Representing Handicapped Persons' Claims Under the Ontario Human Rights Code and the Canadian Charter of Rights and Freedoms*

M. David Lepofsky**

Nineteen eighty-one, the International Year of the Disabled Person, was marked in Canada by the two major advances resulting from efforts to secure equality of rights and opportunities for handicapped persons in this country. The *Canadian Charter of Rights and Freedoms*, then in the proposal stage, was amended to include a guarantee of equality before the law for mentally and physically disabled persons. Second, the Ontario *Human Rights Code*[1] was amended to extend its protection against private and public sector discrimination to handicapped persons in Ontario.

This article provides an introduction to these new laws, and guidance for those who may represent handicapped persons in litigation aimed at enforcing their new equality rights. It addresses basic legal and tactical considerations that will present themselves to the practitioner.

The first part of this article reviews the main substantive provisions of the Ontario *Human Rights Code* as they affect the rights of handicapped persons. Part B sets out practical and tactical suggestions for the conduct of a human rights case on behalf of a handicapped client. Part C provides an introductory overview to the Charter guarantee of equality for the handicapped. Finally, Part D provides some American sources from which legal arguments might be derived in handicap equality rights cases.

PART A:

New Ontario Human Rights Code Protections for Handicapped Persons

This section canvasses the salient provisions of the new Ontario *Human Rights Code* (The Code), as they apply to handicapped persons. Though it does not describe details of human rights procedure, a brief summary is set out here. An aggrieved individual ("the Complainant") may file a formal complaint in the prescribed form with the Ontario Human Rights Commission ("the Commission"). The Commission may then deploy staff investigators ("the Officers") to investigate the validity of the complaint, who are equipped with various investigatory powers (see s. 32). Once the investigation is completed, the officer attempts to effect a settlement between the complainant and the party complained against ("the Respondent").

If the parties are unsuccessful at reaching a settlement, a recommendation is made by the officer to the Commission. If of the opinion that the complaint is meritorious, the Commission calls upon the Minister of Labour to appoint a Board of Inquiry ("the Board"). The Board conducts a *quasi*-judicial evidentiary hearing on the complaint, at which the respondent and complainant are parties, as well as the Commission, which has carriage of the action.

The Board makes findings of fact and law, and makes a decision including any remedial order that it deems appropriate within its powers. The Board's decision is appeallable to the Divisional Court ("the court").

(1) Interpreting New Code Provisions - Requirement of Liberal Construction

The 1981 Code Amendments extending protection from discrimination to handicapped persons should, as a matter of law, be given a liberal construction to ensure that they achieve their intended goal of equal opportunity for disabled persons. This requirement flows not only from sections 8 and 10 of the *Interpretation Act*,[2] but as well from the intention of the Ontario Legislature, manifested during formulation of the Code. To demonstrate this legislative intent, the 1977 report of the Ontario Human Rights Commission's "Code Review Committee," entitled "Life Together", which formed the impetus for reform to the Code, should be examined. It was recommended that legal protection from discrimination be extended in Ontario to physically handicapped persons.

Regard should also be had to the first bill introduced into the Ontario Legislature in fall 1979 in response to "Life Together", by the then Minister of Labour. Bill 188 purported to provide equality rights to physically handicapped persons, as well as to mentally handicapped persons, thereby providing more protection than had been recommended in "Life Together". Bill 188 was withdrawn after first reading, late in 1979, because of two defects pointed out by handicapped organizations. First, the Bill's equality guarantees were not worded with sufficient strength. Second, the Bill sought to provide equality rights for handicapped persons through a special and separate "Handicapped Persons Rights" statute, rather than by direct amendment to the Code.

Careful scrutiny of "Life Together", Bill 188, its successor Bill 209 introduced in November 1980 and of the final amendments enacted by S.O. 1981, c. 53 reveals that the Legislature sought to make certain that protection for the handicapped was thorough, and exceptions, while wide enough to ensure fairness to employers, service providers and the like, are narrow enough to ensure the legislation's

*Based on a paper presented at the 1983 C.B.A. Annual Institute.

**Counsel, Crown Law Offices (Civil), Ontario Ministry of the Attorney General. This article is written in the author's personal capacity and does not purport to express the views of Ontario's Attorney General.

efficacy. This principle of Code interpretation can be relied upon by simple reference to the terms of Bill 188, and the final statute, without resort to the text of actual legislative debate, even though the requirement is that the Code be liberally contrued.

(2) Who is Entitled to the Code's Protection - Definition of "Handicap"

The first step in a complainant's case is to show that he falls within the class of persons defined as having a "handicap" in Code s. 9(*b*). He may do this by four alternative avenues: (a) showing that he has, at present, a handicapping condition, as described below (present handicap); (b) demonstrating that he had a handicapping condition in the past (history of handicap); (c) proving that he is believed by the respondent employer, landlord *etc.* to have a present handicapping condition (perceived present handicap); or (d) indicating that he is believed by the respondent employer, landlord *etc.* to have had a past handicapping condition (perceived history of handicap).

Section 9(*b*) delineates two general classifications of handicapping condition. The first includes physical handicaps. To fall into this class, a handicapping condition must have two attributes: First it must involve "any degree of physical disability, infirmity, malformation or disfigurement". This requirement is so broadly worded, that it readily embraces any imaginable physical dysfunction which could be asserted to interfere with a complainant's job performance, enjoyment of services, goods, facilities, and the like. Second, the physical dysfunction must be caused by illness, birth defect or injury. This requirement is of no practical significance, since a functional physical handicap can only exist if caused at birth, or result later in life from illness or injury. Section 9(*b*)(1) enumerates an explicitly non exhaustive list of physical handicaps which automatically fall within the definition of handicap. It includes among others, "diabetes, epilepsy, and paralysis, or amputation, lack of coordination, vision, speech or hearing handicap".

