**Windsor Yearbook of Access to Justice**
**Recueil annuel de Windsor d'accès à la justice**

# The Influence of the Convention on the Rights of Persons with Disabilities on Canadian Jurisprudence in the First Decade Since its Ratification

Jessica De Marinis, Kerri Joffe and Rachel Weiner

Volume 38, 2022

URI: https://id.erudit.org/iderudit/1095287ar
DOI: https://doi.org/10.22329/wyaj.v38.7781

See table of contents

Publisher(s)

Faculty of Law, University of Windsor

ISSN

2561-5017 (digital)

Explore this journal

Cite this article

De Marinis, J., Joffe, K. & Weiner, R. (2022). The Influence of the Convention on the Rights of Persons with Disabilities on Canadian Jurisprudence in the First Decade Since its Ratification. *Windsor Yearbook of Access to Justice / Recueil annuel de Windsor d'accès à la justice*, *38*, 192–209. https://doi.org/10.22329/wyaj.v38.7781

Article abstract

Canada's ratification of the United Nations Convention on the Rights of Persons with Disabilities [CRPD]in 2010 was met with hope and excitement that it would lead to much-needed improvements in equality, inclusion and accessibility for persons with disabilities in Canada. This paper explores the impact the CRPD has had on Canadian jurisprudence in the decade since Canada ratified the treaty. Our analysis of the jurisprudence indicates that Canadian courts and tribunals have employed a variety of approaches to the CRPD, for which we provide illustrative examples. Overall, the CRPD has impacted the reasoning or outcome in a small number of cases, but has not exerted great influence in Canadian jurisprudence to date. Despite this limited impact, a number of emerging factors suggest that the CRPD may well become more influential in Canadian jurisprudence in the future.

# The Influence of the *Convention on the Rights of Persons with Disabilities* on Canadian Jurisprudence in the First Decade Since its Ratification

**Jessica De Marinis**
**Kerri Joffe**
**Rachel Weiner***

*Canada's ratification of the United Nations* Convention on the Rights of Persons with Disabilities [CRPD] *in 2010 was met with hope and excitement that it would lead to much-needed improvements in equality, inclusion and accessibility for persons with disabilities in Canada. This paper explores the impact the* CRPD *has had on Canadian jurisprudence in the decade since Canada ratified the treaty. Our analysis of the jurisprudence indicates that Canadian courts and tribunals have employed a variety of approaches to the* CRPD, *for which we provide illustrative examples. Overall, the* CRPD *has impacted the reasoning or outcome in a small number of cases, but has not exerted great influence in Canadian jurisprudence to date. Despite this limited impact, a number of emerging factors suggest that the* CRPD *may well become more influential in Canadian jurisprudence in the future.*

*La ratification par le Canada de la Convention relative aux droits des personnes handicapées [CRDPH] des Nations Unies en 2010 a été accueillie avec joie, d'aucuns nourrissant l'espoir qu'elle mène à des améliorations plus que nécessaires en matière d'égalité, d'inclusion et d'accessibilité pour les personnes handicapées au Canada. Cet article traite des répercussions qu'a eues la CRDPH sur la jurisprudence canadienne au cours de la décennie qui a suivi la ratification de cette convention par le Canada. Selon notre analyse de la jurisprudence, les tribunaux judiciaires et administratifs du Canada ont adopté différentes approches, dont nous donnons des exemples, à l'égard de la CRDPH. Dans l'ensemble, la CRDPH a eu des incidences sur le raisonnement suivi ou le résultat obtenu dans quelques affaires, mais son influence sur la jurisprudence canadienne a été minime jusqu'à maintenant. Cependant, certains facteurs émergents donnent à penser que cette influence pourrait bien grandir avec le temps.*

## I. INTRODUCTION

The *Convention on the Rights of Persons with Disabilities* [*CRPD*] entered into force in 2007 and brought with it great aspirations for inclusion and respect for the human rights of persons with disabilities.[1] Canadian disability communities participated extensively in the development and negotiation of the *CRPD.* Canada's ratification of the *CRPD* in 2010 was accompanied by hope and excitement that the *CRPD* would lead to real improvements in equality, inclusion, and accessibility for persons with disabilities in Canada.

---

* At the time of writing, all three authors were staff lawyers at ARCH Disability Law Centre, a specialty legal clinic that practises exclusively in disability rights law. We gratefully acknowledge research assistance from Nick Hill, Cynthia Larue, Emily Mau, Victoria Peter, and Jessica Scifo.

1 *Convention on the Rights of Persons with Disabilities*, 6 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) [*CRPD*].

Canadian jurisprudence has recognized the long history of exclusion and marginalization experienced by persons with disabilities in Canada. In the 1997 seminal decision *Eldridge v British Columbia*, the Supreme Court of Canada observed that

> [i]t is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; … This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms.[2]

Canada's ratification of the *CRPD* was an important counterpoint to this long history of exclusion. The *CRPD* elaborates universal human rights and freedoms in the context of disability. It provides for civil, political, economic, social, and cultural rights for persons with disabilities and establishes obligations that states must meet in order to ensure the full and equal enjoyment of these rights.

The purpose of this article is to explore the impact that the *CRPD* has had on Canadian jurisprudence in the decade since Canada ratified the treaty. Our research and analysis of the jurisprudence indicates that Canadian courts and tribunals have employed a variety of approaches to the *CRPD*. Overall, the *CRPD* has impacted the reasoning or outcome in a small number of cases but has not exerted great influence in Canadian jurisprudence to date. Despite this limited impact, our analysis suggests that going forward the *CRPD* has the potential to become more influential, due to greater uptake of the *CRPD* in domestic legislation, a greater number of litigants raising *CRPD* arguments before domestic courts and tribunals, and legal developments regarding the role of international law claims in domestic courts. We begin this article with a brief discussion of the legal status of the *CRPD* in Canadian law. We then describe the method we used to conduct our research, followed by a summary of our research findings.

## II. LEGAL STATUS OF THE *CRPD* IN CANADIAN LAW

Canada ratified the *CRPD* on 11 March 2010 with a reservation to Article 12 and an interpretive declaration to Article 33(2).[3] Canada's decision to ratify the *CRPD* was made after consultations with provincial and territorial governments, Indigenous governments, and the Canadian public, including persons with disabilities.[4] Canada ratified the *CRPD* with the agreement of all provinces and territories

---

2 *Eldridge v British Columbia,* [1997] 3 SCR 624 at para 56.

3 *CRPD*, *supra* note 1 at 3. Canada's reservation reads: "To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal. Canada's interpretive declaration stated that the obligation on States to create a framework for monitoring the implementation of the CRPD should be interpreted as accommodating the situation of federal states where implementation occurs at more than one level of government and through other existing mechanisms."

