COMPETING RIGHTS IN CLAIMS INVOLVING THE RIGHTS OF PERSONS WITH DISABILITIES

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ABSTRACT

This paper briefly describes some aspects of competing rights claims and responses in the context of disability rights. Such a specific examination may help ground more general approaches to a framework for addressing competing rights claims, as well as reveal how tensions between rights claims may manifest differently in particular contexts

I. INTRODUCTION

The principle that human rights are indivisible and non-hierarchical is widely accepted; nevertheless, it is not uncommon to find situations where rights claims are, or are perceived to be, in tension with each other. Where tensions are most acute, it may appear that one rights claim can only be fulfilled by abridging or denying another. In this sense, rights claims may be seen to compete with each other. This raises extremely complex issues.

It is helpful to consider competing rights claims in the specific context of particular types of rights, such as disability rights, for two reasons. The first is that such a specific analysis may help to ground any approach to developing a framework to address competing rights claims. The second is that the challenges of competing rights may manifest differently in particular contexts, and that these varying manifestations may be an element in designing such a framework.

The approach of this paper is descriptive rather than prescriptive. It is not intended to evaluate any particular approach to addressing competing rights claims, but to highlight some aspects of disability rights that may differentiate competing rights claims in this area from those in other areas, to identify the types of competing rights claims that may manifest in the context of disability rights, and to briefly identify some responses that have been made to such competing claims in this context.

II. SOME PRELIMINARY CONSIDERATIONS REGARDING DISABILITY RIGHTS

As a preliminary step, it is useful to clarify what is meant by the term "disability rights". The breadth or narrowness of one's approach to the concepts of "disability" and "rights" may determine whether a particular situation is considered to raise an issue of competing rights at all. That is, there is not necessarily agreement on which situations may be considered as raising competing rights claims: as some of the examples below demonstrate, in some cases, a particular issue may be seen as one of competing rights by some and not by others.

Defining what is included in the scope of "disability rights" raises a host of complex issues beyond the scope of this brief analysis. There is by no means general agreement on what is meant by the term "disability", and depending on whether one adopts a bio-medical, functional, social or human rights approach in a specific context, particular impairments or barriers will or will

not be considered to fall within the scope of the term "disability".

Similarly, in considering "human rights" claims, it is important to note that the scope of "human rights" covered by domestic human rights instruments such as the Ontario *Human Rights Code* is considerably narrower than the scope of "human rights" embraced in international human rights instruments such as the United Nations *Declaration of Human Rights* and the new *Convention on the Rights of Persons with Disabilities.* While certain apparent competing rights claims may be resolved by restricting the scope of "human rights" to those that are protected in domestic human rights instruments, there are risks and limitations to this approach.

As a further preliminary step in considering competing rights claims in the context of disability-related rights, it is helpful to consider the specific nature of disability rights. Central to disability rights is the challenge of according rights and respect to *difference*. As the Supreme Court of Canada pointed out in *Eaton v. Brant County Board of Education,* while most equality rights law and jurisprudence focuses on elimination of discrimination resulting from the attribution of untrue characteristics based on stereotypical attitudes, a key element of the approach to disability rights is to take into account and accommodate the true characteristics of persons with disabilities. One emerging response to the concept of disability is the "universalism model", which aims to "establish a view of ourselves as individuals who exist at an infinite number of points on an infinite number of continua of ability levels" (Surtees: "What Elder Law Can Learn from Disability Law", *Theories of Law and Aging*, 2009), so that, rather than using difference to reinforce separation, we recognize that we are united in our variation. That is, the "difference" that is associated with disability does not separate persons with disabilities from others, but rather is simply part of the universal human experience. In this model, persons with disabilities cease to be viewed as a minority group, and become part of a broader imperative for inclusiveness and flexibility in the design of social norms, institutions and structures.

III. IDENTIFYING TYPES OF COMPETING RIGHTS CLAIMS IN THE CONTEXT OF DISABILITY RIGHTS

In the context of the rights of persons with disabilities, tensions or competition between rights claims arise in a variety of ways. Three commonly identified sources of competing rights are accommodation of disability-related needs, competing accommodation needs, and competition between different types of rights. These different types of tensions tend to evoke different responses.

1. ACCOMMODATION OF DISABILITY-RELATED NEEDS AS A SOURCE OF COMPETING RIGHTS

One commonly expressed tension in the area of disability rights is the notion that accommodations for persons with disabilities infringe on the rights of other persons. For example, in the context of rental housing, a person with environmental sensitivities may need other tenants in the same building to refrain from using certain materials or chemicals in the renovation or upkeep of their premises, thereby affecting the ability of those tenants to use their own spaces as they see fit.