The second class of handicapping conditions encompasses mental handicaps. By s. 9(*b*) (ii), (iii) and (iv), it includes developmental handicaps, learning disabilities, and mental disorders. Though not determinative you might turn to the American Pyschiatric Association's official "Diagnostic and Statistical Manual of Mental Disorders" (DSM 3, 1980) as a source for a definition of currently recognized mental disorders.

The Code's all inclusive handicap definition has the effect of implementing a legislative policy that cases of handicap-based discrmination not get bogged down in overly technical argument on whether the complainant is or is not handicapped. "Life Together" had proposed that human rights protection be extended only to persons with a physical handicap, while Bill 188, s. 20(c) had offered protection to the physically disabled and a narrow class of mentally handicapped persons. In contrast, the new Code's handicap definition is the most all inclusive. Because the Code makes it easy to ascertain whether a complainant is handicapped, such cases will ultimately be decided on the more relevent issues: (a) was this complainant actually denied equality in employment, housing, *etc.*, because of his disability, and (b) does this complainant's disability render him incapable of undertaking the essential duties or requirements of the job, service, *etc.*

(3) In What Activities is Discrimination Based on Handicap Prohibited? - Definition of Protected Activities

An aggrieved handicapped complainant must prove that he was victimized by discrimination in one of the eight activities to which the Code applies ("protected activities"). These protected activities are described by wide-sweeping labels, whose meaning is often intuitively self-evident, it will not be open to a board or court to superimpose upon them a narrow, technical definition to circumscribe the Code's reach. For example, a board or court need not expend undue amounts of energy inquiring whether a refusal by an insurance company to provide insurance to a handicapped applicant constitutes discrimination with respect to contract (Code s. (3)) or with respect to services (Code s. (1)). Each of these overlapping terms is sufficiently broad that insurance is clearly covered by either, if not both. A board or court can find that the refusal related to "services or contract", after which it can move on to the more important issues: *e.g.*, was the complainant in fact denied insurance because of handicap, and if so, was the denial defensible under the Code?

Protected activities include the following:

Services (s. 1) This is the broadest such guarantee in any Canadian human rights statute. It supercedes the old Ontario Code's narrow equality guarantee which pertained to "services ... available in any place to which the public is customarily admitted".[3] It is also broader than the B.C. Code's right of non-discrimination in relation to "services... customarily available to the public".[4] The new Ontario provision would thus not be subject to the strained, narrow construction placed on the B.C. Code by the Supreme Court of Canada in *Gay Alliance Towards Equality v. Vancouver Sun*.[5] Ontario's protection should include restaurants, hotels, taxis, consumer services (*e.g.*, plumbing, repairs), professional services (*e.g.*, those offered by lawyers, doctors, accountants and engineers), as well as social services and education. (Re education, see *Schmidt v. Calgary Board of Education*, [6] reversed on other grounds.[7] Code s. 9(i) excludes from the definition of services a "levy, fee, tax or periodic payment imposed by law".

Goods (s. 1) This can include rental or sale of consumer or commercial goods of any kind. If real estate sales were not covered by this guarantee, it would certainly be covered by equality rights with respect to contract.

Facilities (s. 1) Overlapping considerably with services and contracts, this activity includes use of private or public halls, ice rinks, gyms, communication systems, (if within provincial regulatory jurisdiction), libraries, hospitals or other health care facilities.

Occupancy of Accommodation (s. 2) Accommodation facilities not covered by this provision are described in s. 20.

Contract (s. 3) The other protected activities already adequately cover many contracting situations, *e.g.*, employment, purchase of goods, rental of accommodations. This guarantee extends the certainty of that coverage. For example, a company cannot avoid compliance with the requirement not to discriminate with respect to employment by demonstrating that the complainant is not an employee, but rather is an independent contractor. The complainant is equally entitled to equality rights in either case because of the addition to the Code of this provision. It also inlcudes any other contractual situation in which discrimination might occur.

A handicapped complainant may only engage in this protected activity without fear of lawful handicapped-based discrimination if he has "legal capacity" to contract

(s. 3). This qualification purports to exclude, among others, from s. 3 persons with a mental handicap which, under the common law of contract, renders them incapable of entering into binding contracts. To the extent that the common law rule excludes from contracting persons who are provably mentally competent to understand and participate in contractual arrangements, those common law rules should be unconstitutional as contravening s. 15(1) of the *Canadian Charter of Rights and Freedoms*,once that Charter provision comes into force in April 1985.

Employment (s. 4) In addition to participation in conventionally-understood employment, this activity includes utilization of the services of employment placement organizations (Code s. 22(4)).

Memberhsip in Union, Trade or Occupational Association, or Self-Governing Profession (s. 5) Though trade unions, trade and occupational associations and self-governing professions are often governed by provincial legislation (*e.g.*, Ontario *Labour Relations Act*[8], *Law Society Act*[9], which may not specifically prohibit handicap-based discrimination (*e.g.*, Law Society Code of Professional Conduct's prohibition of discriminatory conduct by lawyers does not ban discrimination based on handicap) the Code is paramount in this area (see Code s. 46(2)).

By reading together clauses concerning employment, contract and membership in unions, it may follow that collective agreements which have disadvantageous impact on handicapped workers will be subject to scrutiny under the Code.

Insurance and Pensions (ss. 1, 3 and 4) Individual and group insurance policies and pension plans are covered by the Code, with specific provisions regulating them (ss. (e), 21 and 24). The defunct Bill 188 had exempted virtually all insurance and pension plans from compliance with human rights requirements, by permitting insurance and pension plans distinctions based on handicap where *bona fide* (Bill 188, s. 5(1)).

