

Disability Through The Eyes Of The Law: A Review Of Federalism, Democracy And Disability Policy In Canada

D A R C Y L . M A C P H E R S O N *

Federalism, *Democracy and Disability Policy in Canada*, edited by Alan Puttee, is part of the Social Union Series of the Institute of Intergovernmental Relations of the McGill-Queen's University Press. As such, in producing the volume, the authors of the five papers within were given a common linguistic starting-point regarding the types of intergovernmental relationships discussed. I set them out here for ease of reference:¹

- *Unilateral federalism*: where the federal government, without provincial approval, attaches conditions to financial transfers to provincial governments in an area of exclusive provincial jurisdiction;
- *Classical or disentangled federalism*: where each order of government acts independently in its area of constitutional competence; in areas where each has jurisdiction and chooses to exercise it, the two orders of government act independently of each other;

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¹ A. Puttee, ed., *Federalism, Democracy and Disability Policy in Canada* (Montreal, QC: McGill-Queen's University Press, 2002) at 9.

- *Collaborative federalism*: where the two orders of government, recognizing their interdependence, act jointly with no undue reliance on “carrots or sticks”; and
- *Interprovincial collaboration*: where there is collaboration among provinces with no federal involvement.

In “The Canadian Political Landscape of Disability: Policy Perspectives, Social Status, Interest Groups and the Rights Movement”, Marcia H. Rioux and Michael J. Prince discuss both the historical and current relationship between government and those categorized as “disabled.” The authors divide this relationship into two major parts, first, the “worthy poor” perspective, and second, the “human rights” perspective. As “worthy poor”, Rioux and Prince claim that disability-based programs were premised on the idea of protection by government of those who are vulnerable, unemployable and/or uneducable. This approach is characterized by huge infrastructure costs, and a focus on disability as an illness or pathology. Essentially, the view of persons with disabilities was that they need to rely on the charity of others in order to survive, and found expression in government programs that created segregated education and work environments, as well as widespread institutional living arrangements for persons with disabilities. This view was further evidenced by the fact that persons were disentitled from many disability programs if they were able to work.²

The authors discuss how the costs associated with the “worthy poor” approach are many and varied, according to national survey data. Education and income levels, labour force participation rates, unemployment levels, and overall self-reported health quality, amongst others, are all more negative for persons with disabilities than for the general population.³ It is implied that the authors believe that the “worthy poor” approach to disability issues has, at best, not ameliorated these social inequalities, and at worse, exacerbated them. It can hardly be imagined, for example, that program goals such as institutionalized care for persons with disabilities have the effect of improving job and other economic prospects for those under care.

The “human rights” perspective moves away from the idea of disability as illness or pathology. Rather, it is argued that the very concept of “disability” is a socio-political construct that *may* be triggered by an illness, but is defined by the social barriers that are placed on a person as a result of the triggering event. Once one recognizes that disability barriers are *not* simply “natural” outgrowths of illness, but rather, social constructs, society must then confront the fact that society – and *not* some illness or pathology

² *Ibid.* at 13-14.

³ *Ibid.* at 14-15.

– is denying some of its citizens the opportunity to participate fully in the society of which they are members. Therefore, the removal of these barriers to participation, rather than the protection and segregation of persons with disabilities, should be the paramount concern of disability programs. Reference is then made to some legislative changes that appear to embody this shift.⁴

Disability interest groups also reflect this dichotomy between the “worthy poor” perspective and a concern for human rights. Telethons to raise money aid in research and programs for a particular disability (with their focus on charity) are touted as an example of “worthy poor” disability groups. Groups of disabled persons promoting their own rights to full citizenship and participation through broad coalition-building activities and political action are cited as “human rights” oriented. Despite the differences between the two types of disability-related interest groups, both seek to support people with disabilities, as well as increase the profile of disability-related issues.⁵

Rioux and Prince argue that while government programs begun prior to the 1970s were more inclined toward the “worthy poor” model of disability, governments have recently begun to move toward a human rights perspective.⁶ The advent and use of the *Canadian Charter of Rights and Freedoms*^[a1] – in particular, its specific mention of physical and mental disability with respect to equality rights – is credited with pushing the human rights perspective to a more prominent position in debates around disability issues. The move from block-funded institution-specific grants to individualized funding is cited as evidence in furtherance of this. Previously, governments gave block funding based on criteria set by agreements between government and the institution. The recipients of care had no standing to contest the agreements and thus no control over the quality of care they received. Under individualized funding initiatives, people with disabilities receive funds from a government agency with which they can arrange their own care—subject to oversight ensuring that the funds are spent according to the rules agreed to by the agency and the recipient.⁷