4 Government of Canada, *Rights of People with Disabilities* (accessed 1 June 2022), online: <www.canada.ca/en/canadian-heritage/services/rights-people-disabilities.html>.

and with the understanding that its implementation would be the responsibility of both Parliament and provincial legislatures.[5]

The use of international instruments to interpret domestic legislation and the content of the *Canadian Charter of Rights and Freedoms* is generally accepted in Canadian law.[6] However, this approach is informed by the particular international treaty and its context. Generally, Canada takes a dualist approach to the reception of international law: customary international law is automatically received into Canadian law, while international treaties signed by the executive must be incorporated into Canadian law by the legislature in order to have legal effect in Canada.[7] An international treaty can be incorporated by federal, provincial, or territorial legislation that includes all or part of the treaty in Canadian domestic law. In this way, legislative decisions can determine how an international treaty should be interpreted in Canada, which level of government has responsibility for its implementation, and to what extent it becomes part of Canadian law.[8]

To date, Canada has not passed domestic legislation that wholly incorporates the *CRPD* into Canadian domestic law. However, the *CRPD* is referenced in the preambles of a number of federal, provincial, and territorial statutes.[9] In some legislation, particular aspects of the *CRPD* are noted in the preamble – for example, the preamble to the *Accessible Canada Act* refers generally to Canada being a state party to the *CRPD* and also recognizes the specific *CRPD* obligation to develop and monitor minimum accessibility standards.[10] While the *Accessible Canada Act* does not explicitly implement any particular article of the *CRPD*, its references to minimum accessibility standards flow from Article 9 of the treaty and therefore can be said, arguably, to be incorporating that article into Canadian federal law.

Even where an international treaty has not been incorporated into Canadian law, the interpretation of the *Charter* and domestic legislation by courts and tribunals also provides an opportunity for international treaties to have domestic legal effect.[11] Ruth Sullivan explains the principle that international treaties may inform the interpretation of federal, provincial, and territorial legislation.[12] Generally, courts will prefer an interpretation of domestic law that allows Canada to comply with its international obligations to one that does not.[13] Similarly, courts and tribunals may draw upon the values and principles within international treaties that Canada has ratified in order to inform the legal context for interpretation of domestic legislation.[14] Some courts require that a legislative ambiguity exist, or that the legislation explicitly state its purpose of implementing an international treaty, in order to apply that treaty to interpret Canadian law.[15] However, Sullivan asserts that it may not be necessary for the legislation at issue to be explicitly identified as implementing legislation or to be ambiguous in order for a court to turn to an

---

5 Explanatory Memorandum on the United Nations *Convention on the Rights of Persons with Disabilities*, Sessional Paper No 8532-402-57 (13 December 2006) [Explanatory Memorandum] (tabled before Parliament on 3 December 2008).

6 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

7 Gib van Ert, "Dubious Dualism: The Reception of International Law in Canada" (2010) 44:3 Valparaiso U L Rev 927 at 928, 931; *R v Hape*, 2007 SCC 26 at paras 53–56 [*Hape*].

8 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ontario: LexisNexis, 2014) at 585.

9 See e.g. *World Autism Day Awareness Act*, SC 2012, c21; *Accessible British Columbia Act*, SBC 2021, c 19; *Accessibility for Manitobans Act*, SM 2013, c 40; *Accessible Canada Act*, SC 2019, c 10; *Budget Implementation Act 2019 No. 1*, SC 2019, c 29; *Prohibiting Cluster Munitions Act*, SC 2014, c 27.

10 *Accessible Canada Act, supra* note 9, preamble.

11 Van Ert, *supra* note 7 at 928, 931; Sullivan, *supra* note 8 at 567–568; *R v Myette*, 2013 ABCA 371 at para 34.

12 Sullivan, *supra* note 8 at 567–568.

13 *Ibid* at 569.

14 *Ibid* at 569.

15 *Nova Scotia (Community Services) v VAH*, 2019 NSCA 72 at para 17 [*VAH*].

international treaty for guidance in interpreting the legislation.[16] These principles of statutory interpretation recognize the legislature's intent to comply with Canada's international legal obligations and to conform to the rule of law.[17]

In the 2020 decision *Quebec (Attorney General) v 9147-0732 Québec*, the Supreme Court of Canada affirmed that the presumption of conformity applies in the context of interpretation of *Charter* rights.[18] The presumption of conformity states that, where possible, courts will interpret domestic legislation in a manner that conforms to Canada's binding international obligations.[19] In particular, the Supreme Court of Canada reaffirmed Chief Justice Brian Dickson's reasons in *Reference re Public Service Employee Relations Act (Alta)* that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[20] In *9147-0732 Québec*, the majority of the Court emphasized that the *Charter* is "primarily interpreted with regards to Canadian law and history."[21] That said, international law may play the role of " providing support or confirmation for the result reached by way of purposive interpretation."[22] The scope of this role depends on when the treaty was developed and whether it has been ratified by Canada.[23] The majority set out a hierarchy of sources for interpreting the *Charter*, instructing lower courts and tribunals to consider domestic law first, followed by binding and then non-binding international law instruments.[24] For example, the presumption of conformity described above applies only to treaties that Canada has ratified, unless that treaty existed prior to the enactment of the *Charter*.[25] Furthermore, judges should be cautious in explaining how they use non-binding instruments as they may be persuasive but not determinative.[26]

Following the approach articulated by the majority of the Supreme Court in *9147-0732 Québec*, as a ratified treaty, the *CRPD* can continue to be used by Canadian courts and tribunals as a legitimate source of law to support or confirm a purposive interpretation of the *Charter*. Before Canada ratified the *CRPD*, a Canadian government memorandum set out that the *CRPD* would not be domestic law but could have an interpretative influence, including in human rights cases before Canadian courts.[27] Canada takes the position that equality and non-discrimination obligations in the *CRPD* are respected through compliance

---

16 Sullivan, *supra* note 9 at 575–576, 579–580.

17 *Ibid* at 569.

18 *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 [*9147-0732 Québec*].

19 *Ibid* at para 30; *Hape*, *supra* note 7 at para 53.

20 *9147-0732 Québec, supra* note 18 at para 31 [emphasis added], citing *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 349.

21 *9147-0732 Québec*, *supra* note 18 at para 20.

22 *Ibid* at para 22.

23 *Ibid* at para 41.

24 *Ibid* at para 37.

25 *Ibid* at para 31–23, 34. However, the presumption of conformity may apply to international instruments that pre-dated the *Charter*, even if they are not binding on Canada, since they formed part of the historical context within which the *Charter* was drafted (at para 41).

26 *Ibid* at paras 35, 38. *9147-0732 Québec* may be a retreat from a more expansive and open-ended use of international law to inform *Charter* interpretation by the Supreme Court of Canada, exemplified by the concurring decision, authored by Justice Rosalie Abella (at paras 99–100). That said, this new approach may not significantly change the manner in which courts and tribunals rely upon international treaties that have been ratified, such as the *CRPD*. The application of the majority's new framework to the facts at bar led to the same outcome as Abella J's concurrence. The Supreme Court of Canada's new approach to international law instruments may not change the result in cases where domestic sources, as well as binding and non-binding international law instruments, all support the same outcome (at para 107). The Supreme Court of Canada's new hierarchy may matter more when different sources support different outcomes.

27 Explanatory Memorandum, *supra* note 5.

with the *Charter*, the *Canadian Human Rights Act*, and provincial and territorial human rights legislation.[28] This position further supports the use of the *CRPD* in the interpretation and application of the *Charter* and of human rights legislation in Canada.