The Code regulates the treatment and opportunities of handicapped persons in connection with every aspect of the foregoing protected activities. If, for example, the opening words of Code s. 4(1) are read in conjunction with the definition of "equal" set out in s. 9(c), it becomes clear that a handicapped person is entitled to equality of treatment with respect to hiring, promotion, transfer, continuation of employment, and all other considerations associated with employment. The old Code, unlike the new, had specifically enumerated those aspects of employment which were subject to its egalitarian requirements (old Code s. 4).

(4) What Conduct Does the Code Prohibit? - Definition of "Discrimination"

A handicapped complainant's case ultimately rests on Code s. 8's directive that no person shall "infringe or do, directly or indirectly, anything that infringes a right under this part". To succeed the complainant must establish first that a right of his to freedom from discrimination in one of the protected activities covered by the Code has been violated, and second that this infringement was caused, directly or indirectly, in some substantial way by the respondent. This section's discussion of the definition of discrimination refers by example to employment opportunities though its approach applies to all other protected activities.

Discrimination, an elusive concept, can take two alternative forms. The first, attitudinal discrimination, involves purposive or conscious disadvantageous treatment of a particular individual because of his handicap. An example of this attitudinal discrimination would be an employer refusing to hire a blind person as a social worker for the explicit or unstated reason that the person lacks eyesight, even though the person is provably qualified for the job. The employer's attitude constitutes the barrier to the blind applicant's equality of opportunity. This attitude may be based on an inaccurate stereotyping, discomfort with, or fear of the disability, xenophobia or simple misunderstanding of the handicap.

Attitudinal discrimination can be proved in a variety of ways. This can be accomplished by evidence that the employer explicitly revealed such an attitude, or by implicative circumstantial evidence, *e.g.*, proof that the employer told the complainant that the job had been filled, when in fact, interviewing was still in progress. Attitudinal discrimination is prohibited by the Code whether based on malice ("I don't want my customer to have to look at a handicapped person") or by the best of intentions ("I'm afraid that a handicapped person might hurt himself on the way home from work").

The second form which discrimination can take is codified for the first time by s. 10, and is called "constructive discrimination". Action by an employer or a circumstance at the place of employment which was not directed at the handicapped job applicant personally, and which was not intended to exclude handicapped applicants generally, might nonetheless have constituted prohibited discrimination if such action or circumstance triggered disadvantageous treatment of handicapped persons, in some situations. Section 10 defines constructive discrimination as the imposition of a "requirement, qualification or consideration" with respect in this example to employment which, though not the result of attitudinal discrimination, "would result in the exclusion, qualification or preference" of handicapped job applicants.

An example of constructive discrimination would be an employer's blanket requirement that all job applicants present their driver's licences for identification. This practice might be implemented for reasons of administrative convenience. However, it has the effect of screening out from the hiring process all persons with a serious visual handicap or blindness. To ascertain whether a policy such as this constitutes constructive or structural discrimination, unlike attitudinal discrimination, you should focus not on the intention or *bona fides* of the employer, but on the result which the policy imposes on handicapped job applicants.

Because the foregoing definition of constructive discrimination is so broad, s. 10 contains an off-setting exemption clause to protect employers from inequitable claims. Subsection 10(*a*) permits employers from inequitable claims. which amounts to constructive discrimination if such is "a reasonable and *bona fide* one in the circumstances". A sensible, easily applicable way of interpreting this test can take the following form: an employer's business practice or policy is permissible, even though it has the effect of disadvantageously treating handicapped job applicants, so long as he can show that the practice or policy was undertaken for a legitimate business objective, that it was not adopted as a

means to screen out handicapped applicants, and that the practice is a necessary one. If, for example, the employer, described above, demanded all applicants to present a driver's licence because the job in question was that of taxi driver, it would be easily defended under s. 10(*a*). If, on the other hand, the job was that of switchboard operator, for which a driver's licence was unnecessary, the employer would be unable to justify this policy.

Once the complainant establishes that he has been in some way disadvantaged by the employer because of his handicap, either by attitudinal or constructive discrimination the employer may avoid liability under the Code if he can prove that the handicapped job applicant is not sufficiently qualified for the job, within the strict guidelines of either of the two branches of s. 16(1). By s. 16(1)(*b*), the employer may refuse to hire, or may otherwise discriminate against a handicapped person where he can prove that the complainant "is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap". A handicapped person may not be disqualified from a job on the ground that his handicap interferes with his job performance, unless the interference renders him "incapable" of performing the core or "essential duties" of the job. If the disability obstructs his performance of marginal, incidental aspects of the job, his handicap may not be considered a criterion effecting his employability. To identify those job responsibilities which are essential, regard should be had to the circumstances of the particular job, the duties of other employees working in the same or similar department of the employer, the duties associated with similar jobs throughout the same industry or profession, and the frequency and ease with which the employer has made changes to that job and similar job descriptions.

The other means of avoiding liability unde the Code is provided by s. 16(1)(*a*), which provides that the right to non-discrimination (with respect in this discussion to employment) is not infringed for the reason only that "the person does not have access to premises, services, goods, facilities or accommodation because of handicap or that the premises, services, goods, facilities or accommodation lack the amenities that are appropriate for the person because of handicap". This is an extraordinarily narrow exemption. It provides that a human rights case cannot be litigated before a board or court exclusively on the grounds that the place of employment is inaccessible to a handicapped employee.

