

Disability Rights Activists in the Canadian Courts: Legal Mobilization, Equality and Accessibility

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While disability rights organizations have been active participants before the Supreme Court of Canada (SCC) since the mid-1980s, they have been completely neglected in the literature on social movement legal mobilization. This paper seeks to remedy this lacuna by providing an overview of the litigation activity of the main disability rights organizations. It also offers a theoretical perspective for understanding the participation by the movement in the Court. Through a sociological-institutionalist understanding of the diffusion of ideational frames across organizations and by analyzing organizational ecology within a social movement we can begin to explain the variation in participation by collective actors in the movement before the Court at different points in time and cases.

Introduction

The Canadian Charter literature has gone a long way in reaching a consensus about the importance of collective actors in Charter politics and empirical research on the types of litigants appearing before courts, measurement of their success and the influence of their participation in judicial venues on both policy and social movement actors themselves has flourished. Despite this burgeoning body of work, there remain flaws in the debate as a whole. The first flaw, identified by Miriam Smith in the early 2000s, has been the methodological predominance of research based on analyses of cases and their outcomes at the expense of those which focused on actor agency. She argued for an improved research agenda: “the obsession with win/loss ratios before the courts and the belief that court decisions in themselves constitute public policy” may be “the single biggest mistake in the literature.”¹ Smith points to an extensive literature which shows that groups may win in court but lose in society. A related point is that this focus on case analysis has led to a disproportionate amount of scholarly attention on those groups which participate in the courts, to the neglect of those which do not, which has resulted in a gap in understanding, due to selection bias, of the conditions under which a given collective actors is more or less likely to turn to the courts to pursue policy goals. Canadian political scientists have begun to address this and the number of studies focusing on the factors pushing or pulling actors to the courts in the form of political and legal opportunity explanations as well as studies focusing on actor agency has increased.² A prominent example is Christopher Manfredi’s study of the activity of the Women’s Legal Education and Action Fund (LEAF) which goes beyond just an analysis of cases to explore actor characteristics, the make-up of the bench and the broader political ‘support structure’ for legal mobilization.³

However, this raises a second issue with the existing debate: research on legal mobilization by social movements has tended to assess the degree of influence single organizations, appearing before the court, have had on judicial decisions. The main problem with these approaches is they exaggerate the causal linkage between any single actor’s influence, resulting judicial decisions and social change. Turning back to the example of the LEAF study, Manfredi briefly acknowledges that the single organization focus distorts the picture of movement legal mobilization: “LEAF’s participation in the Supreme Court does not, of course, provide a complete picture of feminist legal mobilization in the post-Charter era...LEAF is not the only organization that litigates on behalf of women. Other feminist groups often appear before the Supreme Court in conjunction with, or in the absence of, LEAF.” Despite this, Manfredi nonetheless claims that because LEAF participated in 36 cases before the Supreme Court between 1988 and 2000, more than any other non-governmental intervener, “the Canadian women’s movement has been the most active equality seeker under section 15.”⁴ However, this claim may be an overstatement, a single organization does not constitute a social movement and analyzing it as such ignores the important role that intra-movement politics plays. While the

¹ Miriam Smith (2002). Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science. *Canadian Journal of Political Science*, 35(1), 3-29.

² For example, Miriam Smith (2005). Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada. *Politics & Society*, 33(2), 327; Dagmar Soennecken, *The Growth of Judicial Power and the Admission of Refugees: Comparing Canada and Germany*. Unpublished PhD Manuscript, 2008.

³ Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: University of British Columbia Press, 2004).

⁴ Manfredi, *Feminist Activism in the Supreme Court*, p. 61.

single organization focus may be less problematic in studies of feminist legal mobilization in Canada - because the movement has been largely dominated, at least in its representation before the Court, by a single organization - it may be more troublesome applying this research design in other policy spheres where the division of power and labour between organizations is fundamentally different, important and should be accounted for.

In short, the methodological, theoretical and consequently substantive focus of the existing literature on legal mobilization by social movement actors has left some important gaps. This paper, relying on a case study of the disability rights movement in Canada and its variation in participation before the Supreme Court of Court (SCC) over the last twenty-five years, attempts to illustrate the benefit a broadening of the analytical focus to the range of collective actors within a movement can bring to explanations accounting for the turn to the courts by equality-seeking actors. In doing this, we can begin to gain a more accurate representation of which social movements have been active in the quest for equality since the implementation of the Charter. The analysis in this paper is complementary to other recent studies of legal mobilization which have begun to theoretically situate themselves in 'new institutionalist' approaches. Recent work has tended to focus on various legal opportunity structure frameworks which often implicitly or explicitly draw on rational-choice institutionalist assumptions.⁵ These explanations emphasize the relationship between actors and the political and legal institutions within which they operate. One difficulty with opportunity structure approaches is that they tend to black-box organizations: they either treat organizations as static, homogenous entities and tend to push characteristics of the groups themselves or the social movement organizational environment into the background of their analyses; or they are single-organization case studies and hence treat the interest group as *sui generis*. In sum, opportunity approaches tend to underestimate the potential importance of the internal and social movement dynamics of organizations which might exert an important influence on the range of strategy options available.

The approach adopted here can also be classified as 'new institutionalist,' but instead of focusing on structural determinants, I shift the analytical focus to the social movement organizational context and on to the actors themselves, privileging agency explanations here and pushing considerations of structure to the background. Here I build on Smith's work on social movement and meaning frame analysis to show how consensus and contestation over meanings can influence variation in a movement's participation in legal venues.⁶ While Smith focused on how frames shape social movement goals, I focus here on how frames define which strategies are considered 'most appropriate' in pursuing those goals. Frames have been defined as schemata of interpretation that enable individuals "to locate, perceive, identify and label occurrences within their life space and the world at large."⁷ Meaning frames thus allow individuals to recognize the world: they guide perceptions, expectations and define logics of appropriateness.⁸ The logics of

⁵ Ellen Ann Andersen, *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor: University of Michigan Press, 2005); Rachel A Cichowski, *The European Court, civil Society and European Integration*, (Cambridge, UK: Cambridge University Press, 2007); Chris Hilson, "New social movements: the role of legal opportunity", *Journal of European Public Policy*, vol. 9, no. 2, 2002, pp. 238-55.