Whether these tensions are considered as issues of competing rights depends, as noted at the outset of this paper, on what we characterize as "rights". These effects are not infrequently perceived as impinging on "rights" by the persons affected, or by the general public. However, these types of tensions have not been generally characterized as involving competing rights, as the persons affected are not claiming legally enforceable human rights under domestic human rights instruments. The legal mechanism available for addressing these tensions is the limitation placed on the extent of accommodations in the form of the "undue hardship standard" incorporated into Canada's domestic human rights instruments.

More general, non-legal responses to expressed concerns about the impact of disability-related accommodations on others are based on the fundamental tenets of disability rights. A disability rights approach seeks to undermine the assumptions about the contributions of persons with disabilities in the workplace or in any other context, and to shift the norm to a more inclusive and respectful approach to persons with disabilities. The universalist model seeks to reframe the emphasis from accommodation of individual difference, to the design of environments that minimize the effects of human variation.

2. COMPETITION BETWEEN THE ACCOMMODATION NEEDS OF TWO PERSONS WITH DISABILITIES

More difficult issues of competing rights arise where two persons with disabilities have different and conflicting accommodation needs. For example, one student in a classroom may have a sensory disability and use a service animal, while another student may have severe allergies that make it impossible to be present in the room with the service animal. These types of conflicts are perhaps unique to disability rights, given the infinitely variable nature of disability-related needs and

accommodations. The peculiar difficulty of such scenarios is that the rights are of the same nature and legal status, and are based on the same principles.

The most obvious response to such scenarios is a procedural one, requiring the accommodation provider to explore all possible options for at least minimally respecting the rights of both persons with disabilities. For example, could one of the students be transferred to another class without unduly affecting his or her education? Are there alternative ways of supporting the person with a sensory disability in the classroom without the service animal, such as by the provision of a dedicated human assistant during class hours?

This type of procedural response places significant responsibilities on the accommodation provider, who is required to respond with creativity and flexibility to balance the competing needs of the parties. It may also require compromise and flexibility from the accommodation seekers themselves. However, this notion of dialogue and flexibility is inherent in the notion of accommodation itself. As the Supreme Court stated in *Central Okanagan School District No. 23 v. Renaud*, "The search for accommodation is a multi-party inquiry" and all parties involved must work together to identify and implement appropriate accommodation.

3. COMPETITION BETWEEN DIFFERENT TYPES OF RIGHTS

The third type of tension involves competition between different types of rights, and may not involve accommodation of disability-related needs at all.

A recent example involved labour action to resolve long-standing wage issues in the developmental services sector. In several instances, picket lines were set up in front of group homes of persons with developmental disabilities, in some cases resulting in considerable disruption, and in fear, disorientation and humiliation for many residents. Arguably, the residents of the group home had their "right to quiet possession" of their own homes disrupted by the exercise of labour rights by the workers.

Such conflicts do not fall neatly within a human rights framework. Assuming that one could bring the situation of the residents of the group home within the ambit of the provisions of the *Code*, one might employ the primacy provisions in section 47(2) of the *Code* to assert the primacy of the rights of persons with disabilities over the labour rights of the workers. Such an approach may resolve the conflict within the relatively narrow confines of the *Code*, but does not address the broader social context in which there is a perceived competition between these kinds of rights. It also has implications for broader notions of the indivisibility of rights and of the status of socio-economic rights.

In balancing such competing rights claims, one must consider, not only the nature of the particular rights at stake for either party, but the historical marginalization and oppression of persons with disabilities. Given the history of subordinating the needs of persons with disabilities to those of others, one must be particularly careful, where the rights of persons with disabilities compete with those of others, to ensure that the rights of persons with disabilities have been given at least equal consideration with those of others, and that the broader context of discrimination and exclusion of persons with disabilities has been taken into account. That is, there is a principle of fairness and equality at stake in considering these competing rights claims.

IV. CONCLUSION

It is clear from this brief description that the ways in which a particular set of competing claims will be dealt with in the disability rights context will depend very much on the nature of the particular claims at issue. There has been no single approach to balancing competing rights in the context of disability. It is also clear that, in attempting to balance or reconcile such claims, one must recognize the particular nature of disability rights, including the history and context of marginalization and exclusion of persons with disabilities.