter of Rights* to Protect Equality for People With Disabilities?” December 7, 2020, online: <https://www.aoda.ca/what-did-disability-advocates-tell-canadas-parliament-40-years-ago-this-fall-to-help-win-an-historic-amendment-to-the-charter-of-rights-to-protect-equality-for-people-with-disabilities/>.
- Bobby Hristova, “Niagara MPP calls for province to take over ‘disgusting’ Greycliff Manor after 35-year-old dies” January 28, 2021, CBC News, online: <https://www.cbc.ca/news/canada/hamilton/greycliff-manor-covid19-1.5891730>.
- CBC Radio, “How Justin Clark’s fight for independence transformed disability rights in Canada” November 25, 2018, *The Sunday Magazine*. Online: <https://www.cbc.ca/radio/sunday/november-25-2018-the-sunday-edition-with-michael->

- enright-1.4911588/how-justin-clark-s-fight-for-independence-transformed-disability-rights-in-canada-1.4911590#:~:text=Following%20the%20ruling%2C%20guardianship%20laws,make%20them%20on%20their%20behalf.
- Dying with Dignity Canada, “Linda Crabtree: Why we are writing Dying with Dignity Canada into our wills.” May 17, 2019, online: http://www.dyingwithdignity.ca/blog/linda_wills/.
- Law Commission of Ontario, “Legal Capacity, Decision-making and Guardianship Final Report – March, 2017” Online: <http://www.lco-cdo.org/wp-content/uploads/2017/03/CG-Final-Report-EN-online.pdf>.
- Maria Veronica Reina, “How the International Disability Caucus worked during negotiations for a UN Human Rights Convention on Disability” February 6, 2008, online: <http://globalag.igc.org/agingwatch/events/CSD/2008/maria.htm>.
- Richard Raycraft, “Years after Medical assistance in dying became legal, the debate rages on.” January 2, 2022, *CBC News*. Online: <https://www.cbc.ca/news/politics/maid-access-debate-contentious-1.6300345#:~:text=Politics-,Years%20after%20medical%20assistance%20in%20dying%20became%20legal%2C%20the%20debate,harmful%20to%20Canadians%20with%20disabilities>.
- United Nations Department of Economic and Social Affairs, “Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities; Chapter Six: From Provisions to practice: Implementing the Convention – Legal Capacity and Supported Decision-making” Online: <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-six-from-provisions-to-practice-implementing-the-convention-5.html>.
- United Nations Human Rights Office of the High Commissioner, “End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to Canada.” April 12, 2019. Online: <https://www.ohchr.org/en/statements/2019/04/end-mission-statement-united-nations-special-rapporteur-rights-persons>.
- United Nations Special Rapporteur on the rights of persons with disabilities, “Mandates of the Special Rapporteur on the rights of persons with disabilities; the Independent Expert on the enjoyment of all human rights by older persons, and the Special Rapporteur on extreme poverty and human rights.” OL CAN 2/2021.