⁶ Miriam Smith (1998). Social Movements and Equality Seeking: The Case of Gay Liberation in Canada. *Canadian Journal of Political Science*, 31(2), 285-309.

⁷ David A Snow, Burke Rochford Jr, Steven K. Worden and Robert D. Benford, "Frame Alignment Processes, Micromobilization, and Movement Participation", *American Sociological Review*, vol. 51, 1986, pp. 464-81.

⁸ March, J. G., and Olsen, J. P. (1998). The Institutional Dynamics of International Political Orders. *International Organization*, 52(4).

appropriateness, or norms, limit what is considered acceptable and what is not, within a particular paradigm. The tools of frame analysis allows us to capture the process of the attribution of meaning which groups and individuals give to symbols, events, behaviour and/or discourse.⁹ To understand how ideational frames influence the decision to use a particular strategy we also need to gain an understanding of how organizations within a movement relate to each other and challenge, or conform to, each other's interpretive frames. I argue that these relations are constitutive and generative: meaning frames will influence organizational relations and vice-versa. A core contention of this paper is that a sociological-institutionalist approach relying on analyses of the evolution of framing processes and inter-organizational dynamics can be utilized to provide a theoretical understanding of the conditions under which disability advocacy organizations have relied on the courts to shape notions of equality in Canada. This approach is not incompatible with explanations that focus on the mobilization of organizational resources or political or legal opportunity structures in accounting for litigation strategies and outcomes. Factors such as funding and structure clearly matter in the decision to use litigation to pursue policy goals but what becomes central here are the ways in which movement organizations construct meaning frames both through their own internal struggles as well as through their relations with each other and then how these factors influence the decision to participate in strategic litigation.

I focus on those disability advocacy organizations which have intervened or supported appellants in cases before the Supreme Court from 1985 to 2007 and explore the factors driving this participation. This study is based on research on the public and archival records of key movement organizations (including annual reports, presentations to government, facta submitted to the SCC and accounts in the media and secondary literature) as well as 37 interviews with activists and legal counsel across the movement conducted between October 2007 and January 2008. The aim is to understand the organizational and ideological context within which strategic litigation has taken place and tease out the sometimes subtle relationships between the evolution of the paradigm of disability, the transformation of relations between disability rights organizations and litigation activity.

The next section illustrates the potential theoretical power of analyses of meaning frames and organizational ecology in explaining variation in participation before the courts through a case study of the disability rights movement. It surveys the contested and shared meaning frames and court activity of four key organizations in the disability community, the Council of Canadians with Disabilities (CCD), the DisAbled Women's Network Canada (DAWN Canada), the Canadian Disability Rights Council (CDRC) and the Canadian Association of Community Living (CACL) which have all used strategic litigation as part of a concerted effort to influence equality policy for the benefit of persons with disabilities. The concluding section argues that through gaining an understanding of the dominant and contested meaning frames of a social movement, and the ways in which these diffuse across the movement and infuse relations between organizations, can we begin to gain a more complete and accurate picture of the role of equality seeking movement organizations in Canadian courts and the factors that encourage or inhibit their participation there.

⁹ Erving Goffman, *Frame Analysis*, (Boston: Northeastern University Press, 1974).

The Disability Rights Movement in Canada: Meaning Frames and the Inter-Organizational Environment

While disability organizations have had a significant presence in the courts, legal mobilization by the disability movement remains an area of Canadian political science that is virtually unexplored. This is surprising given the large amount of scholarly attention focused on legal mobilization by other movements in Canada such as the lesbian and gay rights movement¹⁰, official language minority communities¹¹ and in particular by the women's movement, which has been the subject of much scholarly and political debate.¹² This skewed focus has meant that important court judgments and movement politics have been ignored to the detriment of the body of literature. This gap in the Canadian literature is even more lamentable in the face of empirical evidence demonstrating both the growth of the population of persons who consider themselves to have a disability and the degree to which persons with disabilities in Canada have experienced discrimination. A recent Statistics Canada survey reveals that one out of every seven people in Canada is living with a disability. In 2001, 12.4% of the population reported a disability; by 2006, this rate had increased to 14.3%.¹³ Alongside this growth in the population of persons with disabilities there are also several indicators demonstrating that discrimination based on disability is a major problem within Canadian society. There are a high proportion of human rights complaints made to the Canadian Human Rights Commission (CHRC). From 2002 to 2006, experiencing discrimination 'on grounds of disability' produced the highest number of complaints, ranging from 37 per cent to 50 per cent of all complaints received among the 11 different grounds covered by the Human Rights Act. The picture at the respective provincial Human Rights Commissions is similar.¹⁴ The fact that experiences of discrimination based on grounds of disability are widespread is indisputable.

The movement loosely grouped under the title of disability rights, has been less unified in an organizational sense, than the women's movement or the gay and lesbian movement in Canada, particularly in its representation before the Supreme Court. This looseness is reflected in legal mobilization activity by a number of actors, who have a public policy mandate on issues of concern to persons with disabilities: arguably the disability rights movement has been an equally

¹⁰ Miriam Smith, "Nationalisme et politiques des mouvements sociaux: Les droits des gais et lesbiennes et l'incidence de la charte canadienne au Québec", *Politique et Sociétés*, 1998a, pp. 113–40; Miriam Smith, "Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada", *Politics & Society*, vol. 33, no. 2, 2005, p. 327.

¹¹ Troy Riddell, "The Impact of Legal Mobilization and Judicial Decisions: The Case of Official Minority-Language Education Policy in Canada for Francophones Outside Quebec", *Law & Society Review*, vol. 38, no. 3, 2004, pp. 583-610.

¹² Lori Joanne Hausegger. "The Impact of Interest Groups on Judicial Decision Making: A Comparison of Women's Groups in the U.S. and Canada" Unpublished PhD Manuscript, (Ohio State University, 2000); Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund*, (Vancouver: University of British Columbia Press, 2004). F. L. Morton and A. Allen, "Feminists and the Courts: Measuring success in Interest Group Litigation in Canada", *Canadian Journal of Political Science*, vol. 34, no. 1, 2001, pp. 55-84. Sherene Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality*, (Toronto: Second Story Press, 1991).