The authors conclude by indicating that although it appears that the human rights conception of disability appears to be advancing in the government agenda, the process “may be more illusory than real”. The public seems divided on the nature of disability, due in large part to governments lacking both the political will to genuinely advance disability issues to the forefront of debate and a clear vision of what disability is about

⁴ *Ibid.* at 16-17.

⁵ *Ibid.* at 17-18.

⁶ *Ibid.* at 21-23.

⁷ *Ibid.* at 23-25.

(pathology versus social construct). They assert that increased collaboration between levels of government and disability groups is needed to clarify which perspective should prevail, instead of some elements of each.⁸

My comments on this piece are first, that it is not a casual read. It is densely packed with both facts and argument. This is not a negative assessment. Rather, one has to be prepared for the fact that the analysis is robust, despite the article's claim to be a survey of the field. Second, the article does a very good job at placing the historical data into a context that allows the argument to flow. Third, the authors are correct when they claim that the statistical data presented is compelling. The information is methodically set out, and it is virtually impossible to disagree with the claim that there is a significant economic disparity between people with disabilities and the population in general. Fourth, it is clear that the authors view the "human rights" perspective as a step forward when compared to its "worthy poor" predecessor, citing the virtues of "individualized funding" programs to support this view. While individualized funding does support autonomy and control for people with disabilities, it does have its problems. For example, under the individualized funding model, if a caregiver decides to leave their position, the person with a disability is solely responsible for finding a replacement. Conversely, under the "block-funded" system, although people may decide to leave their position, the institution provides care, regardless of which employee does so. The person with a disability does not control the care, but they do have the assurance that even if a caregiver decides to leave, the level of care should be maintained. The authors did not consider this argument. To be clear, I actually believe that the authors are correct in asserting that individualized funding is a superior system as compared to institutional care, but the strength of the argument could have been improved had the authors explicitly acknowledged the difficulties associated with individualized funding rather than simply assert its superiority. It is, however, possible that space constraints did not allow for this additional reflection. Regardless, I found the article stimulating and well-presented. Additional general comments about this and the other contributions as a whole are provided at the end of this review.

Michael J. Prince's sole-authored second chapter, called "Designing Disability Policy in Canada" professes to review "the macro politics of government policy development and federalism."⁹ The author is unfailingly faithful to this "macro" lens throughout the chapter. On the positive side, if one knows nothing of the disability-policy landscape at all prior to reading this chapter, one might be somewhat surprised by the breadth and number

⁸ *Ibid.* at 25-26.

⁹ *Ibid.* at 29.

of programs to which the various levels of government have committed themselves over the decades being discussed.

However, such a macro (or wide angle) lens also has its drawbacks. For example, in discussing recent provincial and territorial programs that belong in the category of “disentangled federalism,”—that is, those relatively unconnected to federal mandates—the author describes six program areas where this is the case in just over a single page.¹⁰ However, the area of focus of a given contribution is a decision of either the author, or the editor, or both. One cannot get everything one needs from a single contribution, and the choice of basic perspective from which the contribution proceeds is one for which no one should be criticized. Given that the author made this choice, the contribution fulfils its stated goals.

In Alan Puttee’s contribution as an author, entitled “Reforming the Disability Insurance System: A Collaborative Approach”, the author begins by setting out the four possible types of federalism arrangements and the bases upon which insurance programs are to be judged.¹¹ He then turns his attention to international comparisons, in which Canada does not score well according to the criteria used. The author then undercuts the validity of this assessment by suggesting that the methodology for the calculation between countries is very uneven.¹² The author next turns his attention to the variety of social programs that provide cash in the event that a disability interferes with earning potential. The programs covered include: (i) workers’ compensation; (ii) Canada and Quebec Pension Plan Disability benefits; (iii) public automobile insurance; (iv) employment insurance sickness benefits; (v) social assistance for those with disabilities; and (vi) private disability insurance schemes. The author provides an overview of each and, depending on their relevance, discusses respective history, governance, philosophy behind coverage, exclusions, benefit levels, and (given that much of this area is within the jurisdiction of the provinces) the level of similarity and co-ordination between jurisdictions.¹³