The 2022 decision *Toussaint v Canada (Attorey General)* suggests additional ways in which international law may have effect in Canada. [29] In *Toussaint*, one of the issues before the Ontario Superior Court dealt with Canada's decision to dismiss findings from the United Nations (UN) Human Rights Committee that Canada had violated Ms. Toussaint's rights under the *International Covenant on Civil and Political Rights*[30]. Canada also refused to implement the remedies recommended by the UN Human Rights Committee. The Ontario Court found that the government's decision may be subject to judicial review in a domestic court in Canada.[31] With respect to the relevance of international law in Canada, Justice Perell stated that

> *Pacta sunt servanda,* the principle that all treaties are binding and must be performed in good faith is a principle of *jus cogens* and as a central unifying principle of the international legal system. The *pacta sunt servanda principle* requires that "parties to a treaty must keep their sides of the bargain and perform their obligations in good faith". The purpose of modern international human rights law is to identify and remedy breaches of internationally accepted norms in a global war on human rights' abuses. Canadian courts have an important role to play and have a responsibility to participate and to contribute to the ongoing development of international law.[32]

At the time of writing, the *Toussaint* case is still working its way through the courts, however its outcome may clarify the extent to which customary international law and findings of competent international human rights committees are justiciable in Canadian domestic courts.

Canada acceded to the *Optional Protocol* to the *CRPD* on 3 December 2018.[33] Accession to the *CRPD*'s *Optional Protocol* provides mechanisms for people in Canada to complain to the UN Committee on the Rights of Persons with Disabilities (UN Committee) about an alleged violation of *CRPD* rights by Canada and to request that the Committee conduct an inquiry into alleged grave or systematic *CRPD* violations.[34] Both mechanisms under the *Optional Protocol* require complainants to meet certain eligibility criteria before the UN Committee will address the complaint or launch an inquiry.[35] Canada's accession to the *CRPD Optional Protocol* further supports the importance of the *CRPD* to Canadian domestic law since Canada has agreed to be accountable to the UN regarding its non-compliance with the *CRPD*. It places further importance on the principle of statutory interpretation, discussed earlier – that is, that the interpretations of Canadian law that allow Canada to comply with its international obligations are

---

28 *Canadian Human Rights Act*, RSC 1985, c H-6; United Nations (UN) Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention Initial Reports of States Parties Due in 2012 Canada*, Doc CRPD/C/CAN/1 (7 July 2015) at 5, online: <https://digitallibrary.un.org/record/811051?ln=en >.

29 *Toussaint v Canada (Attorney General),* 2022 ONSC 4747 [*Toussaint*]

30 *International Covenant on Civil and Political Rights*, 19 December 1996, 999 UNTS 171 (23 March 1976).

31 *Toussaint, supra* note 29 at para 201-202.

32 *Ibid.* at para 181-182.

33 *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 2518 UNTS 283 (3 May 2008).

34 *Ibid*.

35 *Ibid*.

preferred. In addition, following *Toussaint*, should Canada refuse to heed a finding of the UN Committee that CRPD rights have been violated, this may be subject to judicial review by a Canadian court.

## III. RESEARCH METHODOLOGY

The overall purpose of our research was to determine whether and in what ways the *CRPD* has influenced Canadian jurisprudence in the decade since Canada ratified the treaty. To do this, we identified and analyzed Canadian cases in which the *CRPD* appeared and identified patterns in the manner in which Canadian courts and tribunals utilized the *CRPD* in their reasoning. First, we identified and reviewed cases that cited the *CRPD* from all levels of courts and tribunals in all jurisdictions in Canada. The relevant time period for our search was 11 March 2010 (the date that Canada ratified the *CRPD*) until 31 December 2021. To find relevant cases, we developed a number of search terms[36] and applied these terms to online legal search engines. We traced the history of each case to include relevant lower court and appellate court decisions. It was necessary to use multiple search terms because judges, adjudicators, litigants, and lawyers sometimes referred to the *CRPD* by its full name, sometimes by its acronym, and sometimes by various short forms or other names.

Using this method, we identified fifty-three cases in which courts and tribunals cited or referred to the *CRPD* in a reported decision. It is likely that there are additional cases in which the *CRPD* was raised, or in which it influenced the outcome, but which were not captured in our research for several reasons. First, our research was limited to decisions that were reported in open-access legal databases and therefore does not capture unreported decisions. Second, it is likely that litigants and lawyers have raised the *CRPD* in other cases but that the court or tribunal did not refer to these legal arguments in the decision. One example of this is the seminal human rights decision *Moore v British Columbia.*[37] *Moore* was a case about the appropriate accommodation of a student with a learning disability in a public school in British Columbia. In determining whether British Columbia had discriminated against the student, one of the issues was what "service" the province provided to the student. Limiting the definition of "service" to special education would have led to a conclusion that the province had not discriminated against the student. The Canadian Association for Community Living intervened in the case and argued that separating special education as a service distinct from education was the wrong approach because it violated Article 24 of the *CRPD*, the article providing for the right to equal access to education for students with disabilities. The intervener argued that special education was not a different service than education; rather, it was a way to meaningfully accommodate students with disabilities within the education system. The Supreme Court of Canada adopted this reasoning in its decision but did not refer to the *CRPD*.[38] Even though the intervener used the *CRPD* in its arguments, this case was not captured in our case law searches. Without any mention of the *CRPD* in the written judgment, it is not possible to determine what impact the *CRPD* had on the outcome of the case. It is likely that there are other such cases in which the *CRPD* was raised by the parties but not addressed in the court or tribunal's decision.

---

[36] Search terms used were "convention on the rights of persons with disabilities," "Convention Relative aux Droits des Personnes Handicapées," "disability rights convention," "CRPD" not "complex regional pain disorder," "rights of persons with disabilities," "covenant on the rights of persons with disabilities," "convention/s disability! / covenant/s disability!"

[37] *Moore v British Columbia*, 2012 SCC 61.

[38] *Ibid* at para 28.

After identifying the fifty-three cases, we reviewed and analyzed those cases, detecting patterns in the way in the courts and tribunals approached or applied the *CRPD*. We distilled these patterns into four broad approaches:

- A positive approach is one in which the court or tribunal relied on the *CRPD* as a legitimate source of law to influence the outcome of the case or support the reasoning in the decision.
- In contrast, a negative approach is one in which the court or tribunal rejected the applicability of the *CRPD*, either because its provisions conflicted with Canadian domestic law or because of its status as an international treaty that has not been fully incorporated into Canadian domestic law.
- In some cases, parties or interveners raised the *CRPD* in their arguments, but the court or tribunal did not engage with these arguments. We categorized these cases as the court or tribunal having "ignored" the *CRPD*.
- Finally, a neutral approach is one in which the court or tribunal considered the *CRPD* without explicitly relying upon it in the reasoning. A neutral approach is also evident when the adjudicating body has accepted the *CRPD* as a legitimate source of law but declined to apply the *CRPD* based on the particular facts of the case at bar.