¹³ Statistics Canada. "Participation and Activity Limitation Survey (PALS)" accessed December 3, 2007 at <http://www.statcan.ca/cgi-bin/imdb/p2SV.pl?Function=getSurvey&SDDS=3251&lang=en&db=IMDB&dbg=f&adm=8&dis=2>

¹⁴ Interview, In-house Counsel, Manitoba Human Rights Commission, November 2, 2007; Interview, Commissioner, Ontario Human Rights Commission, October, 26, 2007; Interview, Activist, Council of Canadians with Disabilities, November 6, 2007.

apparent equality seeker before the Supreme Court of Canada.¹⁵ Table 1 demonstrates that the four key disability rights organizations (some have undergone name changes) appeared before the Supreme Court, either as interveners or as appellants 40 times between 1985 and 2007.¹⁶ Furthermore, this number represents a conservative estimate of the disability rights movement's role in the Courts as the analysis focuses only on the main organizations in the disability rights movement: it excludes other organizations which are both explicit in their equality objectives and have intervened on one or several occasions¹⁷ as well as those organizations which may not have the advancement of disability rights as their primary objective, but have it as a secondary priority or advance arguments that indirectly support a disability rights analysis.¹⁸ In sum, it is clear that organizations advancing a disability rights agenda are a major player in the Canadian justice system when it comes to the equality and human rights agenda.

Collective Meaning Frames: The Shift from the Medical Model of Disability to the Social Model of Disability

Until the early 1980s an attitude of paternalism dominated disability issues.¹⁹ On a societal level, this was expressed through the existence of disability organizations which excluded persons with disabilities from leadership roles and which promoted a general perception of persons with disabilities as helpless, defined by their impairment and as objects of charity or pity.²⁰ On a policy level, this paternalism was expressed through a consideration of disability as a social security, welfare or health policy issue, not a human rights or equality one.²¹ However, the last

¹⁵ Anecdotal evidence suggests that the persons with disabilities have been the most active equality seekers in the lower courts and before human rights tribunals but this is beyond the scope of this study.

¹⁶ These four organizations were identified as the key players through analysis of the secondary literature and expert opinion gauged through interviews.

¹⁷ Organizations that could be considered to be advancing an equality agenda for persons with disabilities which have intervened at least once (and in some cases more regularly) include Disabled People for Employment Equity; Persons United for Self Help in Ontario (P.U.S.H.); The Quebec Multi Ethnic Association for the Integration of Handicapped People; British Columbia Coalition of People with Disabilities; The Learning Disabilities Association of Ontario; The Down Syndrome Association of Ontario; The Confédération des organismes de personnes handicapées du Québec; People First of Canada; the Canadian Association of the Deaf; the Canadian Hearing Society; The Queen Street Patients' Council later known as Empowerment Council — Centre for Addiction and Mental Health, and Social Benefits Tribunal; the Saskatchewan Voice of People with Disabilities; People in Equal Participation Inc.; Ontario Network of Injured Workers Groups, Transportation Action Now; Alliance for Equality of Blind Canadians; Canadian Hard of Hearing Association; Canadian Association of Independent Living Centres and Ethno-racial People with Disabilities Coalition of Ontario.

¹⁸ An example of the latter would be the Canadian Mental Health Association which has intervened in at least 9 cases before the Supreme Court, often offering a perspective complementary to that offered by disability rights organizations. The Canadian AIDS Society would also fall into this category as many persons with HIV/AIDS do not necessarily consider themselves disabled (Interview, Executive Director of the Canadian AIDS Society, November 14, 2007). Similarly, the organizations for deaf, deafened and hard of hearing in Canada also may not necessarily consider deafness a disability. The Canadian Autism Society also is hesitant about using the word "disability" to describe their membership (Interview, Executive Director of the Autism Society Canada, November 16, 2007)

¹⁹ Aldred H Neufeldt, "Growth and Evolution of Disability Advocacy in Canada", in Deborah Stienstra and Aileen Wight-Felske, eds., *Making Equality: History of Advocacy and Persons with Disabilities in Canada* (Concord, ON: Captus Press, 2003).

²⁰ M. Jones and L. A. Marks Bassar, *Disability, Divers-Ability and Legal Change*, (The Hague: Martinus Nijhoff Publishers, 1999).

²¹ Sandra Fredman, *Discrimination Law*, (Oxford: Oxford University Press, 2002).

thirty years have witnessed a transformation in the paradigm of disability, the universe of disability organizations, in their collective action frames and subsequently in their strategies to influence policy.

In the 1970s there was a growing resistance among persons with disabilities to the use of charity and impairment images of disability and they began to challenge the mandates and fund-raising methods of existing organizations. It was also at this time that rights language began to be used in a more explicit manner within new, emerging organizations founded and led by persons with disabilities.²² It was within these groups, that Canadians with disabilities began to challenge the then dominant view of disability as a medical defect or pathological limitation lying with the individual which they called the medical model of disability.²³ Within this community, activists articulating the rights model of disability, also known as the social model, transformed the political identity associated with being ‘disabled’ from a bio-medical identity focused on an individual’s impairment, to an identity based on the quest for equality within a society that is structurally and culturally biased against persons with disabilities. According to the social model, in order to remedy these biases, members of society, particularly employers and service providers, have a positive duty to make reasonable adjustments to accommodate people with disabilities. Instead of simply requiring conformity to the able-bodied norm, the social model requires some adjustment of that norm to afford genuine equality and accessibility to persons with disabilities.²⁴ This shift can be at least partially explained through social movement diffusion processes: several interviewees traced their own adoption of a rights discourse on disability to their knowledge or participation in other anti-discrimination organizations such as the women’s movement, the trade unionist movement or awareness of the civil rights movement in the U.S.²⁵

Three elements of the shift to the social model can help to explain the organizational emergence and evolution of the disability rights movement and widespread adoption of the use of legal mobilization. The first was the development of a political and citizenship identity associated with disability and the associated understanding of disadvantage as discrimination-based instead of impairment-associated. Several activists commenting on the early period of the moment described the emergence of a rights-consciousness across the community and on a personal level. The impact of the Charter was instrumental:

I think people with disabilities in Canada had to learn more generally that disabled people have rights. [And] that the Charter can have an impact on the quality of life for people with disabilities; that certain kinds of barriers and resistance or rejection can be understood as discriminatory acts that the Charter would prohibit and not only the Charter, but also human rights legislation which regulates private actions. So we had a learning curve of re-understanding our disadvantaged position in society on a rights dimension. Because at one time, as a group, we largely accepted that the fault was in

²² Ibid., p. 24-25.