The author points out the idea of vertical equity—making sure that those without resources receive what their losses took away from them—is not a large concern in some of these programs (such as workers’ compensation schemes) but is a greater concern in others (like private disability insurance schemes) that are often dependent on the benefits offered by one’s employer. In other words, some get left out in the cold despite the need for the scheme as defined by the policy goals of disability insurance overall. For example, the author points out that where the injury

¹⁰ *Ibid.* at 32-34.

¹¹ *Ibid.* at 79-80.

¹² *Ibid.* at 80-81.

¹³ *Ibid.* at 83-97.

occurred can make a large difference in the resulting benefits available to the aggrieved party.¹⁴

The fragmentation of the disability insurance area means that there are losses of efficiency and issues of horizontal equity. Cases that are factually alike may be treated very differently depending on which program is applied. The author also points out that work disincentives contained in certain programs may also reduce the likelihood that recipients of benefits will seek to return to the workforce, because if they try to return to work and fail, the losses will be very serious.¹⁵

Also, there is a suggestion that different program administrators may try to offload costs by saying a given claim should apply to a different program that might provide coverage. Various programs in different jurisdictions also have different rules on the availability of benefits—where one resides can make a large difference as to whether adequate benefits are provided.¹⁶

One of the most interesting points made is that the jurisdictional differences allow for experimentation and the ability to learn from both the mistakes and successes of other similar programs.¹⁷ So, in other words, it is a bit of a mixed bag when it comes to achieving policy goals.¹⁸ In a brief section, the author points out that the current method used to alter the CPP does suffer from some transparency, accountability, and public participation issues in terms of living up to democratic principles. However, other than this, there are high marks on the democratic front.¹⁹

The last section of the contribution discusses the possibility of a comprehensive disability insurance plan (the “CDIP”). The author begins by pointing out that this has already been suggested by others. The CDIP is designed to replace the patchwork of disability-related programs currently in place, and possibly provide savings on administrative costs by avoiding duplication. The author also recognizes—correctly, in my view—that there are constitutional impediments, among other obstacles, to the federal government unilaterally adopting a CDIP. Furthermore, there are practical impediments to an individual province choosing the same route. Therefore, there needs to be collaboration between the two levels of government. The suggestions offered work in two parallel tracks. The first is reform within existing structures; the second is more robust reform. The suggestion is long-term study of the CDIP, the cost of which would be 80 per cent covered

¹⁴ *Ibid.* at 97.

¹⁵ *Ibid.* at 97-99.

¹⁶ *Ibid.* at 100.

¹⁷ *Ibid.* at 100-101.

¹⁸ *Ibid.* at 101-102.

¹⁹ *Ibid.* at 102-103.

by the federal government. The author points out that a CDIP, if validly adopted by both levels of government, would fix many of the issues mentioned earlier in the contribution about the current matrix of disability insurance programs in Canada. If one were able to get agreement between the provinces and the federal government on the various points of the CDIP, I agree that improvement would occur.²⁰

One of my complaints about this contribution is that its beginning tends to repeat aspects of the Introduction offered at the beginning of the volume also written by Alan Puttee. This repetition was not necessary.

Furthermore, I found much of the analytical material derivative, frequently only citing other secondary sources. It would have been much more interesting to hear the author's point of view rather than reading a litany of quotes from others.²¹

From a lawyer's perspective, there is little reference to statutes or regulations, despite the fact that there is a significant statutory and regulatory underpinning to policy and federalism issues at both the federal and provincial level. In my view, this contribution was mere summary of the obvious, and the work of others. Despite its length, it is somewhat of a superficial review of the area.

