
Disabled Persons and Canadian Law Schools: The Right to the Equal Benefit of the Law School

M. David Lepofsky*

Introduction

Over the past decade, Canada's legal establishment, including courts, the profession and legal educators, has directed unprecedented attention to equality issues. A decade ago, human rights codes were being expanded across Canada to outlaw discrimination on grounds which were hitherto unconsidered. Early in the 1980s, Canada's constitution was amended to include a supreme guarantee of equality rights. Policy initiatives in the mid-80s have led to the introduction of pay equity and employment programs, and to calls for their substantial expansion.

As the 1980s drew to a close, this increasing attention to equality issues was directed in a serious way not only to the social institutions to which the law applies, but, as well, to the very institutions which are responsible for the legal system itself. Canada has had a number of studies into racial bias against native persons in the judicial system. Conferences and other activities have drawn attention to concerns of gender bias in the law, and in the judiciary. As well, public and professional attention has been directed at Canada's law schools, to identify possible barriers to equality inherent in the legal education system.

With this examination of the various institutions in Canada's legal system now underway, it is important to ensure that its scope is broad enough to make certain that the concerns of all disadvantaged groups are taken into account. In this context, it is very much to the credit of the Canadian Council of Law Deans that the concerns of persons with disabilities in the legal education system were placed on the agenda at its 1990 Ottawa Conference. Disabled persons are among the ranks of clients who need the services of lawyers trained in Canadian law schools. As well, persons with disabilities are among the ranks of those

* LL.B. (Osgoode Hall), LL.M. (Harvard). Counsel, Constitutional Law and Policy Division, Ontario Ministry of the Attorney General. This is written in the author's personal capacity and does not purport to represent the views of Ontario's Attorney General or his Ministry. This paper was prepared for a meeting of the Council of Canadian Law Deans held in Ottawa on November 8, 1990.

seeking admission to Canada's law schools, for the purpose of pursuing careers in the legal profession.

This paper addresses two distinct, thematically-linked questions pertaining to Canadian law schools and disabled persons. First, it considers how law schools can effectively accommodate disabled law students in order to ensure that disabled persons have equality of access to the practice of law. The second issue concerns how law school curriculum can be shaped to ensure that the law itself and law graduates, who go on to practice law, are effectively equipped to serve clients with disabilities.

There are two common denominators among these questions. First, both are of fundamental importance to the 10 to 15 percent of Canadians who have a physical or mental disability. Second, both issues have received insufficient attention to date. This inattention is not the product of any design or desire; rather, it forms part of a larger trend, whereby disability equality issues have tended to secure attention much later than equality issues regarding gender, race or certain other grounds.

The primary focus of this paper is to provide practical recommendations which can be implemented in Canada's law schools with dispatch. Only a brief discussion is provided of the origins of the problems which these recommendations seek to rectify. Of course, this brevity is not because these problems merit little attention. Rather, it is because this paper's discussion refers the reader to other published sources which can provide a more thoroughgoing description of the dimension of the problems to which these recommendations pertain. As well, no assessment is attempted here of which of the recommendations set forth below are now provided, formally or informally, at any Canadian law school.

The focus of the discussion and recommendations set forth below is exclusively on action that can be taken in and by law schools to address the twin issues of training disabled persons to practice law and of ensuring that both the law and lawyers effectively meet the legal needs of disabled persons. Action in these areas is also required outside of Canada's law faculties, *i.e.*, by the legal profession itself, by the provincial law societies, by the courts, and by government agencies which are responsible for the administration of Canada's justice system. However, these activities and actors are beyond the scope of this paper. Moreover, in the long run, action in law schools is likely the most critical first step in fostering reform in these areas.

While this paper's focus is on issues concerning persons with disabilities, it should not be inferred that the paper's themes are only relevant to disabled persons. To varying extents, similar concerns over law school accessibility and legal curriculum content can apply to other disadvantaged groups in society. A principled commitment to the goals of equality and education equity requires a comprehensive focus on all disadvantaged persons and groups, and not an

exclusive single-group or single-issue orientation, wherever possible. Indeed, any effort at opening up the legal education system which focuses only on one disadvantaged group runs the risk of unintentionally disregarding or marginalizing the serious barriers which present themselves to other minorities.

It is hoped that this paper will serve to inform law teachers, law deans, law school administrative staff and law students about the ways in which Canadian law schools can widen their focus to include both able-bodied and disabled persons. It is hoped as well that this paper will assist disabled law students and law school applicants to formulate strategies for succeeding in their legal education. Finally, it is hoped that this paper, which was originally delivered at a conference of the Canadian Council of Law Deans in Ottawa on November 8, 1990, might serve as a yardstick by which future law school initiatives in the disability area can be evaluated in the months and years after the meeting at which it was first distributed.