²³ Interview, Activist, Council of Canadians with Disabilities, November 6, 2007.

²⁴ It is important to note that the reorientation of disability policy from a charity model to a rights based model was a global trend. However, this global trend manifested itself in different ways within national settings. The comparative nature of this thesis explores this dimension but focuses specifically on convergences and divergences of the implications of the social model of disability within the national setting.

²⁵ Interview, Activist, Council of Canadians with Disabilities, November 6, 2007; Interview, Activist, Council of Canadians with Disabilities, October 5, 2007; Interview, Activist, Alliance for the Equality of Blind Canadians, October 30, 2007.

us, that we had to change, rather than social attitudes and institutional structures. So as we moved through time, we had more and more cases going through the Human Rights Commissions and more and more interest in seeing to it that the Charter would protect us.²⁶

I was involved in some women's organizations before I got involved with disability issues. So I do think that those other kinds of rights and equality-seeking movements were very instrumental in encouraging and motivating people with disabilities to put their issues on the table from a disability rights perspective. I have to say that, personally for me, it was a growth experience, while I really understood a feminist approach to issues in various aspects of life; it took me awhile to come up with a disability analysis. That's partly because, my experience was to persevere and overcome and to cope as an individual and not make too much of a fuss about your disability. It took awhile for me to come to terms with [the fact that] it's not just me as an individual but it's also a societal issue and the barriers I'm encountering are not necessarily ones that I personally can solve. So for me it was a growth experience, it really did help. I put the two things together; my feminist experience and disability issues and realized they had many things in common.²⁷

A second component of the interpretive frames associated with the social model of disability is the construction of cross-disability membership frames. The old-guard of impairment specific organizations had little in common when disability was viewed through the lens of the medical model: each impairment would have required different medical or rehabilitative treatments, research or services. With the shift to the social model of disability, however, the focus shifted from curing or treating a myriad of impairments to the shared experience of exclusion. In 're-understanding their disadvantaged position in society on a rights dimension,' persons with all types of disabilities are now able to articulate the exclusion they experience as discrimination.

A third component of the meaning frames of the social model of disability, and stemming from the re-articulation of disadvantage as discrimination, is the shared goal of removing barriers and the associated concept of accommodation. The vision of creating a 'barrier-free society' through the positive duty of accommodation creates an umbrella frame: one that addresses the discrimination faced by persons with different disabilities. The accommodations needed to break down barriers will vary widely: for example the provision of Braille or assistive technology for persons who are blind or visually impaired, access to ASL interpretation for deaf persons, ramps for persons who are wheelchair users are just a few of the many types of accommodations persons with different disabilities might require. The language and vision of a 'barrier-free society' plays a key role in uniting the disability community.

Meaning Frames and the Organizational Context: Organizations 'of' and 'for' persons with disabilities and Strategic Litigation

Interpretive frames also influence, and in turn are influenced by changes in the organizational sphere of a social movement. In the disability community this manifested itself through a split between organizations 'of' persons with disabilities (often referred to as 'consumer'

²⁶ Interview, Activist, Council of Canadians with Disabilities, November 6, 2007.

²⁷ Interview, Activist, Council of Canadians with Disabilities, October 5, 2007.

organizations) which began to distinguish themselves from charities, voluntary and recreational organizations which they coined organizations ‘for’ persons with disabilities.²⁸

In the early 1970s, there were four large disability advocacy organizations in Canada: the Canadian National Institute for the Blind (CNIB), the Canadian Mental Health Association (CMHA), Canadian Association for the Mentally Retarded (CAMR - now known the Canadian Association for Community Living (CACL)) and the Canadian Rehabilitation Council for the Disabled (CRCD). These four organizations developed community services and as the need for services (and hence funding) grew, their ability to effectively advocate for change in public policy on behalf of their members was limited.²⁹ These service or charity organizations all relied to some extent on a paradigm of ‘pity’ and ‘sickness’ to raise money from the public and government.³⁰ They represented, in organizational form, a medical model understanding of disability issues.

By the mid-1970s, there was a growing differentiation between advocacy and service organizations. ‘Consumer’ organizations grew in part because persons with disabilities wanted a voice of their own on the policy stage, instead of being spoken for by rehabilitation or service-oriented organizations.³¹ The first disability self-advocacy organizations emerged in Manitoba, Alberta and Saskatchewan between 1976 and 1978 and subsequently allied with each other.³² This laid the bases for the founding of the Coalition of Provincial Organizations of the Handicapped (COPOH – now called the Council of Canadians with Disabilities (CCD)), which has since become the key national, consumer cross-disability rights organization. CCD lobbied for, and received, government funding instead of relying on charitable contributions, which they felt posed certain ideological problems for the emerging movement. CCD is a membership organization and members must be disability-led: particularly in the early days, the organization was not only competing with, but also downright hostile, to the traditional organizations because of their claim to be the ‘voice of’ the disability community.

In analyzing this paradigm shift in the concept of disability, through the theoretical lens of interpretive frames and its organizational expression we can begin to understand the turn to litigation by the disability rights movement. When the identity associated with the notion of disability is prescribed by the social model of disability, as opposed to the medical model, the expansion of rights becomes the most appropriate public policy tool for addressing the issues persons with disabilities face. By extension, legal mobilization – collective action based on those rights – becomes a more acceptable method of influencing public policy.³³

The shift to the human rights approach and emergence of an increasing number of consumer-led organizations laid the foundation for the adoption of litigation strategies by the movement. It also led to the establishment of a legal centre, the ARCH Disability Law Centre,

²⁸ In Canada, the term ‘consumer’ began (and continues) to be used to distinguish those organizations politically controlled and/or managed by persons with disabilities, from the older advocacy organizations. Interview, Activist, Council of Canadians with Disabilities, November 6, 2007.

²⁹ Neufeldt, "Growth and Evolution of Disability Advocacy in Canada".