If, however, the complainant's case is based on dual claims, e.g., an assertion that the place of employment lacks physical access coupled with an allegation that the employer inaccurately claims that his handicap incapacitates him from performing the job's essential duties - then the case may proceed before the board or court, and the access question may be considered as a possible indicium of discrimination. This dual claim approach is permissible because s. 16(1)'s opening phrase uses the word "only", while paragraphs 16(1)(*a*) and (*b*) are separated by the word "or". Moreover, s. 16(2) authorizes the Commission to investigate a complaint based solely on allegation of physical inaccessibility. It may continue to endeavour to effect a settlement of the dispute. If, in so doing, it becomes evident that a dual claim situation exists, the Commission can seek to take the case before a board.

At the heart of the Code's conception of "discrimination" is the following: an employer must assess a handicapped job applicant's abilities not by reliance on traditional stereotypes linked to his disability, but by an open-minded examination of what that particular person can actually do. The employer must as well approach this with a measure of rational flexibility. He should consider whether low-cost, non-disruptive and reasonable accommodations to the workplace or job description would enable the handicapped person to perform the job competently. Because the Code only addresses the applicant's ability to perform the "essential duties", the employer must be prepared to consider minor, convenient reallocation of non-essential duties to other employees, if the handicap interferes with the complainant's performance of these non-essential duties. In return, a comparable amount of responsibilities for which the handicap poses no obstacle, can be shifted to the job sought by the handicapped applicant, where reasonably feasible in the employer's circumstances.

Similarly, an employer should not simply appraise the handicapped applicant's abilities on the minimal assumption that the workplace is fixed and unaltered. If low-cost, non-disruptive alterations such as changes to the equipment used, the location in the building where work is performed or the process by which work is performed can be implemented without hardship to the employer, then the employer should size up the handicapped person's capabilities on the assumption that these reasonable accommodations could be undertaken.

If an employer refuses to consider making reasonable accommodations to the handicapped job applicant, and then falls back on the claim that the applicant is incapable of performing the job, it can be argued that the employer is guilty of a combination of both attitudinal and constructive discrimination. His conduct is purposive to the extend that he knows that his unreasonable or inflexible actions or attitude will exclude an otherwise qualified handicapped employee. Moreover, employers as a general rule make reasonable, low-cost and non-disruptive accommodations to new employees handicapped or otherwise, all the time. A new manager preferring to dictate to a dictaphone rather than to a secretary who takes shorthand may be provided with a dictation machine as an accommodation to his work habits. For the same employer to refuse a similar measure of flexibility to a handicapped applicant constitutes differential treatment, aimed at disadvantaging a person because of his disability. If the place of employment lacks physical access, and the handicapped applicant is prepared to provide ramps or other modifications needed to provide such access (either by financing it himself or with the help of government funds), an employer's refusal to consider such an alteration arguably takes the case outside the physical access exemption of s. 16(1)(*a*), and turns it into a case either of attitudinal or constructive discrimination.

The legislative intent that employers appraise handicapped job applicants with the measure of flexibility reflected by this reasonable accommodation principle, is further indicated by other considerations. The Legislature substantially narrowed the section providing employers with the right to discriminate on grounds of handicap in prescribed circumstances. Bill 188 had proposed in s. 5(1) to

allow for discriminatory conduct when reasonable and *bona fide*. Bill 209, s. 16 had proposed that an employer could refuse to hire a handicapped person if he is incapable of performing the essential duties "in the circumstances". By dropping any reference to the particular pre-existing circumstances in the workplace, the Legislature forced employers to consider the applicant's abilities in a more abstract, flexible way. Finally, the new Code provides in s. 16 a particularly narrow basis for permissible employer discrimination in cases based on handicap, as contrasted with the wider basis provided for discrimination based on other grounds, e.g., sex, race, or religion. Section 23(*b*) authorizes employment discrimination if on these grounds it is a "reasonable and *bona fide* qualification ... of the nature of employment". The Legislature's differential treatment of handicap-based discrimination provides ample basis for distinguishing away the Ontario Court of Appeal's decision *in Ontario Human Rights Commission et al. v. Simpsons-Sears Ltd.*[10] That case suggested that under the old, differently worded Code, employers had no duty to make reasonable accommodations to a person's religion, though the court ties its decision explicitly to the predecessor statute.

A most crucial and perhaps most frequently misunderstood aspect of the Code's definition of discrimination is that it does not require employers to give preferential treatment to handicapped persons. While the Code permits affirmative action programmes, designed to rectify long-standing vestiges of past discrimination, (s. 13) it does not direct that affirmative action be undertaken by anyone. All that is required by the Code's ban of discrimination is that when a person engages in any of the protected activities set out in section 3 of this part, they do so with an even hand, and not hold a person's handicap against him in an unfair way.

(5) Remedies for Infringement of Code Rights

After a board or court determines that the complainant's rights under the Code have been infringed by the respondent, it has a wide range of remedial powers, all of which save one are set out in s. 40. It may order that the respondent take prescribed steps which "in the opinion of the Board, the party ought to do to achieve compliance" with the Code. Such an order could include a direction to stop discriminating, to reconsider a complainant's job application in a manner which complies with the Code, to terminate a policy or practice which constitutes a form of constructive discrimination, *etc.* (s. 40(1)(a)). It can tailor such an order to remedy the wrong done as set out in the complaint, and direct it as well at the respondent's overall future practices.

The Code confers on a board or court jurisdiction to award compensatory damages to a complainant for losses incurred as a result of the infringement of their rights (s. 40(1)(*b*)). If the respondent's discriminatory conduct was engaged in wilfully or recklessly, damages may include an amount up to $10,000 for mental anguish.