I. Accommodating Disabled Law Students in the Law School

A. Discussion

How can a law school most effectively ensure that disabled students have equality and equity of access to a legal education, and hence, to the legal profession? A law school's desire to effectively accommodate disabled law students need not solely be motivated by the legal duty to accommodate, enshrined in human rights legislation, or by the Supreme Court's important recognition of equality of access to the legal profession as a *Charter*¹-protected value.² It is tied as well to a fundamental commitment to simple fairness and equity.

When translating this desire into action, five general observations should be born in mind from the outset. First, there is no magical formula for accommodating all disabled students in one fell swoop. Disabilities vary from individual to individual. While this paper refers to examples of specific accommodations relevant to certain disabilities, there are a diverse range of needs which can arise, but which are not individually canvassed here. In addition to the fact that each disability can present differing accommodation needs, the same disability can have a very different impact on different persons, depending on a myriad of factors, such as attitudes, internal and external resources, social support and general environment and the availability of training and accommodation techniques.

¹*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

²*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.].

Thus, effective accommodation is often the product of open-mindedness, "ad hoc" and ongoing trial-and-error experimentation. It is usually not the product of a simple, once-and-for-all quick fix, with the possible exception of the removal of physical barriers to wheelchair access.

Second, while it is often fair to expect a disabled law student to play an active role in finding solutions to accommodation issues, the law school must take positive action and primary responsibility in advance to assist students in searching for effective accommodations, and to ensure that once found these solutions work to their maximum effectiveness. This is so because a newly admitted law student will not necessarily know all of the ins-and-outs of law school when he or she first arrives, so as to be able to quickly identify the most effective accommodations on his or her own. Hence, the recommendations below are generally organizational and structural in focus.

Third, the greatest barrier to reasonable accommodation of disabled persons generally is neither financial nor technological. The greatest barrier in society tends to be attitudinal. Most barriers confronting disabled persons can be readily eradicated if sufficient attention and imagination is applied to the problem.

However, accommodations are often missed or refused because the matter is considered of insufficient importance, because of an incorrect presumption that no effective accommodation is available, because of an unfounded presumption that such accommodations necessarily involve excessive costs, or because expenditures, if required, are considered to be low in priority. In considering a school's spending priorities vis-a-vis the following recommendations, a faculty should reflect on how many resources were channelled to these disability issues in the past. As well, the fact that many if not most of these recommendations involve little or no cost whatsoever should be remembered.

Fourth, with a scarcity of resources confronting all law schools, and with disabled law students and lawyers spread out across this enormous country, it will be difficult to ensure that new, incoming law students can benefit from the successful accommodations fashioned by others in the past. Hence, it is essential to co-ordinate efforts among all law schools, and to keep all posted on the experience gained at each faculty.

Fifth, as technology for disabled persons rapidly develops, approaches to accommodation will evolve commensurately. Yesterday's workable accommodation may be today's antique. As well, yesterday's insurmountable barrier may be today's easily conquered challenge.

The following is a non-exhaustive list of key recommendations in this area. They are not set out in order of importance. It is strongly recommended that in addition to these steps, each law faculty carefully review the excellent discus-

sion of this topic by David M. Engel and Alfred S. Konefsky in "Law Students with Disabilities: Removing Barriers in the Law School Community."³ This article provides clear, hands-on examples of barriers confronted by disabled students in American law schools, and helpful descriptions of effective accommodations to remove these barriers. As well, further information in this area should be sought from the American Association of Law Schools, since American schools have been training disabled law students for many decades.

B. Recommendations

1. Each law faculty should adopt a formal policy which undertakes that all disabled law school applicants and law students will be afforded reasonable accommodations to their needs, to ensure that they have equality of access to legal education and to the legal profession. Faculties should set out this policy in major law school publications, such as course catalogues and application forms, so as to educate students and potential applicants about their entitlements and opportunities.
2. Each faculty should designate a senior-ranking faculty member, such as an associate dean, as the faculty's official ultimately responsible for ensuring the accommodation of disabled students. An appropriate title for this position might be "Disabled Students' Access Co-ordinator." This person should be readily available to disabled law students and applicants for admissions. He or she should serve both to provide information about available accommodations and to authoritatively intervene in the school bureaucracy to ensure that needed accommodations are identified and implemented. Disabled students and applicants should only require "one stop shopping" wherever possible when trying to locate information about accommodations, and when trying to break bureaucratic impasses. This will help avoid unnecessary "run-arounds," where the student is told that a particular accommodation issue is "not my department" by various university officials.

This Co-ordinator should be clothed with authority to speak on the dean's behalf, and to direct the taking of effective action; the role should *not* be simply advisory. Short of the dean's own responsibility, the Co-ordinator should have ultimate responsibility to ensure that reasonable accommodation is made to disabled law students and law school applicants. This activity could be undertaken in the context of a larger law school initiative aimed at ensuring education equity for all disadvantaged minorities in the law school, if the faculty is disposed to undertake a wider education equity initiative.

The Co-ordinator should maintain ongoing contact with his or her counterparts at other law schools, so each can learn from the experiences of others.

³(1990) 38 Buffalo L. Rev. 551.