³⁰ *Ibid.*, p. 24.

³¹ Deborah Stienstra and Aileen Wight-Felske, *Making equality: history of advocacy and persons with disabilities in Canada*, (Concord, ON: Captus Press, 2003).

³² Interview, Activist, Council of Canadians with Disabilities, November 6, 2007.

³³ This does not mean that lobbying or protest is less appropriate, just that the use of legal mobilization becomes more appropriate than it was before the paradigm shift.

which works to support these organizations in pursuing law reform and test case litigation.³⁴ This section explores in greater detail how the evolving meaning frames manifested themselves in the key movement organizations and will also map the organizational ecology of the disability movement and trace how this has influenced attitudes towards the use of litigation. This includes a presentation of the main national cross-disability organization in Canada, the Council of Canadians with Disabilities (CCD); the development of an organization of feminist women with disabilities, the Disability Women's Network (DaWN); the evolution of the family-based organization the Canadian Association of Community Living (CACL); the brief existence of an organization focused specifically on test case litigation called the Canadian Disability Rights Council (CDRC); and finally a very brief discussion of the role of the ARCH disability law centre, the legal centre that emerged as the thought-centre for the strategic delivery of legal services to the disability community.

Council of Canadians with Disabilities

The Council of Canadians with Disabilities (CCD) was and remains the main consumer-driven cross-disability national organization. CCD brings together both provincial and territorial cross-disability organizations as well as disability-specific national consumer advocacy organizations: all controlled by people with disabilities. CCD places a great deal of emphasis on self-determination for persons with disabilities and a rights approach to equality. Its prime agenda, from its founding, was to pursue changes in public policy to accomplish the inclusion of disabled people in society.³⁵

With CCD's emergence, volunteers with disabilities challenged the legitimacy of doctors and therapists to intervene with government on the citizenship issues of persons with disabilities... Canadian politicians impressed by new disability models advanced by CCD began to realize that room at policy tables had to be made for the disability rights movement.³⁶

The organization's motto, 'a voice of our own,' and the governance structure exemplify the 'nothing about us without us' ideology found in organizations 'of' persons with disabilities around the world. The interpretative frames and ideology, shared among the organization's members, are reflected in the explicit consensus within the organization that the rights model of disability should be infused through all policies and practices related to persons with disabilities.

Framing the mandate and mission of the organization primarily in terms of rights has laid the foundation for the use of strategic litigation to influence disability and equality policy. The use of strategic litigation, through third-party participation as an intervener and as an appellant, has been used by CCD in approximately 25 legal challenges, at all levels of the justice system, beginning in the early 1980s and it has appeared before the SCC 16 times between 1985 and 2007. There is an implicit consensus within the CCD about the use of litigation as an advocacy

³⁴ While ARCH is universally acknowledged as a key player in strategic litigation in the disability community and it has represented or otherwise played a part in supporting all four groups discussed here, an examination of its role is beyond the scope of this paper as it generally becomes involved later in the process of strategy decision-making: that is, once the use of litigation has been decided on in a particular case.

³⁵ Neufeldt, "Growth and Evolution of Disability Advocacy in Canada".

³⁶ Council of Canadians with Disabilities website, accessed October 7, 2007 at <http://www.ccdonline.ca/about-us/index.htm>.

strategy. The Chair of the Human Rights Committee, when asked during an interview whether CCD membership is unanimously supportive of the use of litigation as a strategy, responded: “Yes. I’ve never heard of any disputes about it... We might debate the issues and the arguments and how they should be put forward but never the idea of litigation.” This consensus is interesting and important in the face of an organizational recognition of the many limits of litigation: such as the cost and risk of litigation and the relative unwillingness of governments to implement key victories.

The interpretive frames have also influenced the organization’s relations with other actors in the sphere of disability policy. CCD has increasingly begun to cooperate with other collective actors in the sphere of disability issues on policy issues, awareness-raising and strategic litigation: even those of which it was originally suspicious provided they have adopted what CCD sees as the key tenets of a social model understanding of disability. A CCD activist highlighted the changing division between organizations ‘of’ versus organizations ‘for’ persons with disabilities.

We have that history and we remember it well but I think CCD has become a little more pragmatic and will work with organizations that have the capacity and an interest in promoting disability rights. So we work with CACL. Which is differently formed: it consists of parents, caregivers and educators so it’s not a disability-only organization but they do a similar kind of work so it makes sense to collaborate. I think there is always a healthy... cautiousness of how the two organizations work together because of structure and the different perspective but certainly there is lots and lots of good work done between those two organizations and others that CCD has worked with. But each time you go into some kind of collaboration it is with an eye to making sure that the voice of people with disabilities is strong and listened to. The bottom line is that in early 1980s we were adamant, it didn’t matter what work you did, if you weren’t disability-led and run then forget it – I think we’ve changed quite a bit.³⁷

In the early stages of CCD’s development, the organization’s interpretive frames were still being developed and entrenched across its member organizations: this may explain the strong stance it took in regards to relations with other organizations operating in the sphere of disability policy. The frames strongly dictated which types of organizations could serve as allies and which could not. The evolution in relations between the two organizations is significant. As the interviewee points out, CCD changed, their interpretative frames incorporated elements of pragmatism. However, probably even more important than the adjustment of CCD’s interpretive frames was the fact that CACL also changed in profound ways. CACL was one of the first organizations ‘for’ persons with disabilities to undergo an internal transformation: it too adopted a social model perspective and become focused on equality as a key part of their mandate (discussed below).