Enhancing these general powers are specific powers set out in s. 40(2) and (3) to remedy infringement of the rights of handicapped persons. Section 40(2) provides that a respondent can be required to make alterations to premises, goods, facilities, service or accommodations so that they may become accessible to a person with the complainant's handicap, or to provide amenities appropriate to a person with the complainant's handicap, except where the costs of such modifications would cause undue hardship to the respondent. The subsection also indicates that such orders must conform with any regulations which the Ontario Cabinet may choose to make, to further claify the discretion conferred by this provision. Subsection 40(3) authorizes the making of a remedial order which directs that the respondent take steps to modify the equipment or the essential duties attending the exercise of the right in order to meet the needs of the handicapped complainant. As with the s. 40(2) power, these order may not be made where they would impose on the respondent undue financial hardship, or where they contravene regulations pertaining to them.

While these "reasonable accommodation" remedial powers could otherwise have been subsumed under the general remedial power set out in paragraph 40(1)(a), their detailed description in different subsections includes an additional procedural requirement attending their exercise. Before a board or court may order the provision of access amenities, equipment or the modification of duties or requirements related to the job, services, facilities, *etc.*, the tribunal must conduct a formal hearing, which presumably involves presentation of evidence. These provisions appear to require that the burden of proof be borne by the complainant during this hearing to show a need for such a remedy while the burden of proof lies with the respondent to show that the remedy sought would impose undue financial hardship. In contrast, the general remedial power set out in s. 40(1) (a) may be exercised once the board or court has determined that a right to non-discrimination has been infringed, without the need for holding a separate evidentiary hearing on the remedial question, and without any division of burdens of proof.

A special remedy is available against government contractors, or recipients of government grants or loans who engage in employment discrimination. By s. 25(1), and (2), it is deemed to be a condition of every government contract, loan or grant that the recipient of government funds will not discriminate against anyone in employment, in the course of performing the contract or project to which the public funds relate. If such a recipient of provincial money engages in employment discrimination in these circumstances, the contract, loan or grant may be cancelled and the recipient may be denied future provincial contracts, loans, grants *etc.* (s. 25(3)).

Finally, the board or court has authority to order that the Commission pay the legal costs of the respondent if it determines that the complaint should be dismissed, and that it was trivial, frivolous, vexatious or made in bad faith, or that in the circumstances the complaint caused undue hardship to the respondent (s. 40(6)). Accordingly, one must satisfy oneself that the handicapped persons' complaint does not fall within these categories before pursuing it beyond the conciliation stage.[11]

PART B

Building a Case Under the Ontario Human Rights Code

Human rights cases involving handicapped persons are likely to turn, in most instances, on a single issue - is the complainant competent to perform the job, perform the contract, or enjoy the service facility or accommodation which he has been denied. To persuade a Commission officer, Board of Inquiry or court that the complainant has this competence, it may be helpful to engage in any of the

following. Though these comments are addressed to employment discrimination, they are equally applicable to discrimination in other areas governed by the Code.

(1) Obtain Job Description

One should secure from the employers, or request that the officer obtain from the employer, a description of the sought job, as well as descriptions of other jobs in the same or similar departments of the employer. If, as is often the case especially with smaller employers, no written job description has been prepared, then solicit a verbal description of the job requirements from the employer. If descriptions furnished by the employer are vague or uninformative, endeavour to pin the employer to specifics, so that it will be possible to ascertain whether methods exist by which the complainant can perform each task efficiently, despite his disability. The employer will not necessarily benefit by avoiding inquiries about the job's detailed specifics. This evasiveness might be used later to demonstrate that job requirements are marginally adjusted to accommodate a handicapped applicant.

(2) Discover Whether Others Similarly Handicapped Have Succeeded in the Same Occupation

The best evidence demonstrating that a particular handicap does not obstruct the performance of a job is that of successful example. One should seek out others with a disability similar to that of the complainant, who have succeeded in the same or similar job, and arrange for them to testify for the complainant. If the case is at the conciliation stage, it is sufficient to obtain a letter from such a witness, or their employer, describing their position, their techniques for performing it, and any tangible successes already achieved. Many employed handicapped persons are questioned by friends, acquaintances and at times the media, regarding their methods of job performance. This inquiry, though more formal in nature, will probably not be their first.

One can turn to several sources for names of successfully employed handicapped persons, as well as detailed information about the methods used to cope with an employment setting. First, one should look to the numerous rehabilitation agencies and handicapped persons consumer groups operating in Ontario. Various private, non-profit charitable organizations employ professional staff trained to aid persons with a specific disability to become independent and self-reliant. Some have job-training programmes. Often, they employ vocational counselling and employment placement staff. Either their public relations workers or their employment counselling staff may be able to provide previously conducted studies concerning the employability of persons with a particular disability.

The following is a list of some of the organizations one may wish to contact:

Arthritis Society
Canadian Association for the Mentally Retarded
Canadian Cleft Lip and Palate Family Association
Canadian Cystic Fibrosis Foundation
Canadian Diabetes Association
Canadian Hearing Society
Canadian National Institute for the Blind
Cerebral Palsy Adult Association of Toronto
Canadian Paraplegic Association
Canadian Cancer Society
Canadian Lung Association
Mental Health Ontario
Metro Toronto Epilepsy Association
Multiple Sclerosis Society of Canada, Ontario Division
Muscular Dystrophy Association of Canada
Easter Seal Society (Ontario Crippled Children's Centre)
Ontario Federation for the Cerebral Palsied
Ontario Association for the Mentally Retarded
Ontario March of Dimes
Parkinson Foundation of Canada
Silent Voice Canada Incorporated
Society for Goodwill Services
Spina Bifida & Hydrocephalus Association