3. To assist the Co-ordinator, the faculty should establish a committee composed of faculty members, administrative staff, and law students, whose mandate is to identify barriers to access in the law school admissions system, teaching processes and student evaluation methods, and to recommend to the Co-ordinator methods by which these barriers can be removed. This committee can contribute substantially towards the goal of making the law school more accessible in advance of the admission of any particular student with a disability. The committee can also be available to assist the Co-ordinator with individual issues as they arise.

4. Each faculty should adopt a dual "mentoring" system for disabled law students. Each disabled law student should be offered two mentors at the school, to be available to them shortly before the commencement of first year studies, and throughout their legal education. The first mentor should be a faculty member. This person should be selected on the basis not of seniority, but rather, of appropriateness for a close one-to-one relationship with the student. The second member should be an upper year law student selected according to the same criteria.

The function of each mentor is to meet with the disabled student from time to time for the purpose of monitoring his or her progress and helping identify and solve problems. Mentors would be available to the disabled law student on an *ad hoc* basis as well as for addressing individual matters as they arise.

The role of the Co-ordinator is largely administrative. In contrast, these mentors would function in a more individualized and informal counselling role.

5. As soon as it becomes apparent to a law school that it has admitted a disabled student, or that a disabled person is seeking admission, efforts should be made to put that disabled person in touch with similarly disabled lawyers, or law students who are further along in their legal education. Disabled lawyers and law students are thinly scattered across Canada. It is not easy for a disabled newcomer to the legal education system to track them down. As well, the student might be hesitant about approaching more senior disabled students or lawyers on his or her own initiative unless a contact is made in advance to ensure that the inquiries are welcomed. The school should take positive steps to locate these persons, to make connections, and to inform the disabled newcomer that disabled lawyers and advanced law students would welcome their inquiries.

6. Each law school which is not now fully accessible to mobility-impaired students should forthwith take steps to ensure that all facilities in the school are made physically accessible as soon as possible. Physical accessibility cannot simply be measured either by existing statutory standards (such as by those found in local building codes) or by existing policies or standards mandated by university head offices. These standards are often insufficient. For example, they often address only accessibility requirements of persons who use a wheel-

chair. Persons with visual impairments also have often unrecognized physical accessibility requirements. As well, existing legal or university policy standards may be inadequate to meet the actual needs of mobility impaired students.

A school's physical accessibility can be assessed in a rough way on a three-level scale. Each faculty's goal should be to achieve the first level of accessibility as soon as possible. At this level, a school is fully accessible providing disabled students with full and equal access to all parts of the facility, with dignity. Access to buildings can be obtained through the main entrances which all students use, and is not available solely through remote service entrances. A student has a full choice of seating in a classroom. A disabled student can get to any part of the facilities that can be reached by an able-bodied student. At this point, the disabled student has true equality of opportunity at the law school insofar as physical access is concerned.

At the second level, a school is sufficiently accessible that a wheelchair-using student might not be entirely dissuaded from applying to the school because of physical barriers. However, there are places in the facility which a disabled student cannot reach. As well, those places which are accessible are not necessarily open to the student's access in a full, equal and dignified manner. In such a facility, a mobility-handicapped student is placed in a second-class situation. His or her legal education experience is subject to real and practical barriers.

At the third and lowest level, a law school is functionally inaccessible. A disabled student, using a wheelchair, would not be able to participate in the legal education program, short of being carried around the building.

In the long run, full physical accessibility can require large-scale physical retrofitting. In the short term, this can be fostered or achieved in part by smaller-scale physical changes. It can also require the school to adopt a policy that specific class locations will be changed, where a disabled student requests admission to a particular course, and where that course is currently intended to be offered in a classroom which is inaccessible. Where faculty offices are inaccessible, faculty members should advise disabled students that they are prepared to meet them in alternative, accessible and private locations, when students wish to avail themselves of office hours. In such circumstances, private office space should be made available.

Information about effective physical accessibility standards can be obtained from disability service agencies, disabled persons' consumer groups, and from direct consultation with disabled students themselves.

7. Law schools should review their admissions processes and criteria to ensure that disabled applicants to law school have full and equal access to the scarce places in these faculties. For example in Ontario, one law school is entirely

inaccessible to wheelchairs. Hence, a disabled law school applicant can only compete for a lesser number of places in Ontario law schools than can an able-bodied student. Accordingly, those schools which are now fully or partially accessible should consider adoption of an affirmative action admissions policy regarding applicants whose disability precludes them from applying to an inaccessible school. In recognition of the fact that law school applicants ordinarily pepper many if not most schools with applications, with the hope of getting in somewhere, these admissions criteria should be adapted so that disabled students⁴ have an equal shot at getting a place in a law school somewhere.

This recommendation is not intended as a substitute for the previous recommendation that all law schools achieve a condition of full accessibility; it is merely a stop-gap measure.