DisAbled Women’s Network (DAWN) Canada

While the Council of Canadians with Disabilities is in many ways considered the national voice on disability rights issues, the hegemony of its interpretive frames as representative of the disability community across Canada has not been unchallenged. Within the disability community

³⁷ Interview, Activist, Council of Canadians with Disabilities, October 5, 2007.

there is a great deal of heterogeneity of identities and experiences. Some interviewees found that in the early days of the movement, these diverse identities and associated agendas were less accommodated in the mainstream movement than they are today. For example, one activist commented on her feminist leanings and the sexism she experienced in the disability rights movement:

My first involvement with advocacy and promotion of rights was through the women's movement. Most of the early leaders of the disability rights movement were men: and they were men who, I think at that point, really didn't understand the women's movement or women's issues. They didn't have any kind of connection or affinity with it. And so I found that there was a very strong current of sexism within the movement. Which at times was discouraging, frustrating but as I said I was really pulled by the idea of working with like-minded people to bring about change and I didn't want to let go of that. Fortunately for me, I did meet other women. There weren't that many involved early on, but I was able to meet other like-minded women who shared my frustration and we supported each other in raising feminist issues at the table.³⁸

In the mid-1980s, women with disabilities began organizing to identify and discuss the issues important in their lives as women with disabilities. Another early activist within the feminist disability rights movement echoes the frustration of the activist cited above. However, in contrast to the activist cited above, who chose to work within the existing organization for change, this activist was pushed by her experience of exclusion in both the feminist sphere and the disability community to mobilize on the basis of that experience of exclusion in a different way.

I had learned that most of the political work that I had done before was suddenly not accessible to me. I didn't stop being a feminist and a trade unionist, but I did start using a wheelchair; and my former world had too many stairs, and was suddenly closed to me and beyond my reach. The women's movement didn't really 'get it' about access, and was suddenly also pretty much inaccessible to me. I turned to the disability community to do my political work and, soon after, I realized that the disability community just didn't 'get it' around women's issues. I turned there because I figured that at least it would be accessible. It seemed that these organizations, which were mostly dominated by men weren't interested in doing – or didn't have enough time or money to do – anything about an issue like mothering as a woman with a disability or about the violence in our lives.³⁹

A meeting held in Ottawa in 1985, funded by the federal government and at a founding conference held in 1987, signified the birth of DAWN Canada: the DisAbled Women's Network Canada which is comprised of, and controlled by, women with disabilities. DAWN Canada's mission is to end the poverty, isolation, discrimination and violence experienced by women with disabilities. At the founding meeting, the organization ratified its constitution and by-laws and decided to join the national umbrella organization for provincial disability groups, the CCD, as

³⁸ Interview, Activist, Council of Canadians with Disabilities, October 5, 2007.

³⁹ Joan Meister, "An Early DAWNING (1985-1994)", in Deborah Stienstra and Aileen Wight-Felske, eds., *Making Equality: History of Advocacy and Persons with Disabilities in Canada* (Concord, ON: Captus Press, 2003), p. 227.

well as the National Action Committee (NAC) on the Status of Women.⁴⁰ The organization has ebbed and flowed in its composition, activity and output: it has been highly susceptible on both a national and provincial level to the funding whims of governments and as such experienced a downturn in the late 1990s and early 2000s.⁴¹

DAWN Canada has also participated in the courts through the use of strategic litigation: they have appeared as interveners in at least 12 legal cases, including eleven before the Supreme Court. In all of these cases, DAWN Canada has intervened with the women's Legal Education and Action Fund (LEAF) with whom they are very closely ideologically aligned. In fact, it is often LEAF which has approached DAWN Canada about the opportunity to intervene in cases and offer a disability analysis to questions of gender discrimination.⁴² This alliance has proved important in DAWN Canada's litigation activity as it is generally LEAF which has funded and undertaken most of the legal analysis presented to the Court. This partnership working supplanted the need of DAWN to develop independent resources to pursue a litigation strategy.

In turning to an analysis of the meaning frames of DAWN Canada we can see how both those that are shared with CCD, as well as divergent ones, pull DAWN to the courtroom. In the early days of the disability rights movement, there was much commonality found between the feminist movement and the disability communities in their experiences of exclusion: "the notion of *ability* and *normal* were being strongly criticized by the disability and feminist communities for allowing the dominant culture – white, strong, able-bodied, heterosexual men – to exercise exclusionary practices."⁴³ On this basis, DAWN Canada shares the same values underpinned by the social model of disability which CCD espouses: this is also reflected in the fact that many women in the CCD are DAWN Canada members as well. The interpretive frames defined above; the understanding of disadvantage as discrimination and the importance of rights and their effective enforcement, exert a similar type of influence on DAWN as that exerted on CCD and result in defining the Court as an appropriate venue for the influencing of public policy.

However, not all interpretive frames are shared across the disability rights movement: DAWN Canada largely emerged out of the exclusion some women felt within the mainstream disability rights movement and the organization has subsequently distinguished itself as a feminist organization. This has led to some ideological differences with CCD. In one of the organization's documents re-counting the history (or 'herstory') of the organization, the authors describe the relationship between the two organizations in the following terms:

Working with the Council of Canadians with Disabilities (CCD) has been a challenge in many regards. We have, I think, worked hard together to strengthen our common voice as people with disabilities on the issue of funding to disability groups and other issues related to social policy in Canada such as transportation, etc. We continue to value this process of working together as important in our development as a culture and as a movement. As DAWN Canada, however, we find ourselves at odds with this very patriarchal model of a group which is not used to the feminist process of consensus and coalition building...Discrimination against and ignorance of feminist principles is systemic and I think we must continue to fight where it is necessary.⁴⁴

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Interview, Activist, DAWN Canada, November 16, 2007.

⁴³ Terri Hulett. "WWD: Human Rights and the "Twin-Track Approach" (DAWN Canada, 2006.)

⁴⁴ Joan Meister and Shirley Masunda, "DAWNING Manual" (1998) accessed December 12, 2007 at <http://www.dawncanada.net/ENG/ENGspecial.htm>.

DAWN Canada's meaning frames assign importance to the unique experiences of exclusion that women with disabilities face precisely because of their gender. This ideological division has played out in terms of participation in the courts. A substantive division of labour among the two organizations has been established: the different emphasis in organizational identity plays a role in pushing DAWN to the court in cases of strategic importance to women with disabilities. These value differences within the movement, means that each time CCD goes to court to speak on behalf of persons with disabilities, DAWN Canada will also want to be there to provide a feminist voice on the same issues and similarly when an issue of importance to the women's movement is being considered DAWN strives to bring a disability analysis to bear on an issue of importance to women in general. In sum, it is both shared frames across the disability rights movement, and contested ones within it, that have led to DAWN Canada's intervention activity in the courts.

