Discussion Paper on What to Include In the Canadians with Disabilities Act

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By David Lepofsky, CM. O.Ont. LL.B. (Osgoode Hall Law School, LL.M (Harvard Law School, LL.D. (Hon.) (Queen's University and University of Western Ontario)

Note: The author is a visiting professor at the Osgoode Hall Law School, an adjunct faculty member at the University of Toronto Faculty of Law, the co-chair of Barrier-Free Canada, chair of the Accessibility for Ontarians with Disabilities Act Alliance, and the chair of the special Education Advisory Committee of the Toronto District School Board. This article is written in the author's personal capacity and does not purport to represent the views of any of those organizations. The author plans to submit this article, or an edited version of it, to the National Journal of Constitutional Law.

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1. Introduction

Travelers can buy airline tickets online, or by calling an airline's call centre. Yet airlines' websites too often are inaccessible to access technology that some people with disabilities need to use on computers. Compounding this unfairness, some airlines openly announce that an added fee is charged for buying tickets by phone, rather than online. Who will invest years in human rights litigation to contest this patently discriminatory fee?

Self-serve electronic touch-screen check-in kiosks are popping up at Canadian airports. These typically don't accommodate those with disabilities like motor limitations, vision loss or dyslexia.

Canadian cable companies keep updating their set-top cable boxes, needed to enjoy cable TV services. Yet these boxes don't incorporate universal design principles to make them disability-accessible. The same is true for some banks' ATMs. This is so even though accessible technology can readily be incorporated in their design.

The Supreme Court of Canada's landmark decision, *Eldridge v. BC.* [1997] 3 S.C.R. 624, was Canada's most powerful judicial statement on disability equality and accessibility. It held that a core feature of the constitutional right to disability equality is the duty to accommodate disability-related needs.

> "The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual.

> The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability."

Eldridge holds that equality for people with disabilities is denied where there is "a failure to ensure that they benefit equally from a service offered to everyone. It held that it would be "a thin and impoverished vision of s. 15(1)" to approach equality as if "governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits."

Yet almost two decades later, there has been no comprehensive Canadian initiative to fully implement these *Eldridge* requirements across the country. This is so despite strong requirements to do so in the United Nation's Convention on the Rights of People with Disabilities (CRPD), of which Canada is a signatory.

People with disabilities must battle one accessibility barrier at a time, one federally-regulated organization at a time. For remedies, they get shuffled from one federal agency to another. Jurisdiction is splintered among isolated silos. Federally regulated organizations including the Federal Government know that they need fear little, if any consequences for abdicating their *Eldridge* duties. This was made worse when the *Charter* Challenges Program was cut. Its restoration would be positive, but alone, won't solve the problem.

A strong, effective Canadians with Disabilities Act is needed to ensure that Canada becomes fully accessible to people with disabilities, insofar as the Federal Government can achieve this. In the 2014 election, Prime Minister Justin Trudeau promised to enact the Canadians with Disabilities Act, as did the New Democratic and Green Parties.

This Discussion Paper explores core ingredients of a strong, effective Canadians with Disabilities Act. It is offered to help people across Canada discuss and debate what should be included in the Canadians with Disabilities Act. It is being distributed to the public by Barrier-Free Canada, a non-partisan disability coalition that advocates for the enactment and implementation of a strong and effective Canadians with Disabilities Act. Barrier-Free Canada has affiliate organizations in three provinces, Ontario (Accessibility for Ontarians with Disabilities Act Alliance, which also advocates for the effective implementation and enforcement of the Accessibility for Ontarians with Disabilities Act (AODA), Manitoba (Barrier-Free Manitoba, which successfully advocated for enactment of the Accessibility for Manitobans Act 2013) and British Columbia (Barrier-Free BC, which advocates for enactment of the British Columbians with Disabilities Act).

The author's proposals in this paper are offered for discussion. After receiving input from Canada's disability community, Barrier-Free Canada will later release a policy paper that will set out its position on what the Canadians with Disabilities Act should include. This Discussion Paper builds on experience with the Charter's disability equality guarantee, with provincial accessibility legislation, and with experience with human rights laws across Canada. The following are the key ingredients that the Canadians with Disabilities Act should include. This Discussion Paper doesn't list every accessibility barrier the Canadians with Disabilities Act should address, or every disability it should cover. It identifies core principles needed to ensure that this law is comprehensive. It expands upon the 14 Principles for the Canadians with Disabilities Act that Barrier-Free Canada has enunciated. These in turn draw on the principles that drove the design of the AODA and the Accessibility for Manitobans Act.