It is also not intended by this recommendation that any individual faculty or group of faculties be designated as special facilities for disabled students. It is not desirable to concentrate or "ghettoize" disabled students in a small group of schools. Rather, the ultimate goal is to ensure that disabled applicants have the same full range of educational options as are open to able-bodied students.

8. Each faculty should also examine its law school admissions criteria and standards to ascertain whether they contain any unintended barriers to equality of access for disabled students. Where such barriers exist, they should be removed, or avenues for accommodation of disabled students should be fashioned. For example, the traditional LSAT test can pose a barrier to students who are either visually handicapped, otherwise print-handicapped, or learning disabled. Accommodating these students may require an alteration of the test, or its waiver in specific cases.

9. To accommodate those students whose disabilities preclude the completion of a law degree in the usual three year period, each faculty should adopt a policy permitting the degree to be completed over a longer period. For example, this might be necessary for some persons with multiple sclerosis who may experience periods of fatigue which can preclude carriage of a full course load. It may also be required by a newly disabled person who is undergoing an adjustment to his or her condition, or to a person whose pre-existing disability has become more severe while at law school. This recommendation does not seek to reduce the standards of achievement which a law school should expect of a disabled student. Rather, it seeks only to ensure that the student is afforded a fair opportunity to learn and to demonstrate his or her academic achievement free from unnecessary barriers.

⁴This recommendation would not apply to all disabled students. For example, the presence of a flight of stairs in front of a building constitutes a serious barrier for persons using a wheelchair. However, it poses no barrier for a visually impaired person.

10. Each school should adopt a range of specific policies and measures to assist print-handicapped students,⁵ the school should adopt several measures to ensure their effective access to case books and other reading materials in a usable form. These can include, among other things, the following:

- a. Ensure that print-handicapped students receive prompt and automatic placement in the courses which they have selected, without any need to participate in a lottery process. This will give them a head start on getting casebooks translated into an accessible medium. Such transcription is usually an extremely time-consuming process. Thus, advance placement in courses is a critical pre-requisite to equality of opportunity.
- b. Require faculty members to have their casebooks prepared well in advance of the term in which they are to be used, so that they are available to print-handicapped students with sufficient time to ensure their transcription into a usable medium. The current practice of some law teachers, whereby casebooks are prepared or finalized at the last minute, constitutes a serious barrier to access for print-handicapped students.

As a secondary, and substantially inferior measure, the law school administration could provide print-handicapped students with assistance in choosing those courses and professors who are more likely to have their casebooks ready well in advance of the term. Such students could be directed away from those courses and teachers who prepare their materials at the last minute, except where the reading load for such courses is light, where the student has a strong desire to take the course in question, and where rapid transcription services are available. This alternative is inferior and undesirable, since it can perpetuate print handicapped students' inequality of access to the courses they wish to take.

- c. Designate a staff member to recruit volunteer readers in the school, through announcements in classes, posting of ads, and placement of ads in student newspapers. As well, the faculty should assist the student in securing financial resources needed to hire readers.
- d. Designate one or more library staff members to assist print-handicapped students in learning to use the law library. These staff members should be available on an ongoing basis to assist students with getting access to print materials.

⁵The term "print-handicapped" refers to persons who, because of disability, are incapable of reading ordinary printed materials. These persons include, *e.g.*, those who are blind, partially sighted, dyslexic or otherwise learning disabled, and those who, because of muscular or other motor impairment, cannot handle printed text or turn pages.

- e. Ensure library policies regarding "reserved books" are waived when a print-handicapped student needs to remove a book from the library premises to have it brailled, read onto tape, reproduced in large type, or scanned onto computer disc.
- f. Provide print-handicapped students with assistance where needed in photocopying materials so that these can be taken to another location to be translated into a useable medium.

11. Each faculty should adopt a policy providing that where a disabled law student cannot, because of disability, take examinations in the conventional manner, the school will enable the student to take the examination in an alternative manner, which is effective at fully and equally testing his or her legal knowledge and analysis. Possible accommodations in this area can include the following:

- a. Visually impaired students can be provided with their examinations in braille through available transcription services. Similarly, they can be given examination questions on tape, through the use of a volunteer reader during the examination period.
- b. Low vision persons can be given questions in a large print format.
- c. Persons incapable of hand writing can be permitted to take examinations on a print typewriter. Persons unable to use a print typewriter can be permitted to use adapted computer equipment, or can be allowed to dictate their answers to a secretary who can take dictation and transcribe the answers.
- d. Time limits for each examination can be extended to ensure that disabled students have adequate time to prepare their answers.
- e. A disabled student can be permitted to take the examination at an alternate location, such as his or her home or dormitory room, so that he or she can make use of adaptive equipment, computers, and the like.
- f. The school can provide students with a reader and/or monitor who can bring the examination paper to their home, read the questions to them, and help with access to printed materials during open book examinations. The student could be allowed to recruit this assistant, if desired.
- g. Where alternative means for examination writing are ineffectual, the instructor could administer an oral examination. This would apply, for example, where a print-handicapped student takes a tax or accounting examination which involves extensive transcription of numbers. In tax or accounting examinations, the examiner's goal is

to ascertain whether the student is equipped to undertake the requisite analysis. This is often done through written questions which require detailed analysis of numbers, and in the case of accounting, through the preparation of financial statements. If it is not practical for a print-handicapped student to prepare these documents in a form which is readable by a professor, an oral examination may be the only way for the student to effectively demonstrate to the professor the level of his or her analytical abilities.

