

Background Social Structures and Disability Discrimination
in the United States and Canada

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Abstract: Several social structures deeply affect the equality of people with disabilities, but are not ordinarily considered when addressing attitudinal and environmental barriers that disadvantage disabled people. These structures, which relate to employment and the law that regulates it, are: (1) the legal doctrine of employment at will as opposed to notice or severance payment in lieu of notice; (2) unionization or its absence; and (3) government-sponsored social insurance programs. These structures differ from country to country, even between nations with a similar legal heritage. Drawing comparisons between Canada and the United States with regard to each social structure, this paper describes these arrangements and their impact, then discusses how their reform could enhance equality for people with disabilities.

Key Words: social model of disability, employment law, comparative law – Canada and United States

Social structures affect opportunities for disabled persons to participate in society as equals. Social structures are the stable systems by which people or groups relate to each other (Bell, 1965, p. 208). Social structures such as the way buildings and streets are constructed, job qualification standards, educational opportunities, medical care systems, and popular culture either engage or marginalize disabled persons (Hahn, 1993). Some of these, notably building standards, public transportation systems, and education, have long been recognized as disadvantaging people with disabilities, and activists have targeted them for change (Berg, 1999, pp. 9-10). Activists were working to alter physical and attitudinal barriers in these areas long before the social model of disability emerged and put a name to the approach they were taking (tenBroek, 1966, p. 842).

But other social structures also have a significant effect on equality for people with disabilities. These may be referred to as “background social structures.” They form a background against which other arrangements and practices operate, but their effects on the equality of disabled persons may be less apparent than those of staircases, inaccessible buses, and one-size-fits-all education.

Employment is an area in which background structures have a weighty impact on disabled persons. A study of several employment-related social arrangements and how they differ in the U.S. and Canada may provide insight about the prospects for equality for disabled persons in both countries. Drawing Canadian and American comparisons, this paper describes three such structures and discusses how their reform may be possible and could enhance equality for people with disabilities. Each social structure discussed here has a major legal dimension. This paper adopts an intermediate level of generality in its discussion, focusing neither on technical differences in interpretation of specific Canadian and U.S. disability discrimination statutes (Weber, 2010, p. 1171) nor on broad generalizations (Lipset, 1990, p. 2) about comparative Canadian and American culture.

Background Social Structures Related to Employment and the Law

Consider three background structures concerning employment and its legal regulation for which the United States-Canadian comparison may be useful: (1) the legal doctrine of employment at-will as opposed to notice or severance pay in lieu of notice; (2) unionization or its absence; and (3) government-sponsored social insurance.

At-Will Employment Versus Notice or Severance Payment in Lieu of Notice

The dominant legal structure for employment in the United States is employment at will, which applies generally to private employees, except those who are unionized and those in Montana (Arnow-Richman, 2010, p. 4). The employer may discharge the worker for any reason or for none at all, as long as the reason is not one forbidden by discrimination laws or other public policy (American Law Institute, 2009, § 2.01). Although Canadian law does not require that discharge be for cause, the law says that for any termination without cause, the employee must be provided either adequate notice or a salary payment as severance in lieu of notice (Bird & Charters, 2004, p. 205). The requirement of providing notice or severance creates a disincentive to discharge, in effect saying “you can fire the employee, but it will cost you.” Conversely, an incentive is created to provide accommodations or other means to make workers more successful and keep them employed. Moreover, in the United States a discharge without cause is sufficiently common to trigger no special scrutiny and thus provides a good shield for hidden discrimination (McGinley, 1996, p. 1462). The notice-or-severance policy makes it a rarer event in Canada. In fact, many Canadians incorrectly believe they cannot legally be discharged absent just cause (Bird & Charters, 2004, pp. 242-43).

However, the risk of a costs award that will include significant attorneys’ fees against a litigant who is unsuccessful (Knutsen, 2010) may deter Canadian workers from taking notice-severance claims to court, even when they have the law on their side. In addition, American litigiousness (Lipset, 1990, p. 100) may equalize the likelihood of American and Canadian challenges to discharge to some degree.