This Discussion Paper is summarized as follows:

a) The purpose of the Canadians with Disabilities Act should be to ensure that, as far as Parliament can achieve this, the Federal Government should lead Canada to become fully accessible to people with disabilities by a deadline that the law will set. It should effectively implement the equality rights which the Charter of Rights and the Canada Human Rights Act guarantee to people with disabilities, without their having to battle accessibility barriers one at a time, and one organization at a time, by filing individual human rights complaints or Charter claims.

b) The Canadians with Disabilities Act should ensure that all federally-regulated organizations provide accessible goods, services, facilities and employment.

c) The Canadians with Disabilities Act should put the Government of Canada in charge of leading Canada to full accessibility.

d) The Canadians with Disabilities Act should create an independent Canada Accessibility Commissioner, reporting directly to Parliament, that will lead the Act's implementation and enforcement.

e) The Canadians with Disabilities Act should establish a clear, broad, inclusive definition of "disability."

f) The Canadians with Disabilities Act should require the Federal Government to create the mandatory, enforceable accessibility standards that will lead Canada to full accessibility.

g) The Canadians with Disabilities Act should ensure a prompt, effective and open process for developing and reviewing Federal accessibility standards.

h) The Canadians with Disabilities Act should ensure the effective enforcement of the Canadians with Disabilities Act.

i) The Canadians with Disabilities Act should ensure strong centralized action on disability accessibility among Federal Regulatory Agencies.

j) The Canadians with Disabilities Act should ensure that the strongest accessibility law always prevails.

k) The Canadians with Disabilities Act should ensure that public money is never used to create, perpetuate or exacerbate accessibility barriers.

l) The Canadians with Disabilities Act should ensure that no Federal laws authorize or require disability barriers.

m) The Canadians with Disabilities Act should ensure that Federal elections become fully accessible to voters and candidates with disabilities.

n) The Canadians with Disabilities Act should ensure a fully accessible Federal Government.

o) The Canadians with Disabilities Act should ensure full accessibility of all courts within federal authority.

p) The Canadians with Disabilities Act should mandate a national strategy for expanding international trade in Canadian accessible goods, services and facilities.

q) The Canadians with Disabilities Act should establish initial and interim measures to promote accessibility pending development of Federal accessibility standards.

r) The Canadians with Disabilities Act should ensure that efforts at educating the public on accessibility under the Canadians with Disabilities Act don't stall or delay needed implementation and enforcement action.

s) The Canadians with Disabilities Act should mandate the Federal Government to assist and encourage Provincial and Territorial Governments to enact comprehensive, detailed accessibility legislation.

t) The Canadians with Disabilities Act should mandate the Federal Government to create national model Accessibility Standards which provinces, territories and other organizations across Canada can use.

u) The Canadians with Disabilities Act should set time lines for Federal Government action on implementing the Canadians with Disabilities Act.

v) The Canadians with Disabilities Act should require periodic Independent Reviews of progress under the Act.

w) The Canadians with Disabilities Act should be meaningful, have teeth, and not be mere window-dressing.

2. Why the Canadians with Disabilities Act is Needed

The Canadians with Disabilities Act is not needed due to some major deficiency in disability equality and accessibility rights now enshrined in Canadian law. Disability equality rights, including accessibility rights, in s. 15 of the Canadian Charter of Rights and Freedoms and the Canada Human Rights Act are sweeping. Courts have interpreted them expansively, and exceptions to them, narrowly.

Yet far too often, these rights are not honoured. The Canadians with Disabilities Act is needed to make those rights become a reality for people with disabilities in Canada, without their having to privately wage separate legal battles against each of the many accessibility barriers they daily face, over three decades after Canadian law guaranteed these rights.

The Charter and Canada Human Rights Act don't give obligated organizations clear directions on all the steps they must take to become fully accessible to people with disabilities, as employers and service-providers. The grand concepts of "discrimination," "equality before and under the law," and "accommodation" don't specify for those who work in the federal government, or federally-regulated organizations, how to design a websites workplace or goods and services, to ensure that people with disabilities can fully benefit from and participate in them. Obligated organizations are far more likely to take required action if the law specifies what they must do, and by when.

The Canada Human Rights Act and the Charter require people with disabilities to separately fight accessibility barriers, one at a time, by individual legal challenges. This arduous process imposes tremendous hardships on any who take it on. Most don't bother. The well-resourced respondents, like the Federal Government, can often use tax dollars or large private revenues to employ lawyers to mount a vigorous defence. An unsuccessful Charter claimant can be ordered to pay the respondent's legal costs; few can risk that financial exposure. Canadians with disabilities are disproportionately unemployed and live in poverty.

For example a blind woman, Donna Jodhan, brought a Charter s. 15 claim against the federal government because government websites were too often not designed to be accessible to blind computer users using a talking computer. The Government vigorously opposed this challenge. It lost. It appealed, losing again. Such legal opposition deters most from starting a legal challenge.

Those considering using the Canada Human Rights Act face additional barriers. The human rights enforcement process is slow. Even if the case is in the Canadian Human Rights Commission's jurisdiction, that agency has been predisposed to force discrimination victims to first take their case to other regulatory agencies, if some or all of the remedies they seek are available elsewhere. That inflicts more delay and expenses on discrimination victims.

For practical purposes, the federal disability accessibility rights guarantees in law are ostensibly voluntary laws. An organization that doesn't voluntarily comply with them now need not fear a likelihood of practical enforcement. They can carry on inaccessible business as usual, until someone brings an accessibility claim. They can drag their feet for years, wearing down a claimant. After a major disability equality rights ruling like *Eldridge*, they can drag their feet

even longer.