- h. Where a student's examinations are scheduled back-to-back, the examination schedule can be modified for those disabled students so requiring, to ensure that they have reasonable time to prepare for each examination, having regard to their special needs. This could be especially important for students whose disability can cause significant fatiguing.

12. Each faculty should take steps to have its student organizations ensure that in all organized student activities operated in connection with the law school, disabled students are provided with reasonable accommodation to ensure their opportunity to fully participate in all aspects of student life. Organized student activities can play a vital role in the disabled law student's educational experience, for reasons additional to those applicable to all law students generally. For example, through these activities, disabled law students can make contact with other students who can be recruited as volunteer readers and assistants.

To ensure maximum opportunities for participation in student activities, the law school should:

- a. require that organized student activities be held in physically-accessible premises. Where no such facilities are available in the law school building, efforts should be made to find alternative, accessible facilities on campus to hold these events;
- b. make information about upcoming student activities available to print-handicapped students in a useable form. For example, a telephone answering machine can be made available with a law school newswire, reciting announcements of weekly events. Alternatively, a law school secretary could be assigned to read major posted announcements to print-handicapped students, when required;
- c. in the case of student legal aid clinics, clinic staff and senior law students should arrange for a mentoring or "junior/senior" relationship to be established for disabled students wishing to do volunteer legal aid work. By this means, disabled students can experiment with techniques for accommodating themselves in their practice in real cases,

with the assistance and oversight where needed of a more experienced clinic worker.

While student legal clinic work and volunteer mooting programs are educationally worthwhile for any student, they are especially important for disabled students during their law school training. This is because these activities provide an excellent opportunity to acquire practice skills and evolve techniques for accommodating their disability with appropriate supervision. This experience with practice can be critically important when the disabled student goes for job interviews and faces a prospective employer's questions about his or her ability to function in a practice environment.

13. Law schools should ensure that student housing authorities at the university provide disabled students with priority access to student housing, and that sufficient physically accessible student housing is available.

14. The Disabled Access Student Co-ordinator should arrange to have a person available to orient visually-handicapped students to the school's facilities on initial arrival at the school in first year. Such services may be available, though unevenly, through the Canadian National Institute for the Blind or other disability service agencies. In addition to tapping these agencies' resources where practically available, the school should make staff and/or upper year students available to assist in this orientation and mobility process. For a newly-blinded student, the assistance of a professional mobility instructor may be needed. A person with good pre-existing mobility training can often have their orientation needs satisfactorily met by a thorough tour by an untrained guide, such as a faculty member or sighted student.

15. Each faculty should assist disabled students in making contacts with practising lawyers, in order to smooth the difficult process of seeking articling positions, summer jobs, and ultimately, permanent jobs. These contacts are preferably made early in the law school process, so that the student can build upon them. This recommendation is motivated by the need for disabled law students to overcome barriers in the job-seeking process, and to assist them in developing a bank of strategies for coping with actual practice situations while they are still in law school. This pre-planning is critically important to disabled law students, since they will wish to undertake job interviews, and later to enter the workforce with an ability to identify and circumnavigate physical and attitudinal barriers to full integration.

Those practising lawyers with whom contact should be made need not be restricted to lawyers with disabilities. Specifically, these contacts should be largely comprised of able-bodied lawyers who have experience with practice and familiarity with the bar.

16. Each faculty should adopt a policy requiring that any legal education activities which the faculty sponsors or organizes should be convened in physically accessible facilities. Law schools and law professors are active in organizing and convening law conferences for legal academics and the practising bar. In selecting facilities to host these events, due regard should be paid to the need to ensure that disabled persons can attend and participate fully and equally in these events. Unless this is enunciated as a matter of firm school policy, it will likely be overlooked or neglected in the excessive rush that attends the organization of such events. As the flagships in the field of legal education law schools should attempt to set a positive example in this context.

17. Each faculty should produce a brochure which lists services and facilities available to accommodate disabled students at the law school. This brochure should be circulated to all faculty members, to interested groups within the university, to disabled students at the law school, to disabled law school applicants, to other law faculties in Canada, and to community groups with contacts within the disabled population of Canada. This measure will help ensure that once accommodations are implemented at the law school, those who could benefit from them will be able to discover their existence.

C. Summary

The result of an effective implementation of these recommendations would be to transform Canada's law schools into facilities which can readily welcome persons with disabilities as students. They would also increase the capacity of these schools to bring disabled persons into their legal clinics as clients. As is evident from the preceding discussion, the effective eradication of barriers to the full participation in law school by persons with disabilities cannot and indeed should not await the advent or initiative of individual disabled students. Because the barriers to access are themselves systemic, their removal must as well be systemic and systematic.