Unionization or Its Absence

Unionization is much more prevalent in Canada than in the United States, especially in the public sector, where Canadian union density is 78%, in contrast to the American number of 36% (Finlayson, 2007). The Canadian legal framework for unions is widely viewed as more supportive than the American one (Titkemeyer, 2006). Canada regards collective bargaining as a fundamental right. The Canadian Supreme Court has applied the Canadian Charter of Rights and Freedoms to overturn legislation applicable to public sector bargaining that had suspended union agreements, restricted contract terms, and limited the scope of bargaining (Health Servs. & Support Facilities Subsector Bargaining Ass’n v. B.C., 2007). In contrast, a leading American court decision upheld the federal government’s refusal to negotiate with a public workers’ union about a program of performance incentives, finding the subject non-negotiable under applicable law (Nat’l Treasury Employees Union v. Fed. Labor Relations Auth., 1986).

Unionization helps workers who have disabilities. As Malhotra (2009, p. 103) has written, the presence of a union opens up arbitration as a way to enforce accommodation rights, and as Lynk (2008, p. 224-226) demonstrated, Canadian labor arbitration is more effective than are human rights tribunals or courts in enforcing disability accommodations and obtaining reinstatement for workers when appropriate. Taking a disability discrimination complaint to arbitration with union support is likely to be far less onerous for the employee than the widespread American practice of finding an attorney—which may be difficult given the poor record of success in litigation (Stein, Waterstone, & Wilkins, 2010, p. 1689)—and bringing a case to the federal courts.

It is true, as Malhotra (2003, p. 144-147) also indicates, that union-protected rights, such as seniority and the integrity of bargaining units, may conflict with accommodations such as transferring to other positions when an employee no longer can perform the functions of an existing job even with workplace modifications. Malhotra points out that under Canadian law, a tribunal may consider potential conflict with a union contract when evaluating an employer's refusal to provide accommodations (2003, p. 148). Moreover, the individual-focused interactive process of working out accommodations with the employer may conflict with collective bargaining practices. Nevertheless, both collective bargaining and seniority practices can be reconciled with accommodation rights if the employer and bargaining unit representative act in good faith (Bruyere, 1993, pp. 123-24).

On a more basic level, however, Canada's union-friendliness indicates a greater willingness to allow outsiders—both unions and courts—to intervene in the control of the workplace in Canada than in the United States. There is a strong management-prerogative ideology in the United States, and management prerogative is often relied on explicitly in judicial decisions in American discrimination cases. For example, in *Texas Department of Community Affairs v. Burdine* (1981), the United States Supreme Court said of Title VII of the Civil Rights Act of 1964, "The statute was not intended to diminish traditional management prerogatives" (p. 259). This American attitude of deference to the employer reinforces the reluctance of American judges to require employers to provide accommodations to disabled workers (O'Brien, 2001, pp. 3-4).

Social Insurance Programs

In both countries social insurance benefits are available for individuals who meet a disability threshold. These benefits programs are exemplified by the Canadian Pension Plan, the Quebec Pension Plan (CPP/QPP), and U.S. Social Security Disability Insurance (SSDI). Both the Canadian and United States programs are relative newcomers to the social insurance structures in the two countries. The CPP/QPP disability program came into being in 1968 and started making payments in 1970 (Campolieti & Krashinsky, 2002, p. 419). SSDI came into being in 1956; a requirement that beneficiaries be 50 or older was repealed in 1960 (Weber, 2009, p. 583). The Canadian and American programs provide benefits to individuals who meet a standard of long-term and severe disability. Within limits, the level of benefits depends on the level of earnings before the onset of disability. However, the benefits are distributed in such a way that low earners receive a greater proportional amount in relation to prior income than higher earners.

Benefits under these programs are tied to having a record of work. Only chancier and more meager social safety net programs cover those who lack a long work history (Wiseman & Ycas, 2008). There is thus a premium on getting and keeping work, even apart from wages and whatever social connection and personal fulfillment a job may provide. The weakness of American government programs for impoverished people who lack a work history makes the problems of lack of social insurance coverage even more acutely felt below the 49th parallel than in Canada (Wiseman & Ycas, 2008, p. 61).