The discussion that follows explores these various approaches that Canadian courts and tribunals have taken to the *CRPD*. There is no bright line division between the approaches we developed; some of the cases could arguably fall within more than one of the approaches. These approaches are merely intended to assist in our analysis, not to capture all the nuance and complexity evident in the cases.

## IV. WHAT THE CASES TELL US

### A. Overall Trends

In the decade between 11 March 2010 and 31 December 2021, only fifty-three reported court and tribunal cases in Canada cited or referred to the *CRPD.* This is a small number when compared to the many thousands of cases decided each year in Canada's federal jurisdiction and its thirteen provincial and territorial jurisdictions. However, the total number of cases decided in Canada each year is not a particularly helpful comparison to use since only a fraction of these cases raise disability rights issues where the *CRPD* would be relevant to the case. A much more helpful comparison would be the number of cases that raise disability issues each year; however, this number is not known and is very difficult to estimate. It is significant that the Supreme Court of Canada has not yet cited or referred to the *CRPD* in any of its decisions, even though the *CRPD* has been raised in argument multiple times before the Supreme Court.

As shown in Figure 1, of the fifty-three reported decisions, approximately 41.5 percent were cases in which the court or tribunal took a positive approach to the *CRPD*. In approximately 17 percent of the cases, the court or tribunal took a negative approach to the *CRPD*. In approximately 17 percent of cases, the *CRPD* was ignored, and in approximately 24.5 percent of cases, the court or tribunal took a neutral approach. Of the approximately 41.5 percent of cases in which the court or tribunal took a positive approach, the *CRPD* was used in a number of different ways to positively influence the legal reasoning and outcome of the case:

- In some cases, the *CRPD* provided normative content to proactively fill gaps in domestic law, leading to the adoption of new legal principles or approaches. In these cases, the *CRPD* was used to support the introduction of broad legal concepts and principles that may not otherwise be supported by domestic law. [39]
- In other cases, the *CRPD* was used to resolve explicit or implicit ambiguities in domestic law, including legislation and the common law.[40]
- The *CRPD* was also used to bolster or support reasoning based on existing domestic authorities.[41]
- And, finally, the *CRPD* was used to affirm or declare the importance of the underpinning values and aims of the treaty in Canadian law – this approach has been referred to by scholars as the affirmatory function.[42]

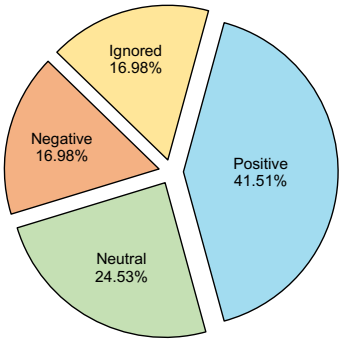


Figure 1: Approaches to the *CRPD* in Canadian Jurisprudence

In the following discussion, we provide case examples of these various positive approaches. Notably, we did not find any judgments in which the *CRPD* played a determinative role in the decision. Instead, in each of these positive approaches, the *CRPD* played an important supporting role alongside domestic law. This is consistent with what we would expect to find, given the status and manner in which international human rights treaties are employed in Canadian law. The Supreme Court of Canada's decision in *9147-0732 Québec* emphasized the primacy of domestic law, with international sources playing a supporting role.[43] While the majority indicated that they imposed a new hierarchy of sources,[44] our results demonstrate that this decision may simply confirm an approach that many courts and tribunals already followed.

Interestingly, the same is not true for jurisdictions outside Canada. In foreign jurisdictions, courts and tribunals have approached the *CRPD* in the various positive ways described above. However, some jurisdictions have also gone further and employed the *CRPD* in much more influential ways. For example,

---

39 For a discussion on this approach, see Anna Lawson, "Uses of the Convention on the Rights of Persons with Disabilities in Domestic Courts" in Lisa Waddington & Anna Lawson, eds, *The UN Convention on the Rights of Persons with Disabilities in Practice* (Oxford: Oxford University Press, 2018) 556 at 561–562.

40 *Ibid* at 563–564.

41 *Ibid* at 564–567.

42 *Ibid* at 567–570.

43 *9147-0732 Québec, supra* note 18 at para 20.

44 *Ibid* at para 37.

the *CRPD* has been used to invalidate or declare unconstitutional national or regional legislation.[45] It has also been used to overturn or radically reinterpret domestic case law and legal doctrine.[46] And it has been used as a check on executive or public body decision-making.[47] These approaches are not evident in Canadian cases.

Anna Lawson has observed that these more influential approaches to using the *CRPD* have only been found in monist states.[48] Monist states are those in which international law automatically has domestic effect, without needing to be translated or incorporated into domestic law. Compared to dualist states like Canada, judges in monist states are more likely to give the *CRPD* greater weight.[49] In Lawson's research, the more influential uses of the *CRPD* were the exception rather than the norm. Overall, both monist and dualist countries took more conservative approaches, such as using the *CRPD* to resolve ambiguities or to fill gaps in domestic law.[50] These trends observed by Lawson are consistent with our research regarding the approaches apparent in Canadian jurisprudence. If in the future the *CRPD* is wholly or in large part incorporated into Canadian domestic law, we would expect Canadian courts and tribunals to adopt more influential approaches to the *CRPD*, similar to those described in monist states.

With respect to the approximately 17 percent of cases in which courts and tribunals took a negative approach to the *CRPD*, much of that negative treatment was the result of judges and adjudicators applying a dualist understanding, whereby international treaties are not considered to be binding sources of law in Canada unless they have been incorporated into domestic law. The discussion that follows includes some examples of this type of reasoning, wherein judges or adjudicators refuse to apply the *CRPD* because it has not been explicitly incorporated into Canadian domestic law. As is the case with Australia and other common law countries,[51] dualism is a significant legal barrier preventing the *CRPD* from influencing Canadian jurisprudence more significantly. One clear trend that emerged from our analysis of the fifty-three reported decisions was that Quebec was the province with the greatest number of positive approach cases (Figure 2). We hypothesize that because Quebec is largely a civil law jurisdiction, judges and adjudicators in Quebec may be less influenced by dualism. They may be more willing to treat the *CRPD* (and other international treaties that Canada and Quebec have ratified) as a valid source of law and to interpret and apply it to Quebec law.

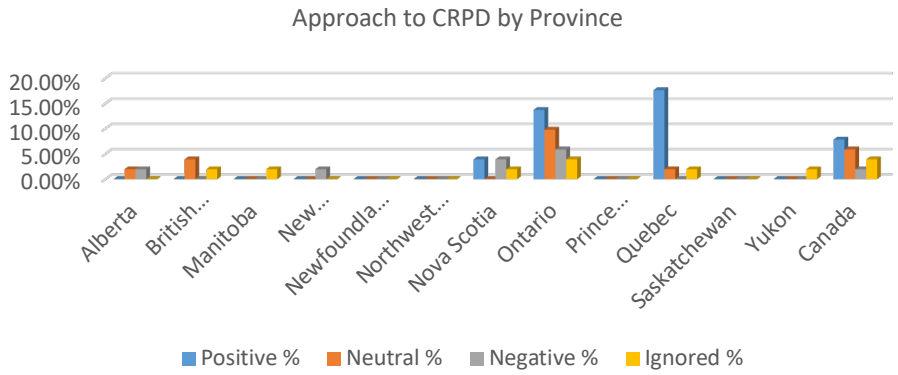


Figure 2: Approach to the *CRPD* by Province

[45] Lawson, *supra* note 39 at 558–559.
[46] *Ibid* at 559–561.
[47] *Ibid* at 570–572.
[48] *Ibid* at 573.
[49] *Ibid* at 572–573.
[50] *Ibid* at 573–574.
[51] Lisa Waddington, "Australia" in Waddington & Lawson, *supra* note 39, 51.