II. Training Lawyers to serve Disabled Clients

A. Discussion

As indicated previously, fully 10 to 15 percent of Canada's population have a physical or mental disability. They have consistently suffered from conditions of chronic poverty, have suffered from excessive dependency on public assistance, and have achieved exceptionally high unemployment rates which are multiples of the national average. As well, they are often far more dependent on insensitive and unresponsive government and private charitable bureaucracies and on health care professionals than are the majority of Canadians. They confront massive obstacles to their full and equal participation in society's oppor-

tunities despite major medical and technological advances which can often liberate a person from many, if not most, of the limitations thought to be intrinsic to his or her disabilities. Of these, one of the greatest barriers is prevailing public attitudes towards disabled persons, which underestimate their abilities, which overestimate the costs of their accommodation, and which frequently ignore their desire and need to fully participate in the mainstream of Canadian life. In *Charter*-era parlance, disabled Canadians clearly constitute a "discrete and insular minority."⁶

As a consequence of the situation confronting disabled persons, they are in a position of special need for access to effective legal services. In addition to the plethora of legal problems which confront able-bodied persons, disabled persons often require legal assistance in dealing with welfare, health, institutional and other bureaucracies. They require legal services to contest their frequent victimization by discrimination at the hands of employers, landlords and service providers. They need effective representation in the governmental and legislative arenas, to ensure that when laws and policies are formulated, they are sensitive to the need to ensure opportunities to disabled persons for full participation in society.

While disabled persons have a heightened need for effective legal services, they have tended to be substantially under-served by the legal profession. This was the conclusion of a judicial inquiry into the provision of legal services to disabled persons in Ontario, conducted by Judge Rosalie Abella in 1982 on the appointment of Ontario's then Attorney General Roy McMurtry.⁷ The Abella Report (which preceded Judge Abella's well-known Royal Commission on Equality in Employment that recommended the adoption of employment equity programs⁸) identified that legal services are often provided in venues which are inaccessible to disabled persons, that lawyers are for the most part unfamiliar with legal matters particular to disabled persons, and that both law schools and law societies fail to adequately educate law students to serve the legal needs of disabled Canadians. In addition to these barriers, the obstacle of costs cannot be underestimated. Legal services provided by the private sector, outside the legal aid context, are very expensive. Disabled persons are often very poor.

The Abella Report includes a specific chapter which deals with legal education and the provision of legal services for disabled persons. In material part, the Report recommends as follows:

⁶*Andrews, supra*, note 2 at 153, Wilson J.

⁷Ontario, *Report of the Study Into Access to Legal Services by the Disabled* (Toronto: Queen's Printer for Ontario, June 1983) (Chair: R.S. Abella) [hereinafter Abella Report].

⁸*Report of the Commission on Equality in Employment* (Ottawa: Supply & Services Canada, 1984) (Commissioner: R.S. Abella).

3. Law schools should develop special courses dealing with the legal needs of the handicapped and disabled.⁹

4. Law schools should integrate problems and situations involving the legal needs of the handicapped into other courses, such as constitutional law, criminal law or family law.¹⁰

It is a fair assessment that to date, these particular recommendations have generally not been implemented by Canadian law schools. Indeed, it is likely that many if not most persons occupying positions of authority on law school faculties have been unaware of these recommendations, and were likely unaware of the existence of the Abella Report. Thus, with some exceptions, it is likely that the focus of law school curricula continues to be on the law as it applies to able-bodied persons. Legal education also continues to operate on the implicit assumption that the client whom a lawyer serves is able-bodied, and has both the legal needs and the capacity to avail him or herself of legal services of an able-bodied person. Indeed, the only disability-related subject which a law student is likely to learn about for certain during his or her legal education is the subject of criminal insanity — an area of law which has historically reflected the stereotypical perception of mentally disordered persons as tending to be uncontrollably dangerous.

In addition to a focus on the provision of specific legal services to disabled persons, an outstanding concern in the area of legal education and disabled persons is the pre-existing attitudes of law and of the judiciary towards persons with disabilities. It is well recognized that law schools can serve the important roles of contributing to legal scholarship, to law reform, and to the public's, court's and legal profession's understanding of law and the justice system. In this context, legal scholars and advocates addressing gender equality concerns have brought to the attention of the public and the legal community important and serious concerns regarding the attitudes of the law and of courts towards women, as is reflected in legislation and legal doctrine.

A similar focus is warranted in the disability context. Our law, our legal thinking, and our justice system tend to reflect prevailing negative and unfounded stereotypes about disabled persons. Law schools should be encouraged to address both academics' and classroom attention to this problem, to its origins, to its manifestations, and to its elimination.