To the extent that work is unavailable for people who have disabilities in the United States and Canada, the result is severe income inequality uncushioned by public pensions. In the United States, Supplemental Security Income (SSI) may provide subsistence for people with disabling conditions, but its benefits are set at sub-poverty level: an amount about 70% of the federal poverty level. On the other hand, for workers who become disabled after an extensive employment history, social insurance payments offer a lifestyle that has some level of dignity (Weber, 2009, p. 603). The lack of work for people with disabilities in the United States and Canada results in severe income inequality uncushioned by public pensions. On the other hand, for workers who become disabled after an extensive employment history, social insurance payments offer a lifestyle that has some level of dignity (Weber, 2009, p. 603).

Reforming Background Social Structures

It is possible to undertake reforms to make these background social structures offer better opportunities for equality for disabled persons, and circumstances suggest that expending effort and resources on these reforms is worthwhile.

At-will employment is longstanding part of U.S. common law, one that has been challenged repeatedly with few successes (Feinman, 1976, pp. 118, 128-29). It is a bad sign for the challengers that the recent American Law Institute Restatement of Employment Law enshrines the principle (American Law Institute, 2009, §2.01). Permitting discharge only for cause would be a better rule than the Canadian rule of severance-in-lieu-of-notice for employees who are vulnerable to hidden discrimination, but notice-severance is surely better for disabled workers than at-will. Recent American legal scholarship supports the adoption of a legal requirement of advance notice before discharge (Arnow-Richman, 2010), and the WARN Act, requiring notice before mass layoffs, is an example of a limited U.S. reform along these lines (Worker Adjustment Retraining and Notification Act, 2006), so there may be a basis for optimism that the United States position might be nudged a little closer to Canada's through legislation or law reform litigation.

As for unionization, it would appear to be strongly in the interest of people with disabilities and allies to support unionization and laws that facilitate unionization, if only to weaken the ideology that management has an ironclad entitlement to make all of the decisions at the workplace, including those about accommodations. Moreover, as long as the union provides assistance, the arbitral forum is a good one for disabled workers. Malhotra (2009, pp. 101-102) has pointed out that non-unionized workers fare poorly in Canada in comparison to unionized workers with regard to accommodations. Perhaps the famous litigiousness of U.S. culture has some effect on promoting the disability accommodation rights of individual workers who lack

the support of a union. But on the whole it would seem in the interests of disabled people and their allies in both Canada and the United States to advocate for greater union power. At the same time, efforts to facilitate individual disability discrimination litigation by nonunionized Canadian workers may be in order.

On balance, social insurance programs benefit people with disabilities, so measures to strengthen them would appear desirable. Social insurance is a work incentive, and part of the overall rewards that come from work (Berkowitz, 2005, p. 23). It not only protects against the obvious economic risks that come with illness, accident, and age, but also provides some financial protection against the risk of disability discrimination. If after a person is disabled, no one will hire the individual even when he or she could work with accommodations, disability insurance furnishes a means of survival, typically at levels a good deal higher than the subsistence that may be available under poverty programs (Weber, 2009, p. 591).

Social insurance benefits are both generous compared to other forms of government support and relatively unlikely to be cut back in hard times because of the sense of entitlement created by funding through a dedicated payroll tax (Berkowitz, 2005, p. 23). Social insurance has been crucial in lifting the elderly out of poverty in the United States and Canada (Wiseman & Ycas, 2008). Nevertheless, social insurance alone is inadequate. Many individuals with disabilities lack the work history needed for social insurance eligibility (Erkulwater, 2006, p. 82) and continue to face poor or no employment options under current accommodation practices (Stein & Stein, 2007, p. 1210-1211). Public welfare programs will have to meet their needs (Erkulwater, 2006, p. 242). Proposals to bolster public welfare programs may meet resistance in the current political climate in North America, but people with disabilities and their allies should make the case for maintenance and expansion of social insurance.

Conclusion

Background structures such as the nature of the employment contract, unionization, and social insurance arrangements, exert influence on the equal participation of people with disabilities in society. Reforms of these structures to promote equality appear both feasible and desirable.