We expected that, over time, with greater awareness of the *CRPD*, a clear trend would emerge of more courts and tribunals in more Canadian jurisdictions employing a positive approach. No such trend was evident. In fact, there was no apparent pattern over time associated with any of the four approaches we measured. Regardless of the approach, we did observe a slight increase in the overall number of cases in which the *CRPD* appeared over time, suggesting that the treaty is beginning to be raised by litigants and addressed in judicial reasoning more frequently (Figure 3).

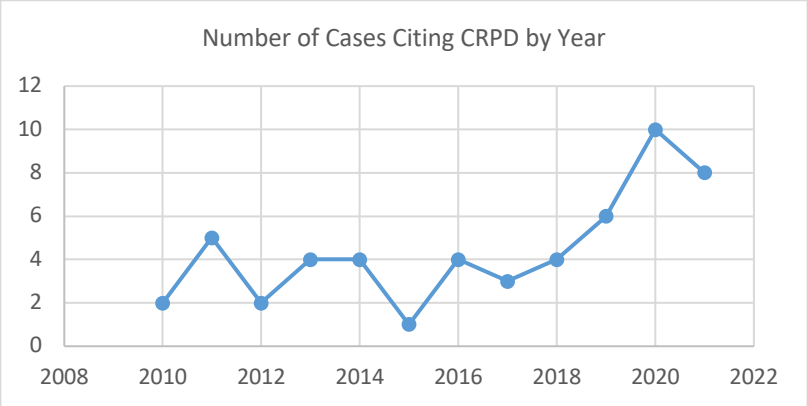


Figure 3: Number of Cases in which the *CRPD* Appears per Year

Our analysis showed that the *CRPD* has been cited and referred to in a wide variety of fora in Canada, including federal courts, provincial and territorial trial and appellate courts, administrative tribunals such as the Immigration and Refugee Board and Ontario's Consent and Capacity Board, and federal, provincial, and territorial human rights commissions and tribunals. Perhaps not surprisingly, human rights proceedings are the fora in which the *CRPD* has most often been approached positively. Our analysis also revealed several cases in which the *CRPD* was treated positively by a trial-level court or administrative tribunal, but this approach was overturned or not endorsed on appeal.[52] In the following section, we provide case examples illustrating the various approaches observed in these cases.

## B. Positive Approach

### 1. CRPD Provides Normative Content to Fill Gaps in Domestic Law

In our review of the cases, there were several examples of courts and tribunals using the *CRPD* to add to, or build upon, domestic law with a new doctrine or legal concept that is not otherwise present domestically. As described by Lawson, this approach operates to "populate domestic law with some doctrine or norm present in the *CRPD* but previously missing from or under-developed in domestic law."[53] Because it does not necessarily invalidate, override, or radically reinterpret existing law, it has been hypothesized that some decision-makers may be more willing to use this approach.[54] One example of this approach is *Yuill v Canadian Union of Public Employees*.[55] In this case, the Human Rights Tribunal of

---

52 See e.g. *R v Myette*, 2013 ABPC 89 [*Myette* PC]; *R v Myette*, 2013 ABCA 371; *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43; *Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres) c Ward*, 2016 QCTDP 18.

53 Lawson, *supra* note 39 at 561.

54 *Ibid.*

55 2011 HRTO 126 [*Yuill*].

Ontario considered whether it had jurisdiction to appoint litigation guardians in a similar fashion as courts. This was not a power that existed within Ontario's *Human Rights Code* at that time.[56] The Tribunal held that it was required to undertake a purposive-functional and value-based approach to interpreting its own powers. It relied, in part, on Articles 12 and 13 of the *CRPD* to support the appointment of a litigation guardian within its own process:

> The values of the [*CRPD*], the [*Statutory Powers and Procedures Act*] and the *Code* suggest an interpretation of this legislation that facilitates access to the Tribunal process for persons with disabilities while also providing appropriate safeguards to prevent abuse (see Article 12(4) of the Convention and *Kacan*, at paras. 24–25). The HRTO and other tribunals covered by the *SPPA* are designed to facilitate access to justice in a more informal, tailored and faster process than the courts. Requiring persons with disabilities that affect their capacity to commence a court process in order to access the administrative justice system would hinder that access for them. The Tribunal's power to determine its own procedure give it the power to appoint a litigation guardian.[57]

The lower court decision in *R v Myette*[58] provides a good example of the *CRPD* being relied on to build upon domestic law. This case was a sentencing decision in which the accused was a person with a vision disability. His counsel argued that the sentence recommended by the Crown would contravene the *CRPD* because the accused would not have access to reasonable accommodation for his disability in prison. The lower court agreed with these arguments and relied on the *CRPD* as an additional consideration for determining the appropriate sentence:

> [E]ven though denunciation and deterrence are primary sentencing features for offences of this type, that placing Mr. Myette in a gaol in Alberta would contravene not only the United Nations Convention but also the provisions of s 718 of the *Criminal Code*. In other words, a period of incarceration in a jail of 18 months to 2 years as the Crown recommends, would be unduly harsh, a deprivation of liberty out of all proportions to the deprivation suffered by other offenders in the Corrections system.[59]

The lower court gave Mr. Myette a sentence of strict house arrest. In this way, the lower court relied on the *CRPD* to build upon the existing sentencing considerations in domestic law. Notably, the Court of Appeal of Alberta overturned this decision – in part, on the basis that it was not open to the lower court to bypass the legislated sentencing considerations found in section 718 of the *Criminal Code* and prefer the language of an international treaty. The Court of Appeal firmly grounded its reasons in the canon of construction that prevents a direct importation of international law into the domestic field.[60]

**2. CRPD Used to Resolve Ambiguities in Domestic Law**

Another approach to the use of the *CRPD* can be understood as the "classic" approach, whereby courts and tribunals engage with the *CRPD* to interpret ambiguity in domestic law. In adopting the classic

---

56 *Human Rights Code*, RSO 1990, c H.19 (version in force between 15 December 2009 and 18 June 2012).
57 *Yuill*, *supra* note 55 at para 17.
58 *Myette* PC, *supra* note 52.
59 *Ibid* at para 16.
60 2013 ABCA 371 at para 34. In our quantitative analysis, this case was included in the "negative" approach category because the court of appeal ultimately rejected the lower's court's use of the *CRPD*.

approach, the decision-maker typically uses the *CPRD* to directly interpret domestic law. However, as explored above, there are two schools of thought about whether the legislation at issue must be explicitly ambiguous before a decision-maker can turn to an international treaty for aid in interpretation. Some decision-makers require the legislation to be ambiguous,[61] while others rely on international treaties as an interpretive aid without expressly identifying the legislative ambiguity.