Perhaps the most pointed if not the most extreme example of such attitudes in the disability context is provided by one of the United States' most respected and revered judges, Oliver Wendell Holmes. In the case of *Buck v. Bell*,¹¹ the United States Supreme Court considered a constitutional challenge to a law

⁹*Supra*, note 7 at 145.

¹⁰*Ibid.*

¹¹274 U.S. 200 (1926).

authorizing the compelled sterilization of certain mentally handicapped persons. The appellant, one Carrie Buck, was mentally handicapped. She was the daughter of a mentally handicapped parent. Ms. Buck also had a mentally handicapped child. The court upheld the law's constitutionality. In supporting the law's justifiability, Justice Holmes stated on behalf of the Supreme Court that "[t]hree generations of imbeciles are enough."¹²

As a result of the foregoing, recommendations are offered here which provide means for law schools to help equip lawyers with knowledge and skills needed to effectively serve disabled clients, and hence, to foster their access to justice. As well, these recommendations focus on action concerning legal stereotyping of disabled persons.

B. Recommendations

18. Each law faculty's curriculum committee or other appropriate body should establish as faculty policy that the school be committed to the goal of ensuring that a comprehensive legal education shall include training in the provision of legal services to disabled persons. Law teachers should be encouraged to include materials in their courses which would contribute to this objective, where appropriate. This includes training in the following areas:

- a. substantive law of special concern to disabled persons, as is described further below;
- b. specific aspects of legal ethics, professional responsibility and practice which pertain to the serving of disabled clients;
- c. legal, legislative and judicial perceptions of, and attitudes towards, persons with disabilities; and
- d. the way in which disabled persons experience the law and the justice system, including the barriers to access to justice, and the attitudinal barriers to equality.

19. Faculties should approach instruction in the foregoing areas through a "mainstreaming" philosophy. This curriculum should not be reserved for a specialized course in "Disability Law" which would only be taken by a select minority of law students. Rather, where appropriate, this curriculum should be integrated into existing law school courses, and especially into those courses which are compulsory, or which are taken by the vast majority of students during their law school training. This is not to suggest that faculties should not develop and offer students a specialized, advanced seminar on disability and the law. Such a course would be highly worthwhile. However, it should not serve

¹²*Ibid.* at 207.

as a total or partial substitute for the incorporation of disability related materials into existing courses.

20. Substantive legal topics which should be considered for infusion into law school curriculum include the following non-exhaustive list:

- a. Introductory and advanced administrative law courses could include study of regulatory agencies of particular importance to disabled persons, including human rights commissions, welfare agencies, psychiatric detention review tribunals, and school boards;
- b. Family law courses could examine family law issues faced by disabled persons, including their capacity to enter into legal matrimonial relations, their capacity to enter into matrimonial contracts, education rights of disabled children, and custody and support issues arising in the case of disabled family members;
- c. Introductory and advanced constitutional law courses could include a study of constitutional issues pertaining to disabled persons, including the scope of *Charter* s. 15's equality rights guarantee to disabled persons,¹³ and the impact of *Charter* s. 7¹⁴ on criminal, civil and administrative proceedings targeted at the detention or treatment of disabled persons;
- d. Basic and advanced tort courses could examine the treatment of disability in tort law, including the assessment of damages for personal injuries or death in the case of disabled persons (which now includes a number of stereotypical presuppositions about life with a disability), alternatives to traditional tort law for income maintenance for disabled persons, the duty of care concerning disabled plaintiffs in negligence law and the foreseeability of disabled plaintiffs. As well, an examination could be provided of tort concepts of "consent" as a defence to intentional torts such as battery, as it relates to mentally handicapped persons, and the legislative provisions regarding substitutional consent;

¹³S. 15(1) states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹⁴S. 7 states:

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.

- e. Introductory contracts courses could include an examination of the law's treatment of mentally handicapped persons' capacity to contract;
- f. Feminist jurisprudence courses could include a comparison of judicial and legal attitudes towards disabled persons and those attitudes towards women, as well as the impact on legal and judicial attitudes of the compounded situation confronting disabled women;
- g. Introductory and advanced criminal law courses could examine the treatment and perceptions of disabled persons inherent in the criminal law, both in the case of disabled accused persons and disabled victims of crime. Alongside the traditional examination of the insanity defence and its relationship to *mens rea* and criminal responsibility doctrine, these courses could explore the related topics of judicial and legal stereotyping of mentally disordered persons, the comparatively disadvantageous law pertaining to mentally disordered persons found unfit to stand trial, or found not guilty by reason of insanity, and the law's deferential view of psychiatric evidence in this field;
- h. Estates and trusts courses could include a component examining the special aspects of estate planning for disabled dependents, as well as an examination of the law governing the management of the property of "mentally incompetent" persons, so labelled;
- i. Courses on employment law, law and discrimination, and equality rights can include a component addressing legal doctrines concerning legal protection against discrimination based on disability, the concept of reasonable accommodation as applied to disabled persons, and the practical barriers to the enforcement of disabled persons' human rights;
- j. Tax law and tax policy courses, could consider the tax position of disabled persons and its interplay with income support legislation and programs;
- k. Law and poverty courses could include a section addressing the specific poverty related issues confronting disabled persons, such as the barrier to the pursuit of employment created by certain social assistance schemes, and the impact of sheltered employment regimes on disabled persons' poverty.