Finally, some of the author's suggestions might be described as utopian in their orientation. For example, the federal government cannot resolve the issues addressed by unilateral legislative or other decree. Yet, according to the author, the federal government should be willing to shoulder the vast majority of the financial burden of the study of the issues in an effort to develop a multi-governmental consensus. To me, this seems unrealistic. It becomes all the more unrealistic when there is a recession and a fiscally conservative government in Ottawa. While the fiscally conservative government was not in power when the book was first published in 2002, during this time, the recession caused by the burst of the "tech bubble" in the early 21st century was in full swing. Since it would almost seem to take a "perfect storm" to align all the factors to bring about what Puttee seeks to achieve, I question where this is at all realistic.

In Chapter 5, "Disability Supports and Services in the Social Union", authors Roy Hanes and Allan Moscovitch describe the availability of supports ranging from attendant care, to prosthetics, to employment counseling in six provinces.²² Historically, this can be traced to the original English Poor Law.²³ In the 1940s there was a flurry of activity to provide

²⁰ *Ibid.* at 104-112.

²¹ *Ibid.* at 98-99.

²² Newfoundland, Nova Scotia, New Brunswick, Ontario, Manitoba, Saskatchewan and Alberta. See *Ibid.* at 125

²³ *Ibid.* at 122

social supports, particularly given the number of disabled veterans returning home after World War II.²⁴ Once again, the contribution refers to the replacement of the Canada Assistance Plan (*unilateral federalism* with some collaborative elements²⁵) with the Canada Health and Social Transfer²⁶ (*classical federalism*).²⁷ In reviewing six different provinces, the first thing that the authors point out is that the definition of disability differs from jurisdiction to jurisdiction,²⁸ but that typically, these programs are only available to those who qualify with little or no income of their own.²⁹ The authors discuss how the availability of supports is often also conditioned on a lack of employment. The justification for a variation of services between jurisdictions is neither transparent from an equity perspective nor static.³⁰

This equity issue is one of the primary concerns of the authors in the next section which addresses policy considerations. The first of these considerations concerns method of delivery. As already mentioned, because disability supports are often delivered through the social-services system, which is usually dependent on the recipient's income, inequities arise because a person with means is expected to provide their own support, while others are not.³¹ Also, it appears that these programs are under attack in times of economic downturn, particularly where the government is fiscally conservative.³² The fact that some provinces use both provincial and municipal programs for delivery provides an area of intra-provincial variation.³³ In addition, there is also significant interprovincial variation.³⁴

The authors thus discuss a "paradigm shift" from the medical model of disability to the social, "rights based" model. National grassroots disability organizations were at least temporarily successful at convincing the federal government to take both disability issues generally and the "rights-based" model of disability in particular seriously, while provincial counterparts were engaged in a similar dialogue at the provincial level, both of which have met with some policy success.³⁵ The second shift was away from segregation and toward integration. The problem was that the Canada

²⁴ *Ibid.* at 123-124.

²⁵ *Ibid.* at 128-129.

²⁶ *Ibid.* at 124-125.

²⁷ *Ibid.* at 129-130.

²⁸ *Ibid.* at 126-127.

²⁹ *Ibid.* at 122.

³⁰ *Ibid.* at 127.

³¹ *Ibid.* at 130-131.

³² *Ibid.* at 131.

³³ *Ibid.*

³⁴ *Ibid.* at 132.

³⁵ *Ibid.* at 132-134.

Assistance Plan did not foresee this shift, and therefore, by not providing minimum service level requirements, the lack of mobility that affects many people with disability is exacerbated. The need to deal with multiple governments makes it even more difficult.³⁶

The authors next turn to efficiency concerns. Because disability supports are tied to social assistance, the authors acknowledge that this can cut administrative inefficiencies.³⁷ But the fact that different levels of government and different departments within a government are involved can lead to inefficiency. The converse is that there is much opportunity for innovation, although it seems that provinces rarely take advantage of this opportunity.³⁸

In terms of democratic principles, the transformation of CAP into the CHST did not have much impact on these, except to the extent that a lack of federal government involvement in these issues may reduce the effectiveness of national lobbying.³⁹ In terms of federalism principles, the authors argue that because CAP was a product of intergovernmental negotiation, it is highly respectful of Canadian federalism.⁴⁰ While intergovernmental negotiation continues, agreement on disability issues seems elusive.⁴¹

The authors then present two different options for reform. The first of these is an agreement between provinces on certain minimum conditions for disability supports and services, which would then be placed into federal legislation and then allocated as a segregated part of the CHST.⁴²

The second option is a refundable tax credit for supports. This would return money out of the tax system to those individuals who would have to purchase supports.⁴³ There is some precedent for the federal government doing this even in an area of provincial legislative jurisdiction.⁴⁴ This would either be done on a co-operative basis, or unilaterally.⁴⁵ However, the former requires negotiation, and the provinces could claw back provincial benefits for those who are eligible for federal assistance.⁴⁶

³⁶ *Ibid.* at 134-135.