The second source for names of employed handicapped persons is government. Various government agencies undertake responsibility for helping handicapped persons obtain gainful employment. The following is a non-exhaustive list of helpful government offices:

Ontario Ministry of Labour, Handicapped Employment Programme
Secretariate for Social Development - Secretariate for Disabled Persons
Ontario Ministry of Community and Social Services.
Vocational Rehabilitation Services
Work Incentive Programme (Adult Services Branch)
Worker's Compensation Board of Ontario
Ontario Human Rights Commission
Canadian Human Rights Commission
Canada Employment and Immigration Commission
Ontario Civil Service Commission Employment of the Handicapped Programme

The final source of names of working handicapped persons is the media. The press regularly publishes "human interest" stories exploring how a selected handicapped individual pursues the gaining of a livelihood, though not only when the featured individual has pioneered a hitherto unattempted job. One may contact the reporters assigned to "human interest" stories or the social services beat by large media establishments for leads, or check public library files or newspaper libraries to locate helpful articles.

Finally, one may, turn to American organizations, government or private, to ascertain whether the vocation has been successfully undertaken in that country by persons with a handicap. At times, Americans are ahead of Canadians in this area.

(3) Investigate Untried Methods of Job Performance

If the complainant has been refused a job which has never successfully been undertaken before by a similarly handicapped individual, one should determine whether this is the case because others have tried unsuccessfully to perform that job, or because no one has taken the pioneering step previously. The organizations listed in the preceding section may be able to provide an answer to this question.

In the event that the complainant is the first to make a try at the sought job, it will be necessary for you to ascertain whether there are methods for the complainant to perform the job efficiently, despite their disability. This requires unfettered creativity.

Such exploration might proceed along the following lines: first, examine the employer's description of the sought job, to identify the essential duties, as distinct from those which are incidental or inconsequential. Then, ascertain which of these can be performed by a person with the complainant's disability without any changes to the workplace or job description. Consider each duty for which the complainant's handicap might pose a difficulty, and particularize precisely how the handicap obstructs successful job performance.

The final two steps of the process involve ingenuity: first, see whether the job description might be marginally modified, trading off with other employees those tasks for which the handicap poses a substantial barrier, while transferring to the sought job tasks ordinarily performed by others in the workplace, for which the disability poses no problem. Second, explore whether there are methods for modifying the process of job performance, including the introduction of specially modified equipment, would enable the complainant to efficiently do the job. New devices

making hitherto impossible tasks possible are coming on the market faster than most could foresee especially in light of the computer revolution. A newly invented device, designed to enhance the abilities of a handicapped employee, can render previously unachievable jobs easily accessible.

If needed equipment is expensive, one should seek out funding for it from sources independent of the employer. If available, the employer will not be able to raise the problem of costly accommodations as a justification for refusing to hire the complainant. If the complainant was covered by private disability insurance when injured, the insurer may subsidize the equipment in order to terminate their liability for ongoing support payments. Workers injured on the job may be entitled to equipment subsidies from the Vocational Rehabilitation Services Department, operating under the Vocational Rehabilitation Services Act.[12]

PART C

Freedom From Discrimination Based on Handicap at the Hands of Government

(1) Non-Constitutional Protection

A handicapped person, aggrieved because of discriminatory treatment at the hands of government, has several avenues by which redress can be sought. If a right, guaranteed to him under the Ontario *Human Rights Code*, is infringed by an agency of the Ontario Government, he may bring a complaint before the Ontario Human Rights Commission, since that legislation binds the Crown (Ont. Code s. 46(1)). If the discriminatory treatment was authorized or required under an Ontario statute or regulation, he can also seek to have the offending enactment declared inoperative to the extent of its inconsistency with the Code (Code s. 46(2)). This latter remedy is only available at present with respect to legislation or regulations enacted since June 15, 1982. Those offending laws on the books prior to that date are immune from attach until two years after the Code's proclamation, *i.e.*, June 15, 1984 (Code s. 46(3)). An Ontario statute or regulation can be shielded from attach under the Code if amended to explicitly provide that it operates notwithstanding the Ontario *Human Rights Code* (Code s. 46(2)).

If the handicapped person seeks relief on account of discriminatory treatment at the hands of the Government of Canada, he has two remedies available to him. He can file a complaint with the Canada Human Rights Commission pursuant to the Federal *Human Rights Code* S.C. 1976-77, c. 33, amended recently by Bill C-141 (1983). Second, he can seek a judicial order that his right to equality before the law, and to the protection of the law, as guaranteed under s. 1(b) of the statutory *Canadian Bill of Rights* has been infringed. This latter route is of questionable worth, since this provision has been given so strained and restrictive an interpretation.[13]

One's right to rely on these non-constitutional entitlements to put an end to governmental discrimination based on disability is not weakend by the incorporation of the *Canadian Charter of Rights and Freedoms* into the *Canadian Constitution*. Section 26 of the Charter provides that the Charter may not be construed so as to deny rights or freedoms existing in Canada. This preserves the right of a handicapped person to rely on existing laws prohibiting discrimination by government. A handicapped person is not only at liberty to combine challenges to discriminatory action by government under the Charter with claims of statutory protection against discrimination, but he is well-advised to do so. Courts are under a duty to resolve cases involving constitutional arguments wherever possible on non-constitutional grounds. They may resort to consideration of constitutional issues only as a last resort, once it is clear that the *lis* cannot be decided by application of statute or common law.