Canadian Disability Rights Council (CDRC)

While DAWN Canada and the CCD have established an ideological division of labour between them, CCD also participated in a tactical division of labour, during the late 1980s and early 1990s, with an organization called the Canadian Disability Rights Council (CDRC). The CDRC was a national, not-for-profit advocacy organization with the goal of securing disability rights through the use of legal mobilization. It was founded in 1987 and collapsed in 1994.

The CDRC's mandate included: a) promoting the human and civil rights of people with disabilities by sponsoring selective litigation and, in particular, securing the enforcement of the Constitution Act, 1982, including the Charter; b) undertaking and promoting research on the rights of people with disabilities; c) assisting people with disabilities to exercise their rights; developing legal skills and leadership among people with disabilities and providing opportunities for people with disabilities to participate in legal education, research and litigation; d) educating people with disabilities, the legal profession and the public about the rights of people with disabilities.⁴⁵ The CDRC was created because it was decided that a new national organization should be formed with resources and expertise dedicated solely to a strategic litigation. In one of its documents the reasons behind the founding were laid out:

The CDRC has been created because of the immediate and pressing need for a national organization which is specifically dedicated to representing the interests of disabled persons in key legal cases. It was observed that in the absence of such an organization disabled persons in all parts of Canada would not have an effective means of exercising their Charter rights, nor would the Canadian courts have the assistance of disabled people in interpreting the provisions of the Charter which directly affect their lives. In addition, the representatives at the founding meeting expressed the conviction that this is a crucial time in the development of the law for disabled persons.⁴⁶

⁴⁵ Canadian Disability Rights Council, Annual Report 1993-1994.

⁴⁶ Affidavit of Henry Vlug, Board Member of the Canadian Disability Rights Council in *R. v. Swain*, [1991] 1 S.C.R. 933.

During its existence, the CDRC focused on strategic litigation, while the CCD turned its attention exclusively to lobbying and related activities. Understanding the relations between the two organizations can also explain the litigation propensity of the CCD over time: the division of labour by strategy is crucial in understanding why CCD (then COPOH) was relatively inactive for a period of time when it came to strategic litigation activity. Because the CDRC existed to perform the task of legally mobilizing in pursuit of disability rights, the CCD could focus on its lobby activity instead. The CDRC underwent an early demise in 1994 due to internal divisions and a subsequent loss of confidence on the part of funders.⁴⁷ After the CDRC's demise, the CCD took on the organization's work and mandate (without the funding) and began participating in strategic litigation again.

Canadian Association for Community Living (CACL)

The Canadian Association for Community Living (CACL), formerly known as the Canadian Association for the Mentally Retarded (CAMR), is a family-based, community living organization advocating for the rights of persons with intellectual and developmental disabilities and against segregation of persons with disabilities. CACL differs from the other organizations discussed here in that it is a family-organization and was founded by parents in 1958. In 1979, a Consumer (also known as 'self-advocate') Advisory Committee, made up of persons with disabilities, was formed in order to advise the organization's president and board. CACL has changed dramatically over the last twenty-five years: in both its internal identity and activities and in its relations with other key organizational actors in the sphere of disability advocacy.

In terms of its use of strategic litigation, CACL has intervened in or supported interveners in 9 cases before the Supreme Court. The organization's involvement in one particular case and its impact on the movement will be focused on here: at the heart of the organization's transformation was a group of self-advocates who made up the consumer advisory committee whose participation in an important legal case, *E (Mrs.) v Eve*, which addressed the wish of a mother to sterilize her intellectually disabled daughter, had a profound and lasting impact on the community living movement.

When the *Eve* case came to light, the board of CACL (then CAMR) considered whether it should apply for leave to intervene before the Supreme Court. The board, made up of parents and professionals, was sharply divided on the issues. At that time, being an organization primarily composed of parents, the case placed them in a difficult situation of considering whether to go against the wishes of a parent.⁴⁸ However, the emerging rights model of disability began to influence the thinking within the organization.

It was the time of the Charter. So the rights framework was really beginning to take hold and was the subject of much debate. And certainly the association was totally behind the Charter and did really impressive work to get mental disability as a prohibited ground in section 15. But when it came to the *Eve* case, [the organization] couldn't reach a real consensus on whether to proceed.⁴⁹

⁴⁷ Interview, Activist, Council of Canadians with Disabilities, November 6, 2007.

⁴⁸ Interview, Former Counsel, Canadian Association of Community Living, November 7, 2007.

⁴⁹ Interview, Executive Vice-President, Canadian Association of Community Living, November 12, 2007.

In the face of indecision by the board, the Consumer Advisory Committee developed a strong rights-protection perspective on what should be argued in *Eve*: at a meeting of the CAMR board of directors in 1981 the chairperson of the Consumer Advisory Committee, Barbara Goode, presented a motion, which was unanimously approved, to gain funding required to enable the self-advocates to represent the interests of citizens with intellectual disabilities as interveners in the case.⁵⁰ The committee retained counsel and applied for leave to intervene on their own behalf. This participation by the consumers and their overriding victor in the SCC had a profound effect on the organization:

CAMR supported the consumer advocacy committee to be the intervener and I think that was a really important moment for the organization. One, to recognize that people with intellectual disabilities themselves had a clear voice and that voice should be supported right up to the Supreme Court of Canada. And also the idea, that this isn't just about an organization it's about a movement and there's a difference and ultimately for the movement this was an important case and if this organization couldn't take the lead it could support another group to do that.⁵¹

The *Eve* case is important because of the effects on the organization itself and the broader movement. First, at the same time that the consumers were developing their case in *Eve*, they also began pushing the local, provincial and national associations to change the name: the consumers found the name 'Association for the Mentally Retarded' offensive and wanted the organization to adopt a 'non-labelling' name, the 'Association for Community Living.' This was resisted within the organization, but as the result of a group of consumers and their allies walking out of the Annual General Meeting in 1985, combined with the victory in *Eve*, the name was changed in 1986.⁵² The adoption of a new name was more than just a superficial change: the ideology of the organization began to change as well. One activist describing the case highlights this change: "the win [in Court] probably helped the new board, especially after the name change, to start looking at themselves differently and to start listening to self-advocates."⁵³ Second, there was a broader impact as well: new legal battles and new groups emerged out of participation in the case. One of the members of the *Eve* committee went on to be a leader in a legal battle in Alberta, on behalf of persons who had been sterilized against their will in an institution called the Michener Centre. Also, a group of self-advocates involved in the intervention went on to found a consumer-centred organization called People First made up of 'people who have been labelled intellectually disabled.'⁵⁴ The goals of People First are to: promote equality, speak on behalf of persons who have been labelled and teach the community about the movement.