The Ontario case, *Geldart v Geldart*,[62] exemplifies the latter. In this case, the defendant failed to attend a scheduled hearing and received a default judgment against her. She argued that her failure to attend was due to her counsel removing themselves immediately prior to the hearing and that her disability prevented her from being able to represent herself in court. Rule 52.01(2) and (3) of Ontario's *Rules of Civil Procedure* [63]describes the potential consequences for failing to attend a scheduled hearing, including an order of default judgment where the defendant fails to appear as well as a judge's discretion to set aside or vary a judgment obtained against a party who failed to attend. The Ontario Superior Court held that, in the circumstances of the case, Rule 52.01 must be interpreted in a manner that is consistent with Article 13 of the *CRPD* – access to justice:

> In the circumstances of the present case, preserving [the defendant's] access to justice requires the court to apply Rule 52.01(2) as a mechanism that permits a person with a recognized disability to proceed to a trial of the action on the merits, with legal representation, where her initial failure to attend is reasonably attributable to her heightened emotional response to her lawyer's removal from the case on the eve of trial, and the pronouncements of the pre-trial conference judge, amplified her psychological disorder.[64]

The Ontario Superior Court did not identify a particular ambiguity within Rule 52.01(2), but it still relied on the *CRPD* to interpret the *Rules of Civil Procedure* in a manner that supported access to justice. From the Court's reasoning, it could be implied that, in the circumstances of this case, the ambiguity was rooted in an assessment of whether the party truly failed to attend the hearing in the manner contemplated by the *Rules*. The Court interpreted the *Rules* and "failure to attend" in light of the *CRPD* to conclude that the party had not and, accordingly, set aside the default judgment.

In *Saporsantos Leobrera v Canada (Minister of Citizenship and Immigration)*,[65] the Federal Court was asked to consider whether a twenty-three-year-old woman with an intellectual disability was a "child" for the purposes of the *Immigration and Refugee Protection Act*[66] because of the degree to which she required supports for daily living. In this way, the implied ambiguity that the Court was asked to interpret was the scope of the term "child." The Federal Court considered domestic law as well as international instruments, including the *Convention on the Rights of the Child*[67] and the *CRPD*. In particular, it reviewed the purpose of the *CRPD* as set out in Article 1, which draws a distinction between children with disabilities and adults

---

61 See e.g. *Myette* PC, *supra* note 52 at paras 10–11.
62 2016 ONSC 7150.
63 *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, under *Courts of Justice Act,* R.S.O. 1990, c. C.43
64 *Ibid* at para 70.
65 2010 FC 587 [*Leobrera*].
66 SC 2001, c 27 [*IRPA*].
67 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, [1992] CanTS no 3 (entered into force 2 September 1990).

with disabilities.[68] It found this distinction significant and that it was important to interpret the scope of "child" as it appears in domestic legislation to be consistent with this distinction:

> The Court concludes that the distinction between children with disabilities and adults with disabilities in the [*CRPD*] is significant for the current discussion. Both the *Convention on the Rights of the Child* and the [*CRPD*] support the argument that childhood is a temporary state which is delineated by the age of the person, not by the personal characteristics. It is recognized that the domestic legislation, the specified international instruments and the jurisprudence of the Federal Court of Appeal and the Supreme Court of Canada all lead to this conclusion.[69]

In a powerful conclusion, the Federal Court held that "[e]very child is a dependant but not every dependent is a child."[70] This approach and logic was adopted ten years later in *Shabdeen v Canada (Citizenship and Immigration*).[71] Notably, both *Leobrera* and *Shabdeen* were decided pursuant to the *Immigration and Refugee Protection Act*, which expressly directs judges to apply and interpret it in compliance with international human rights instruments.[72] The positive tenor in which the *CRPD* is addressed in these cases demonstrates how influential the *CRPD* can be in Canadian court decisions when domestic legislation incorporates it.

**3. CRPD Used to Bolster or Support Conclusions Based on Domestic Authorities**

Cases that employ this bolstering approach are clear that the *CRPD* on its own has not played a determinative effect on the outcome of the case. The reasoning suggests that the decision-maker would have come to the same conclusion in any event, and the *CRPD* supported that overall outcome. *Grant v Manitoba Telecom Services*[73] is good example of using the *CRPD* to bolster or support decisions otherwise based on domestic authorities. In this case, the complainant was dismissed from her employment for the purported reason of poor work performance. She argued that any performance issues were a direct result of her disabilities. The Canadian Human Rights Tribunal ultimately found that the employer failed to accommodate the complainant's disability-related needs and terminated her on the basis of disability, contrary to the provisions *Canadian Human Rights Act*. It stated that the *Act* granted all individuals the right to equal opportunity and the right to have their needs accommodated. In its reasons, the Canadian Human Rights Tribunal noted that the *CRPD* contained this same principle.[74] The Canadian Human Rights Tribunal's decision clearly turned on the provisions of the domestic legislation, but the *CRPD* was used to support or bolster its conclusion.

Likewise, in *R v Capay*,[75] the Ontario Superior Court's decision turned predominantly on the *Charter*, with the *CRPD* cited as a supporting source of law. In this case, the accused was an Indigenous man with a mental health disability. He was charged with first-degree murder while in prison for the death of another inmate. While this charge against him was being tried, he was held continuously in administrative segregation (solitary confinement) for 1,647 days. He alleged that this treatment violated his rights

---

68 *Leobrera*, *supra* note 65 at para 71.
69 *Ibid* at para 72.
70 *Ibid* at para 81.
71 2020 FC 492 at para 17.
72 *IRPA*, *supra* note 66, s 3(f).
73 *Grant v Manitoba Telecom Services Inc*, 2012 CHRT 10.
74 *Ibid* at para 104.
75 2019 ONSC 535.

pursuant to the *Charter* and sought a stay of the charges. Specifically, he alleged that the period of segregation infringed his section 7 right to life, liberty, and security of the person, his section 9 right not to be arbitrarily detained, his section 12 right not to be subject to cruel and unusual treatment, and his section 15 right to be free from discrimination. He alleged that segregation has a disproportionate impact on Indigenous persons and persons with mental health disabilities, and he argued that the state was required to provide him with accommodations, alternatives, or mitigating measures while in segregation. The bulk of the Ontario Superior Court's decision focused on the alleged infringements of the accused's *Charter* rights, finding ultimately that each of his claims were substantiated in "multiple and egregious breaches."[76] In addition to its *Charter* analysis, the Ontario Superior Court noted that the language of the *CRPD* provides that the existence of a disability "shall in no case justify a deprivation of liberty"[77] and that, where persons with disabilities are deprived of their liberty, they still must be afforded the provision of reasonable accommodation, which the state failed to do.[78]