(2) Protection Under the New Constitution's Charter of Rights and Freedoms

The Charter confers constitutional equality rights on handicapped persons by virtue of a number of its provisions. The most obvious of these is s. 15(1) which provides 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." Protection for handicapped persons was explicitly incorporated into s. 15(1) only after months of public discussion during the patriation debates. Its incorporation during the International Year of Disabled Persons manifests a clear legislative intent that it be given meaningful, and rigorous application. Additionally, the expanded, potent wording of equality guarantee in s. 15 as contrasted with the terse s. 1(*b*) of the statutory *Canadian Bill of Rights* signals that Parliament intended a new regime of constitutional egalitarianism.

One can foresee that when s. 15 comes into force on April 17, 1985 (see Charter s. 32(2)), challenges may be levelled against a multiplicity of existing statutes. They might involve statutes authorizing payment of sub-minimum wages to certain handicapped employees, education systems providing separate or demonstrably substandard education for handicapped children, marriage laws which deny mentally handicapped persons the right to obtain a marriage licence without requiring and inquiry to determine whether they are incapable of informatively consenting to marry, and civil and criminal commitment legislation mandating involuntary detention or treatment of mentally disordered persons without the procedural protections normally afforded the non-handicapped.

The equality rights guarantee in s. 15(1) is not available as a basis for attack on "any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" according to s. 15(2). The Charter's drafters inserted this provision to ensure the continued validity of affirmative action programmes, fearing that, without it, Canadian courts might brand these as "reverse discrimination" and invalidate them.[14] Arguably, s. 15(2) cannot be invoked by government to defend any discriminatory legislation or programme simply by making a bald claim that the impugned activity was enacted or undertaken for the purpose of ameliorating the conditions of disabled persons. If an unsubstantiated assertion of laudatory legislative intention could save any government action otherwise contravening s. 15(1), it would follow that s. 15(1)'s equality rights guarantee would be utterly meaningless. Accordingly, for s. 15(2) to be available to protect an impugned government programme from invalidation, it should be necessary for a court to be satisfied, presumably by evidence, that the programme is likely to have the practical effect of ameliorating the disadvantageous conditions caused by a physical or mental disability.

Although s. 15 is not yet in force, Charter attacks on laws and government programmes discriminating against disabled persons might be brought at present under s. 7, which provides that "Everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice." One court has already suggested that equal treatment under law is a principle of fundamental justice.[15] This is not surprising, since American courts have for some time shown that attacks on laws based on equal protection analysis tend to take a form remarkably similar to attacks levelled under their due process clauses. To the extent that s. 7 and s. 15 of the Charter each protect the individual from arbitrary government action, they invariably overlap.

Independent of the s. 15 equality guarantee, Charter s. 14 ensures a measure of equality to any person, involved in a legal proceeding, who has a hearing impairment. That provision stipulates that such persons have a right to an interpreter, during the proceeding, which arguably must be provided at the public expense. Two other Charter provisions guarantee a degree of equal treatment to handicapped persons who are involuntarily confined as a result of their disability. Section 9 requires that their confinement not be arbitrary *i.e.*, without demonstrably good reason, while s. 12 demands that during their confinement, such persons not be subject to cruel and unusual treatment or punishment.

All the foregoing Charter rights are subject to two important limitations. First, governments retain the power to impose limits on these rights, if they can prove that, in the circumstances, their interference with constitutional rights of handicapped persons is reasonable, prescribed by law, and can be demonstrably justified in a free and democratic society. Second, government may shield an otherwise unconstitutional law or practice from invalidation by enacting a statutory provision stipulating that the impugned law or practice may operate notwithstanding the Charter. This legislative override clause expires in five years, unless renewed (Charter s. 33).

With the enactment of the Charter, a new era has begun in Canada, an era during which the entitlement of handicapped persons to equality of rights under law has for the first time been advanced to the effect that certain Charter provisions merely codify the common law, or freeze pre-existing statutory rights. While such arguments might be worth considering in the context of the Charter's guarantee of reasonable bail (s. 11(e)) or self-incrimination (ss. 11(c) and 13), they have no place in the expounding of handicap equality rights. Prior to the Charter, neither the common law nor statute law recognized anything approximating a legal requirement that handicapped persons not be subject to discriminatory treatment by the law.

PART D

Drawing Upon American Experience With Human Rights for Handicapped Persons

(1) In Human Rights Code Cases

One should consider turning to U.S. experience with equal rights legislation extending protection to handicapped persons. It may furnish precedents to support legal arguments, and more importantly, it may supply ideas on what arguments to advance in support of a particular case. Though Canadian boards and courts are not bound to follow U.S. jurisprudence, they can certainly derive insight from the reasoning process employed by U.S. courts and legislators who have grappled with the balancing of the interests of handicapped persons, employers, service providers, etc., for many years.

The most important American legislation extending protection to handicapped persons from discrimination is the federal Rehabilitation Act, 1973[16]. Because the U.S. congress lacks power to regulate business practices within local state economies, the device used in this legislation to allow the long arm of federal law to reach discriminatory practices is the Federal Government's spending power. The *Rehabilitation Act* binds federal government agencies and those who either receive federal funds or who do business with the U.S. Government above a minimum dollar amount.

The *Rehabilitation Act*, 1973 sets out the rights of handicapped persons in two short provisions. For example: s. 504 provides, "No otherwise qualified handicapped individual in the United States, as defined in section 7(6) shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 503 imposes a similar requirement on parties doing business with the U.S. government.