21. As well, law school courses dealing with subjects of procedure or practice could be infused with curriculum components regarding disability issues. The following is a non-exhaustive list of topics which could be covered in basic and advanced civil procedure courses, basic and advanced criminal procedure

courses, courses on legal ethics, professional responsibility and the legal profession, and advanced advocacy seminars:

- a. The current, insufficient level of legal services for disabled persons, and the lawyer's ethical obligations to ensure that all, including the disadvantaged, secure adequate legal representation;
- b. The barriers to legal services which now confront disabled persons, and the means by which such barriers can be reduced or eliminated;
- c. Legal and practical considerations regarding the taking of instructions from disabled clients, including the capacity to instruct, the securing of interpreter's services for clients with communication disabilities and the preservation of client confidentiality for clients with communication or cognitive impairments;
- d. Legal, statutory, judicial and social attitudes towards disabled persons, and their adverse impact on a disabled client's access to justice;
- e. Other barriers to access to justice for disabled persons, including (among others) physical barriers posed by inaccessible court facilities;
- f. Familiarization with the disabled person's own perspective on access to legal services, and with attitudes towards disability, through opportunities to meet and interact with disabled persons;

22. In order to facilitate the most expeditious development of course materials, casebook chapters and the like to assist in the teaching of the matters described in the two preceding recommendations, the Canadian Council of Law Deans, the Canadian Association of Law Teachers/Association canadienne des professeurs de droit, and other interested groups should form a committee of interested academics and others. This committee could prepare casebook chapters dealing with disability issues which could be circulated to all law schools, and made available for use by those professors wishing to take advantage of such resources. This would avoid duplication of effort, maximize the chances that this material will in fact be infused into law school courses quickly, and leave to the individual instructors the full final say over the contents of their courses. In addition to legal academics, the committee should include members of the disabled community, to help ensure that the materials developed are accurate and appropriate. These persons should be selected in a fashion which ensures that the course materials which are developed reflect the needs of persons having a wide range of different disabilities.

The committee could seek funding for such research from public and private sector funding sources, where needed. A key player in such efforts could be those legal organizations which specialize in disability rights issues, includ-

ing the Canadian Disability Rights Council and Toronto's Advocacy Resource Centre for the Handicapped. In fashioning curriculum content on disability issues, it is critically important to secure the input of disabled consumers themselves. They are in the best position to articulate their needs and to ensure that materials are presented in a sensitive and appropriate fashion.

23. In addition to the preceding recommendation, each faculty should set up its own internal committee to ensure that the law school's curriculum adequately addresses disability issues referred to above. This committee could assist in the development of casebook chapters, especially if no inter-school initiative in this regard is undertaken.

24. Each faculty should review its curriculum's clinical legal education component to ascertain the extent to which students in such programs are exposed to the provision of legal services to disabled persons. An effort should be made to infuse disability related curriculum into such programs where appropriate and feasible.

25. Each faculty should commit its student legal aid clinic to the goal of being fully equipped to serve disabled clients, both with mainstream legal problems, and with specialized legal matters associated with their disabilities. Faculties should investigate their student legal aid clinics to determine:

- a. whether it is accessible to physically disabled clients;
- b. whether its staff know how to secure interpreter services for deaf clients, and other accommodations needed to communicate with disabled clients;
- c. whether, and to what extent, its training programs and manuals include components on the provision of legal services to disabled clients, and
- d. the extent to which it has brought its services to the attention of groups and agencies which are in close contact with the community's disabled population.

Steps should then be taken where required to implement improvements in each of these four areas.

26. Law schools should encourage their faculty members and students to undertake research in areas of the law which are especially pertinent to disabled persons, and to endeavour to have this research published. This is in conformity with the law school's traditional role as a source for innovative legal scholarship which can contribute to law reform through legislation and litigation.

27. Law faculties should keep each other posted about initiatives in each of these areas, so that each can learn from the experience of others.

C. Summary

As in the case of accommodations for law students with disabilities, the adjustment of law school curriculum should be systemic and systematic, for it to be effective. If it is left entirely to individual law teachers, without any leadership from law faculty deans and administration, it will likely not occur with sufficient breadth.

Conclusion

The foregoing is clearly not intended to be exhaustive. As measures such as these are examined and implemented, new insights will inevitably arise, and will merit attention. Whatever steps are ultimately implemented, it is urged that action in these areas is overdue. Any effort at implementing these recommendations should be action oriented, with an emphasis placed on achieving results as expeditiously as possible. This paper was delivered to a meeting of Canada's law deans in November of 1990. It would be worthwhile for them to meet again in the near future to ascertain what successes have been achieved in this area.