Similarly, in *R v A.L.*,[79] the Provincial Court of Nova Scotia delivered a sentencing decision for a defendant who pleaded guilty to possession of drugs for the purposes of trafficking. The accused person sought a suspended sentence on the basis that she was a person with an addictions disability. She had been in recovery for over fourteen months at the time of sentencing, was participating in Narcotics Anonymous, and had enrolled in counselling. She argued that there was a developing line of cases in which persons who had similar biographical profiles received rehabilitative rather than custodial sentences. The Court reviewed the underlying principles of the controlled substances legal framework in Canada. It noted, in particular, that the *Controlled Drugs and Substances Act*[80] and the Supreme Court of Canada's decision, *PHS Community Services Society v Canada (Attorney General)*,[81] placed emphasis on "multifaceted approaches" and accommodation to achieve harm reduction in the community of persons with addictions disabilities.[82] The Court found that these approaches were "well aligned" with Canada's obligations under the *CRPD*. In describing the principles enshrined within, the Court noted that the *CRPD* recognizes that:

> disability is an evolving concept; disabilities arise from the collision between persons who have physical or mental challenges encountering attitudinal and environmental barriers. Disabilities hinder people's full and effective participation in society on an equal basis with others. This describes well our expanding understanding of persons who use controlled drugs and substances illegally. It is a dynamic and complex environment, not amenable to simplistic carrot-and-stick resolutions.[83]

In a similar manner, in *Commission des droits de la personne et des droits de la jeunesse c Spa Bromont*, a complainant was terminated from her employment as a massage therapist at a spa because of her guide dog.[84] The spa argued that it could not accommodate the complainant's need for a guide dog because it did not have enough space and because of the risk of allergies and odours. The Quebec Human Rights Tribunal found that the spa infringed the complainant's right to be treated equally by refusing to allow her

---

76 *Ibid* at para 534.
77 *Ibid* at para 156.
78 *Ibid.*
79 2018 NSPC 61 [*AL*].
80 SC 1996, c 19.
81 2011 SCC 44.
82 *AL*, *supra* note 79 at para 131.
83 *Ibid*.
84 *Commission des droits de la personne et des droits de la jeunesse c Spa Bromont Inc*, 2013 QCTDP 26.

guide dog to accompany her at work. The Tribunal cited the *CRPD*'s recognition of the right to work and to receive appropriate accommodations at work.[85] It also cited the *CRPD* to support its finding that any discrimination based on disability denies the person's inherent dignity.

In *Grant*, *Capay, A.L.*, and *Spa Bromont*, the courts' reasons were firmly rooted in the applicable domestic legal framework and supported by the *CRPD*. These decisions highlight how these domestic frameworks are consistent with Canada's *CRPD* obligations.

**4. Decision Affirms the Values and Aims of the CRPD in Canadian Law**

In this affirmatory approach, courts and tribunals rely upon the *CRPD* to reinforce or declare the importance of its underlying values and aims in Canadian law. This affirmatory approach is evident in a number of cases. In *Cruden v Canadian International Development Agency and Health Canada*,[86] the applicant alleged that she had been discriminated against when the Canadian International Development Agency and Health Canada concluded that she was unsuitable for a posting in Afghanistan because she failed to meet medical requirements due to her diabetes. The Canadian Human Rights Tribunal looked to the *CRPD*'s preamble, Article 10 (right to life), and Article 11 (situations of risk and humanitarian emergencies) to support its finding that Health Canada failed to consider the "inherent worth and dignity of the complainant."[87] In this way, *Cruden* highlights the Tribunal's application of the underpinning values or aims of the *CRPD*. Notably, this decision was overturned on appeal, but the appellate-level decisions did not address or engage with the *CRPD*.[88]

In *Hinze v Greta Blue Heron Casino*,[89] the Human Rights Tribunal of Ontario invoked the preamble of the *CRPD* to underline an important shift in the definition of "disability" away from the bio-medical model to the social model, recognizing that persons with disabilities are deserving of human rights protections.[90] In a sweeping declaration, the Tribunal described the shift in this way:

> The social model understanding of "disability" has been articulated in the Preamble to the Convention on the Rights of Persons with Disabilities, which has recently been ratified by Canada. This is believed by many to have created a "paradigm shift". That is, the medical model of disability, where disability was defined by an individuated bio-medical subordinate self, has been replaced with a view that disability is a personal affect deserving of human rights protection. Enshrining the social or independent living model is the culmination of a conceptual evolution of a disabled person's place in society and hence their right to be free from discrimination.[91]

In *Hinze*, the Tribunal cited approvingly the inherent dignity, worth, and equality of persons with disabilities, principles that are enshrined in and underlie the *CRPD*. A similar approach to the definition of disability is evident in the Quebec Human Rights Commission case *C.A. et un autre) c Comeau*.[92]

---

85 *Ibid* at para 150.
86 2011 CHRT 13.
87 *Ibid* at para 78.
88 2013 FC 520, aff'd 2014 FCA 131.
89 2011 HRTO 93.
90 *Ibid* at para 106.
91 *Ibid* at para 21.
92 2020 QCTDP 11.

**C. Negative Approach**

In contrast to the cases adopting a positive approach to the *CRPD,* we identified a number of cases in which judges and adjudicators rejected the applicability of the *CRPD*. In the majority of these cases, courts and tribunals found it to be determinative that the *CRPD* had not yet been expressly incorporated into Canadian domestic legislation and consequently held that the treaty had no force of law and minimal impact on domestic disputes. One example is a series of decisions called *Nova Scotia (Community Services) v V.A.H.*[93] The Nova Scotia Court of Appeal considered a child protection matter in which both the children and the parents were persons with disabilities. The lower court denied the Minister's request for a permanent care order, in part on the basis of Article 23 of the *CRPD*, which states that no child shall be separated from his or her parents on the basis of disability of either the child or one or both of the parents. The Minister appealed. The Nova Scotia Court of Appeal granted the appeal on the basis that international norms and obligations do not have the force of law. The Court of Appeal stated that the lower court erred by importing and relying on international principles. It acknowledged the Supreme Court's decision in *Baker*[94] and the legitimate role that international human rights law can play in interpreting domestic law, but it found that this "interpretive assistance cannot displace clear statutory language."[95] In *V.A.H.*, the best interests of the child was a statutory requirement that had to be interpreted within the prescribed conditions set out in the relevant *Child and Family Services Act.*[96] With what appears to be a particular disdain for international law-informed decision-making, the Nova Scotia Court of Appeal held that the task of the court is to interpret domestic legislation, "not to supplement it with a judicial preference justified by generic 'values'."[97]

*New Brunswick (Families and Children) v L.P.*[98] was decided based on similar reasoning. In this case, the issue was whether the children should be under the care of their father, a person with severe physical disabilities. The father argued that he should not have his children removed from his care as a result of his disabilities and, instead, that the Minister had a duty to provide him with the necessary supports to be able to parent.[99] While the New Brunswick Court found that the father's disability must be considered, this did not alter its analysis. It followed Supreme Court of Canada and other jurisprudence and rejected the argument that the *CRPD* should factor into its reasoning. It held that, notwithstanding the provisions of the *CRPD*, domestic authorities continue to emphasize that child protection matters are to remain child focused.[100]