³⁷ *Ibid.* at 135.

³⁸ *Ibid.* at 135-136.

³⁹ *Ibid.* at 136-137.

⁴⁰ *Ibid.* at 137-139.

⁴¹ *Ibid.* at 138-139.

⁴² *Ibid.* at 141-143.

⁴³ *Ibid.* at 143-144.

⁴⁴ *Ibid.* at 144.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 144-145.

The first option for reform seems very unlikely given the current political climate in Ottawa. After all, the CHST was meant to step away from the CAP-type spending incentives that preceded it. Meanwhile, the second option would seem to fit the current wave of “compassionate conservatism” that seems to have captured the attention of many in power. But anything that requires negotiation, such as a cooperative disability tax credit, is susceptible to breakdown through the unwillingness of any number of parties. Unilateral action, on the other hand, leaves open the possibility of manipulation by the provinces so as to rob the federal program of its intended effect.

As a lawyer, I appreciate that the authors provided an appendix with the applicable legislation and identification of the government department responsible for the administration of the requisite program. While there are certainly issues with the options for reform offered by the authors, I appreciate the fact that the authors presented the options both with a degree of hope and realism as to the potential flaws in the proposal.

This contribution also maintained my interest, and while it referred to the government programs at issue, it still seemed relatively clear that this was about the individuals who need these supports. There is nothing overt about this, but in reading the contribution, it was clear that this was one of the underlying themes—the implicit understanding that individuals understand their needs better than any government bureaucrat.

In “Governance Regimes in Disability-Related Policy and Programs: A Focus on Community Support Systems”, author Michael Bach provides the volume’s final contribution. Although there was some overlap, it is evident that this contribution is designed to be a bookend to the previous one. It discusses community support systems. These are often provided by not-for-profit organizations with government support.⁴⁷ In addition, there is an important advocacy role to be played by these organizations.⁴⁸ One of the problems of this type of research is that every organization is slightly different and services vary widely between provinces.⁴⁹ The author then sets the stage for later analysis by referring to several government documents, the most pertinent of which is *In Unison*, which refers to both the need for full citizenship and the importance of community organizations in this process.⁵⁰

⁴⁷ *Ibid.* at 154-155.

⁴⁸ *Ibid.* at 155.

⁴⁹ *Ibid.* This is described as “atomistic”

⁵⁰ *Ibid.* at 156.

After laying out the taxonomy of intergovernmental regimes, the contribution sets out the seven government programs connected in some way to community support initiatives.⁵¹

The author sets out five different stages in the “policy process”, ranging from initial set up to monitoring and information.⁵² The intergovernmental regime can change at any of these five stages, and according to the author’s research, it usually does change.⁵³ The overall impression of the author is that there is an increasing trend toward disentangled federalism. This is similar to the other contributions. The difference is that the author has done somewhat of a better job at (i) laying out the policy results and (ii) relating those results to a stated analytical framework; in this case, the goals described in the paper, *In Unison*.⁵⁴ The author also discusses other problems. Some of these were mentioned in other contributions. These problems include: (i) unequal access to supports both between and within provinces;⁵⁵ (ii) the concomitant “burden of care” on families;⁵⁶ (iii) heavy accountability to funders and little accountability to consumers;⁵⁷ and (iv) a focus on the level of supports as a matter of supply, rather than demand, which the author attributes to the obligations under CAP.⁵⁸

The piece sets out some of the disadvantages of this disentanglement: (i) because CHST is a per capita grant, rather than 50 per cost-sharing under CAP, poorer provinces will not do as well under this formula thus creating fiscal pressures in the provinces least able to cope with them;⁵⁹ (ii) the lack of transitional arrangements can affect existing programs;⁶⁰ and (iii) the loss of opportunities for national discourse and information collection.⁶¹

That being said, the account is very balanced in that it points out that there are some positive aspects to this change, notably the possibility of

⁵¹ *Ibid.* at 156-157. The programs were (i) the CHST, (ii) the CAP, (iii) provincial/territorial health, social services and education departments, (iv) Labour Market Development Agreements, (v) the Employability Assistance for People with Disabilities program, (vi) the Deinstitutionalization Initiative (as part the National Strategy for the Integration of Persons with Disabilities; and (vi) the Opportunities Fund.