Augmenting these sections are a mass of regulations found in the U.S. Federal Register promulgated by the executive branch which set out in finer detail the substantive obligations created by the statute. One may wish to have regard to these regulations, as an instructive guide on reasonable interpretations of amorphous concepts like "discrimination" in particular fields. Of greatest significance is the partial definition of "discrimination" in the regulation #84.112. It provides:

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless a recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include:
  (i) making facilities used by employees readily accessible to and useable by handicapped persons; and
  (ii) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:
  (ii) the overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
  (ii) the type of the recipient's operation, including the composition and structure of the recipients work force; and
  (iii) the nature and cost of the accommodation needed;

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodations to the physical or mental limitations of the employee or applicant.[17]

One should examine state legislation in force in various parts of the United States that provides protection against discrimination for the handicapped, as well as jurisprudence developed under that legislation.

(2) In Charter Cases

When canvassing legal arguments that may be raised in a Charter case, regard may be had to American constitutional treatment of equality rights for handicapped persons. Canadian courts have shown themselves willing to examine American constitutional jurisprudence as a source of insight.[18] The 14th Amendment to the U.S. Constitution guarantees that no state shall deprive a person of "the equal protection of the laws". The due process clause of the Fifth Amendment has been construed to impose the same obligation on the U.S. Federal Government.[19] These constitutional guarantees have been used in a number of areas to expand the civil right of handicapped Americans. Legislation providing for the involuntary incarceration of asserted-ly mentally handicapped persons without adequate procedural safeguards has been struck down.[20]

Second, U.S. courts have held that state educational systems that provide separate schools for mentally handicapped children, whose programmes are inferior to that provided non-handicapped children, violate the 14th Amendment's equal protection clause.[21] Responding to those decisions, the U.S. Congress enacted the Education of All Handicapped Children Act[22] which obliges states, receiving federal funds, to provide educational opportunities for handicapped children in the least restrictive environment suited for each child's needs.

Finally, the 14th Amendment due process guarantee has been held to provide that a blind school teacher be afforded some form of hearing before the state can fire him on account of his disability.[23]

NOTES

1. S.O. 1981, c. 53.
2. R.S.O. 1980, c. 219.
3. R.S.O. 1980, c. 340, s. 2(1).
4. R.S.B.C. 1979, c. 186, s. 3(1).
5. (1979), 97 D.L.R. (3d) 577 (S.C.C.).
6. [1975] 6 W.W.R. 279 (Alta. S.C.)
7. [1976] 6 W.W.R. 717 (Alta. C.A.).
8. R.S.O. 1980, c. 228.
9. R.S.O. 1980, c. 233.
10. (1982), 38 O.R. (2d) 423 (C.A).
11. See generally, *Human Rights in Ontario*, J. Keene, Toronto, 1983 and *Discrimination and the Law*, W.S. Tarnopolsky, Toronto, 1982.
12. R.S.O. 1980, c. 525.
13. See, e.g., *Lavell v. A.G. Canada*, [1974] S.C.R. 1349: *R. v. Saxell* (1980), 59 C.C.C. (2d) 176, *Bliss v. A.G. Canada*, [1979] 1 S.C.R. 183.
14. Compare the American experience with attacks on affirmative action programmes addressed to race in the celebrated U.S. Supreme Court decision in *Regents of University of California v. Bakke* (1978) 438 U.S. 265, since narrowly confined in *United Steelworkers v. Weber* (1979), 443 U.S. 193.
15. See *R. v. Gustavson* (1982), 143 D.L.R. (3d) 491 (B.C.S.C.).
16. Pub. L. 93-112, s. 504.
17. For a more indepth understanding of this legislation see the following list (this list is not exhaustive): *Jane Doe v. Bailey Marshall* (1978), 459 F. Supp. 1190; *Southeastern Community College v. Davis* (1979), 442 U.S. 397; *Upshur v. Ruth Love* (1979), 474 F. Supp. 332; *E.E. Black Ltd., General Contractors Association of Hawaii, and Hawaii Employers Council v. F. Ray Marshall* (1980), 497 F. Supp. 1088; *Gary E. Simon v. St. Louis County, Missouri et al.* (1980), 497 F. Supp. 141; *Clinton Simpson v. Reynolds-Metals Company Inc.* (1980), 629 F. 2d 1226; *Laura Majors v. Housing Authority of County of DeKalb, Georgia et al.* (1981), 652 F. 2d 454; *Prewitt v. U.S. Postal Service* (1981), 662 F. 2d 292; *Fair Employment and the Handicapped: A Legal Perspective*, 27 DePaul L. Rev. 953 (1978).
18. See, e.g., *Collin v. Kaplan* (1982), 143 D.L.R. (3d) 121.
19. See *Bolling v. Sharpe* (1954), 347 U.S. 497.
20. See, e.g., *Jackson v. Indiana* (1972), 406 U.S. 715, *O'Connor v. Donaldson* (1975), 422 U.S. 563; *Baxstrom v. Herold*, (1966), 383 U.S. 107; *Relf v. Weinberger* (1974), 372 F. Supp. 1196; *Lessard v. Schmidt* (1972), 349 F. Supp. 1079, U.S. Dis. Ct.; *In Re Ballay* (1973), 482 F. 2d 648 D.C. Circ.; *Addington v. Texas* (1979), 99 S. Ct. 1084; *People v. Daniel Williams* (1977), 362 N.E. 2d 1306; *United States ex rel. Schuster v. Herold* (1969), 410 F. 2d 1071; *Viteck v. Jones* (1980), 445 U.S. 480; *People v. McQuillan* (1974), 221 N.W. 2d 569 S.C. Michigan.
21. See, e.g., *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* (1971), 334 F. Supp. 1257; *Mills et al v. Board of Education of the District of Columbia* (1972), 348 F. Supp. 866.
22. P.L. 94 142 (1976).
23. See, *Bevan v. N.Y. State Teacher's Retirement System et al.* (1973), 345 N.Y.S. 2d 921.