**D. Neutral Approach**

In these cases, the court or tribunal considered the *CRPD* but did not explicitly rely upon it in the reasoning. A neutral approach is also evident when the adjudicating body accepted the *CRPD* as a legitimate source of law but declined to apply the *CRPD* based on the particular facts of the case at bar. While not categorized as "positive" decisions in our analysis, these cases give rise to interesting qualitative discussion about the potential impact of the *CRPD* in Canadian jurisprudence. An example of a neutral decision is *Cole v Cole (Litigation Guardian of)*.[101] This case involved a dispute between two parents over

---

93 *VAH*, *supra* note 15.
94 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.
95 *VAH*, *supra* note 15 at para 18.
96 RSO 1990, c C-11.
97 *Ibid* at para 18.
98 2019 NBQB 19.
99 *Ibid* at para 41.
100 *Ibid* at para 43–46.
101 2011 ONSC 4090.

managing their adult son's property and personal affairs. Both parents sought to be appointed guardian of their son. The mother argued, in part, that according to Article 12 of the *CRPD*, adults with disabilities ought to be considered the decision-maker, and that they should be given the supports required in order to exercise their legal capacity.[102] The Ontario Superior Court found the *CRPD* arguments "most interesting, and worthy of consideration."[103] However it found that applying the *CRPD* in this case would risk making a decision that conflicted with an existing custody order. It declined to apply the *CRPD* to avoid this result. Another example is a recent decision from the Human Rights Tribunal of Ontario, *A.T. v Children's Aid Society of Ottawa*.[104] In this case, the applicant requested reconsideration of a decision dismissing her case on the basis that another proceeding had appropriately dealt with the substance of her human rights matter. The other proceeding was a child custody matter. On reconsideration at the Human Rights Tribunal, the applicant argued that, according to the *CRPD* and policy recommendations from the Ontario Human Rights Commission, children should not be separated from their parents based on a disability of the child or the parent. She further argued that persons with mental health disabilities should not be subject to the intervention of child protection agencies and should not have their children removed from them at all.[105] The Human Rights Tribunal did not immediately dismiss these arguments. Instead, the Tribunal noted that the applicant's arguments misstated the *CRPD* and policy recommendations:

> The UN Convention and OHRC recommendations do not, as the applicant suggests, say that children should never be removed from parents with disabilities. Rather, what they say is that a decision to remove a child should be based on objective criteria and evidence that removal is in the best interests of the child, and should not be pursued based on stereotypes and assumptions about the capabilities of individuals with disabilities to care for their children, or simply on the basis that the parent has a disability.[106]

For this reason, the Tribunal found that the *CRPD* did not provide a basis for reconsideration in this particular case. However, it did not decide that the *CRPD* could never ground a reconsideration request. Ultimately, the Tribunal found that the applicant had not met the legal test for reconsideration in this case and dismissed the request.

### E. Using the *CRPD* and Its Companion Works as Evidence

Leaving aside the various approaches of treatment of the *CRPD*, our research revealed that, in a handful of cases, the *CRPD* or its companion works were used as evidence to support legal argument. By companion works, we mean the UN Committee on the Rights of Persons with Disabilities' General Comments, Concluding Observations, consultation reports, and other documents that elaborate the normative content of the *CRPD.* This use of the *CRPD* was not common in the fifty-three cases we found. Nevertheless, it is worth noting as it demonstrates a different way in which the *CRPD* has been used in Canadian jurisprudence.[107] An example is *X. (Re)*,[108] a 2013 immigration case decided by the Immigration

---

[102] *Ibid* at para 6.
[103] *Ibid* at para 7.
[104] 2020 HRTO 954.
[105] *Ibid* at para 9.
[106] *Ibid* at para 10.
[107] It is also worth noting that courts have relied upon non-*CRPD* international human rights reports and comments to ground an evidentiary basis for their decisions. See e.g. *Brazeau v Canada (Attorney General)*, 2020 ONCA 184 at paras 75–86.
[108] 2013 CanLII 91931 (CA IRB).

and Refugee Board of Canada. In this case, the claimants, who were all Hungarian citizens of Roma ancestry, sought refugee protection in Canada. One of the claimants was a minor with an intellectual disability and complex disability-related support needs. As such, she could not be separated from the other claimants, whether in Canada or Hungary. The claimants relied on a report of the UN Committee on the Rights of Persons with Disabilities to substantiate their claim of discrimination against persons with disabilities in Hungary. The report made particular note of the discrimination experienced by persons with disabilities related to their legal capacity and decision-making rights. Relying in part on this report, the Board found the minor claimant with disabilities to be a refugee for the purposes of the *Immigration and Refugee Protection Act* because there was a more than reasonable chance that she would face discrimination in Hungary and the discrimination would be aggravated by her disabilities.[109]

## V. CONCLUSION

Canada's ratification of the *CRPD* over a decade ago was a critical moment for disability rights advocates and disability communities. It brought the promise of a new human rights approach to disability and legally enshrined guarantees of equality, inclusion, and full accessibility for disabled people. Since then, the *CRPD* has not had significant influence on Canadian jurisprudence. Across Canada, the *CRPD* has been cited in a relatively small number of cases. Within those cases, there are a range of different approaches that courts and tribunals in Canada take to the application of the *CRPD* to domestic law and disputes. Even where Canadian courts or tribunals have approached the *CRPD* positively, it is often used to support legal reasoning or an outcome that is chiefly grounded in domestic law. We did not find any decisions in which the *CRPD* played the sole determinative role in the reasoning or outcome of a case.
Not surprisingly, although courts and tribunals have treated the *CRPD* positively in cases that span a wide variety of areas of law, our review of the jurisprudence indicates that human rights proceedings are the fora in which the *CRPD* has most often been approached positively. The *CRPD* is more likely to be influential in the reasoning or outcome of a case when it is incorporated into the relevant Canadian domestic statute, as exemplified in the immigration cases *Leobrera* and *Shabdeen.* Going forward, we anticipate that the *CRPD* may be similarly influential in cases that deal with the application of legislation that references the *CRPD*, such as the *Accessible Canada Act*, which includes the *CRPD* in its preamble. In these cases, courts and tribunals are more likely to regard the *CRPD* as a persuasive source of law that must guide their interpretation and application of domestic law.

Our conclusions should not be taken to mean that the *CRPD* has had limited influence on Canadian social policy or disability rights advocacy. To the contrary, disability communities in Canada have used the *CRPD* to ground and inform their advocacy on a wide variety of laws, policies, and programs. Federal and provincial governments are becoming increasingly aware of the *CRPD* when developing new policies and legislation. Our research has demonstrated an increase in the overall number of cases in which the *CRPD* has appeared over time. Legal norms have the potential to influence behaviour by changing broader social conceptions when they become part of the legal discourse.[110] Looking forward, we expect that, as the law on the justiciability of international claims in Canadian courts evolves, and as the *CRPD* becomes more embedded in domestic policies, is referenced more often or incorporated into domestic legislation, and continues to be raised more often by litigants, so too will its influence on Canadian jurisprudence evolve and grow.

---

[109] *IRPA*, *supra* note 66.
[110] Alex Geisinger & Michael A Stein, "A Theory of Expressive International Law" (2019) 60:1 Vanderbilt L Rev 77.