⁵² *Ibid.* at 159.

⁵³ *Ibid.*

⁵⁴ *Ibid.* at 160-161.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at 161.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* at 161-162.

⁵⁹ *Ibid.* at 161.

⁶⁰ *Ibid.* at 162-163.

⁶¹ *Ibid.* at 163-164.

innovation in provincial programs;⁶² and that the devolution into regions, as opposed to the provincial level, is not necessarily a product of disentanglement, although they did occur at approximately the same time.⁶³

The author suggests reform that puts individualized funding into the hands of consumers. In individualized funding scenarios (since such employees cannot typically unionize) it can be difficult to ensure fairness to the employees who would provide these individualized services.⁶⁴ Also needed are new financing options for certain provinces, as well as programs and reporting mechanisms to allow policies to be assessed on a thoroughgoing basis.⁶⁵

One of the positive things about this particular contribution is that it clearly views policy development as a process. Though there are stages listed for descriptive purposes, it seems clear that this is a fluid transition, as opposed to a change that occurs in an instant.

One of the more negative aspects to this is that, having read the contribution twice, I am still not sure how the CHST and the CAP are different at the community support level and the discussion of disability supports in the social union from the previous contribution are different, although they did draw different conclusions out of their research. While there is clearly a tie between the two contributions, the distinctions between the two are not clearly articulated.

OVERALL IMPRESSIONS

One of things that I liked about this volume is that it does provide a relatively compendious series of secondary sources with respect disability issues. Some of the contributions even provide the relevant primary materials. A second positive attribute is the quality of the authors. They have credibility in the disability community. Third, all of the contributions were clearly well-researched and detailed.

The fourth point that I enjoyed about this volume is that it proceeded from the more general issues in the first half to more specific issues in the second half of the book. Therefore, the intended progression of the contributions was obvious.

While the progression was obvious, it was also obvious that the connection between most of the contributions was loose at best.⁶⁶ While they

⁶² *Ibid.* at 164-165.

⁶³ *Ibid.* at 158.

⁶⁴ *Ibid.* at 166-167.

⁶⁵ *Ibid.* at 167-169.

⁶⁶ The notable exception to this conclusion is the obvious connections between the fifth and sixth contributions, as already mentioned.

all clearly fell within the rubric of “disability policy”, the “golden thread” that one looks for in order to maintain continuity throughout the volume was largely missing. While this is more difficult to achieve in a multi-author volume, the editor’s introduction was not enough to make this clear and have it hold the reader throughout the journey in the various contributions. Perhaps putting this type of discussion at the beginning of the volume was not the best use of the editor’s talent, given that introductory links might be lost by the time one is into the third or fourth contribution. An introduction by the editor to situate each contribution at its beginning would have been useful.

Some of the suggestions for reform, while valid from the points of view from which they were analyzed, were not terribly realistic given the current political situation in Canada. Other contributions were, in a word, dry. Even for a person like myself, who is interested in this type of disability-related research, there were parts of the volume that had trouble holding the reader’s interest.

Despite an avowed focus on both democracy and federalism, two subjects that should be of interest to lawyers, particularly those who focus on cases with a disability element, and though there is discussion of individual programs, there is little mention of the statute law or regulations that bring those programs to fruition. Indeed there is little discussion of the legislative process in this volume, with only one or two of the contributions referring to statutes at all. While the policy choices underlying programs are important, from a lawyer’s perspective, we also need the source material to prepare an argument as to why and how those policy choices should affect the reasoning of a court.

On balance, as a resource to researchers, this volume clearly has value. However, in terms of creating, or even sustaining a person’s interest in the subjects of either disability studies specifically, or social policy development more generally, this book misses the mark. This book has its virtues, but if I had to guess, I would suspect that the contributors and editors wanted it to deliver more. I know I did.