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References

- American Law Institute (2009). *Restatement (third) of employment*. Washington, DC: American Law Institute.
- Arnold-Richman, R. (2010). Just notice: Re-reforming employment at will. *UCLA Law Review*, 58, 1-72.
- Bell, D. (1965). The disjunction of culture and social structure: Some notes on the meaning of social reality. *Daedalus*, 94 (1), 208-222.
- Berg, P. (1999). Ill/legal: Interrogating the meaning and function of the category of disability in antidiscrimination law. *Yale Law & Policy Review*, 18, 1-51.
- Berkowitz, E. D. (2005). *Robert Ball and the politics of social security*. Madison, WI: University of Wisconsin Press.
- Bird, R. C., & Charters, D. (2004). Good faith and wrongful termination in Canada and the United States: A comparative and relational inquiry. *American Business Law Journal*, 41, 205-250.
- Bruyere, S. M. (1993). The implications of the ADA for labor relations, collective bargaining, and contract administration. *Journal of Rehabilitation Administration*, 17, 120-126.
- Campolieti, M., & Krashinsky, H. (2003). Substitution Between Disability Support Programs in Canada. *Canadian Public Policy*, 29(4), 417-429.
- Erkulwater, J. L. (2006). *Disability rights and the American social safety net*. Ithaca, NY: Cornell University Press.
- Feinman, J. M. (1976). The development of the employment at will rule, *American Journal of Legal History*, 20, 118-135.
- Finlayson, J. (2007). Patterns of union density in the United States. *Industrial Relations Bulletin*, 39 (2), 1-2
- Hahn, H. (1993). Equality and the environment: The interpretation of "reasonable accommodations" in the Americans with Disabilities Act. *Journal of Rehabilitation Administration*, 17, 101-106.
- Knutsen, E. (2010). The costs of costs: The unfortunate deterrence of everyday civil litigation in Canada. *Queen's Law Journal*, 36, 113-159.
- Lipset, S. M. (1990). *Continental divide*. New York, NY: Routledge.
- Lynk, M. (2008). Disability and work: The transformation of the legal status of employees with disabilities in Canada. In R. S. Echlin & C. Paliare (Eds.), *Law society of upper Canada special lectures 2007: Employment law* (pp. 189-257). Toronto, ON: Irwin Law.

- Malhotra, R. (2003). The duty to accommodate unionized workers with disabilities in Canada and the United States. *Journal of Law & Equality*, 2, 92-155.
- Malhotra, R. (2009). A tale of marginalization: Comparing workers with disabilities in Canada and the United States. *Journal of Law and Social Policy*, 22, 79-113.
- McGinley, A. C. (1996). Rethinking civil rights and employment at will: Toward a coherent national discharge policy. *Ohio State Law Journal* 57, 1443-1524.
- O'Brien, R. (2001). *Crippled justice: The history of modern disability policy in the workplace*. Chicago, IL.: University of Chicago Press.
- Stein, M. A., & Stein, P. J. S. (2007). Beyond disability civil rights. *Hastings Law Journal*, 58, 1203-1240.
- Stein, M. A., Waterstone, M. E., & Wilkins, D. B. (2010). Cause lawyering for people with disabilities [Review of the book *Law and the contradictions of the disability rights movement*, by S. R. Bagenstos]. *Harvard Law Review*, 123, 1658-1703.
- tenBroek, J. (1966). The right to live in the world: The disabled and the law of torts. *California Law Review*, 54, 841-919.
- Titkemeyer, J. (2006). American unionism [Review of the book *The paradox of American unionism: Why Americans like unions more than Canadians do but join much less*, by S. M. Lipset]. *Monthly Labor Review*, 129 (10), 89-90.
- Weber, M. C. (2009). Disability rights, disability discrimination, and social insurance. *Georgia State University Law Review*, 25, 575-605.
- Weber, M. C. (2010). Unreasonable accommodation and due hardship. *Florida Law Review*, 62, 1119-1178.
- Wiseman, M. & Ycas, M. (2008). The Canadian safety net for the elderly. *Social Security Bulletin*, 68 (2), 53-67.
- Statutes and Court Cases
- Health Servs. & Support Facilities Subsector Bargaining Ass'n v. B.C., 2007), [2007] 2 S.C.R. 391 (Can.).
- Nat'l Treasury Employees Union v. Fed. Labor Relations Auth., 793 F.2d 371 (D.C. Cir. 1986).
- Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).
- Worker Adjustment Retraining and Notification Act, 29 U.S.C. §§ 2101-2109 (2006).