Understanding the transformation of the Canadian Association of the Mentally Retarded (CAMR) to the Canadian Association of Community Living (CACL) in terms of evolving interpretive frames can help to explain why the organization is now able to build bridges with others in the disability rights movement such as CCD and also account for the organization's use

⁵⁰ Affidavit of Paule Mercure, President of the Canadian Association for the Mentally Retarded (CAMR) in *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388.

⁵¹ Interview, Executive Vice-President, Canadian Association of Community Living, November 12, 2007.

⁵² *Ibid.*,

⁵³ Interview, Former Counsel, Canadian Association of Community Living, November 16, 2007.

⁵⁴ Park, Monteiro and Kappel, "People First: the History and the Dream".

of strategic litigation. There also seems to be an implicit consensus within the organization regarding the use of strategic litigation. When the organization's former in-house counsel was asked about whether there was any criticism within the organization about the use of litigation, he responded: "I was more likely to hear people say 'why aren't we pursuing this case?' I frequently found myself in a defensive position about why the organization wasn't litigating."⁵⁵

The *Eve* case led to a change in interpretive frames in the organization. Before the case and the beginnings of People First, the organization's board was made up of parents and professionals and there was little room for influence by those persons on whose behalf the organization was advocating. After the case, the voice of the self-advocates began to have greater importance. The court victory bolstered the legitimacy of this voice within the organization. This changing dynamic led to an ideology shift within the organization with the wholehearted adoption of the tenets of a rights model of disability. As discussed above, this has had certain implications for the use of strategic litigation and the organization has cooperated closely with other disability rights organizations in a number of key cases before the Supreme Court.

Conclusion

In de-constructing the shift from the medical model of disability to the social model of disability, we begin to see that various ideational components of the latter have played a crucial role in establishing the legitimacy of the use of strategic litigation by collective actors within the disability rights movement. The re-understanding of disadvantage as discrimination; a heightened rights-consciousness across the community and the shared vision of a barrier-free society on a cross-disability basis, play an important part in explaining why organizations adopting the social model framework have largely developed an implicit consensus on the use of legal mobilization. By framing the common problem and experience as one of discrimination, the establishment of equality rights becomes the most appropriate method of addressing the issue. By extension, enforcing, clarifying and expanding those rights becomes a major policy agenda for organizations claiming to adhere to the social model.

The findings here also demonstrate that collective actors do not operate within political and legal opportunity structures in isolation: they are presented with opportunities for competition, conflict and cooperation with other actors in a multi-organizational field. These opportunities can be ephemeral or enduring. As this paper shows, a division of labour may emerge within the movement which can help to explain both the litigation propensity of particular organizations and its variation over time. The division of labour can be substantive, such as that which exists between the Council of Canadians with Disabilities and DAWN Canada. This type of division of labour will influence the issues and cases in which groups will want to become involved through strategic litigation. Or the division of labour could be a tactical one, such as that which existed in the late 1980s and early 1990s between the Council of Canadians with Disabilities and the Canadian Disability Rights Council, with the former focusing on lobbying and other advocacy activity and the latter focusing on legal mobilization. This survey of organizations across a movement demonstrates that caution should be exercised when making claims regarding the legal mobilization activity of a social movement based on single-organization studies.

⁵⁵ Interview, Former Counsel, Canadian Association of Community Living, November 7, 2007.

Table 1 Key Disability Rights Organizations Intervening in the Supreme Court of Canada, 1985-2007

Key disability rights organizations intervening in the Supreme Court		
Case Name	Year	Disability Rights Interveners
<i>Ont. Human Rights Comm. v. Simpsons-Sears</i>	1985	CAMR/CACL COPOH/CCD
<i>Bhinder v. CN</i>	1985	CAMR/CACL COPOH/CCD
<i>E. (Mrs.) v. Eve</i>	1986	Consumer Advisory Committee of the CAMR/CACL
<i>Andrews v. Law Society of British Columbia</i>	1989	COPOH/CCD
<i>R. v. Swain</i>	1991	CDRC CACL
<i>Canadian Council of Churches v. Canada (Minister of Employment and Immigration)</i>	1992	COPOH/CCD CDRC
<i>Weatherall v. Canada (Attorney General)</i>	1993	COPOH/CCD
<i>Rodriguez v. British Columbia (Attorney General)</i>	1993	COPOH/CCD
<i>A. (L.L.) v. B. (A.)</i>	1995	DAWN
<i>R. v. O'Connor</i>	1995	DAWN
<i>Battlefords and District Co-operative Ltd. v. Gibbs</i>	1996	CCD
<i>Eaton v. Brant County Board of Education</i>	1997	CCD CACL
<i>Eldridge v. British Columbia (Attorney General)</i>	1997	DAWN CCD
<i>British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)</i>	1999	CCD
<i>British Columbia (Public Service Employee Relations Commission) v. BCGSEU</i>	1999	DAWN
<i>R. v. Ewanchuk</i>	1999	DAWN
<i>New Brunswick (Minister of Health and Community Services) v. G. (J.)</i>	1999	DAWN
<i>R. v. Darrach</i>	2000	DAWN
<i>Lovelace v. Ontario</i>	2000	CCD
<i>Granovsky v. Canada (Minister of Employment and Immigration)</i>	2000	CCD

Case Name	Year	Interveners
<i>R. v. Latimer</i>	2001	CCD CACL DAWN
<i>Auton (Guardian ad litem of) v. British Columbia (Attorney General)</i>	2004	CCD CACL DAWN
<i>Newfoundland (Treasury Board) v. N.A.P.E.,</i>	2004	CCD
<i>Blackwater v. Plint</i>	2005	DAWN
<i>Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)</i>	2005	CACL
<i>Nova Scotia (Minister of Health) v. J.J.</i>	2005	CACL
<i>Council of Canadians with Disabilities v. Via Rail Canada Inc.</i>	2007	CCD (as appellant) CACL DAWN