The lack of legislative specificity and the lack of effective enforcement, compound each other. Obligated organizations are less likely to try to figure out their accessibility duties if they don't fear enforcement. Obligated organizations are less likely to comply with their accessibility obligations if they don't know what they must do, or must hire lawyers and consultants to find out. Making this worse federally-regulated obligated organizations are often huge, like the Federal Government, banks, airlines telephone and cable companies. It is harder to induce change in larger organizations.

Splintered, piecemeal accessibility strategies in a large organization like the Federal Government or across a country, have been proven ineffective. A comprehensive legislated national accessibility action plan can avoid duplication of effort, and ensure the fastest rate of progress.

The need for this legislation is demonstrated by the spread of such legislation at the provincial level in Canada. Ontario and Manitoba have accessibility laws. Nova Scotia is developing one. British Columbia is actively considering whether to develop one. The international trend in support of such legislation started with the enactment of the Americans with Disabilities Act in 1990, reinforced by the CRPD.

3. Key Ingredients of the Canadians with Disabilities Act

a) A Purpose to Achieve a Barrier-Free Canada by a Specified Deadline

A law's purpose guides all actions taken under it. It aids courts and lawyers when interpreting it. It guides the vast majority who work with the law outside of courts, who are not lawyers nor advised by lawyers.

The Canadians with Disabilities Act should specify a clear, bold purpose. Barrier-Free Canada's 14 Principles include:

> "1. The Canadians with Disabilities Act's purpose is to achieve a barrier-free Canada for persons with disabilities by a deadline that the Act will set, and that will be within as short a time as is reasonably possible, with implementation to begin immediately upon proclamation, to effectively ensure to all persons with disabilities in Canada the equal opportunity to fully and meaningfully participate in all aspects of life in Canada based on their individual merit."

Elaborating on this full inclusion, full participation and universal design goal, the Canadians with Disabilities Act should ensure that Canada fully complies with the CRPD. Among other things, the CRPD requires:

> "Article 4 - General obligations
>
> 1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without

discrimination of any kind on the basis of disability. To this end, States Parties undertake:
a. To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
c. To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
d. To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
e. To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;…"

Article 5 of the CRP requires:

"3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided."

Article 9 of the CRPD addresses duties regarding accessibility:

"Article 9 - Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:
a. Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
b. Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures to:
a. Develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
b. Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
c. Provide training for stakeholders on accessibility issues facing persons with disabilities;

d. Provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
e. Provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
f. Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
g. Promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
h. Promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost."

The Canadians with Disabilities Act's purpose clause must avoid terms that sound good but are too weak. It is not good enough for this law to aim merely to "improve accessibility." A single new ramp, installed somewhere in Canada, would fulfil that feeble goal.

It would be grossly insufficient for the Canadians with Disabilities Act to aim merely to make Canada the most accessible country in the world. That requires far too little action. It only requires that Canada should be slightly more accessible than other countries, no matter how poor all other countries are on accessibility. If Canada merely aspired to be more accessible than any other country, it would accept people with disabilities remaining forever frozen out of too much of society's mainstream. Canada's Charter and human rights laws entitle people with disabilities to so much more than that.

The question is not whether Canada should ever become a fully accessible society –the only question is how long Parliament should give Canada to reach that goal. Thus, the Canadians with Disabilities Act's purpose clause should set the deadline by which Canada should become fully accessible to people with disabilities, in so far as Parliament can advance this goal. If it sets no deadline, then full accessibility is relegated to the indefinite future. It will never be reached. Human nature dictates that governments and private organizations achieve the most when they face a deadline. Political dynamics reinforce this. Politicians and senior government officials worry about the crisis of the week, or of the day. This contributes to their failure to honour long term Charter and human rights accessibility duties.

In 2005, Ontario's AODA commendably set 2025 as the deadline for full accessibility. That has been essential to the AODA's implementation, and to assessing the effectiveness of action taken. The Ontario Government, obligated organizations, people with disabilities, the public and the media can ask if Ontario is on schedule for full accessibility by 2025. They can ask whether a proposed AODA accessibility standard will ensure that full accessibility in the area it regulates will be achieved by 2025. If it doesn't, it is clear that more is needed.

The deadline must give obligated organizations enough time to reach full accessibility. It should not be so distant to inspire procrastination. It should demand immediate action on readily achievable barrier-removable and prevention. It should counter-act large organizations' tendency to bog down in delay and bureaucracy.

b) Ensuring All Federally-Regulated Organizations Provide Accessible Goods, Services, Facilities and Employment

Barrier-Free Canada's second of its 14 principles includes:

> "It should apply to the Parliament of Canada as well as to all federal government entities, federally-owned public premises and facilities, federally-regulated companies and organizations, recipients of federal grants, subsidies, loans or other funds, and any other persons or organizations to whom the Government of Canada can apply it."

The Canadians with Disabilities Act should regulate any and all accessibility barriers that Parliament is permitted to regulate under Canada's Constitution. It should address accessibility of goods, services, facilities and employment within federal regulatory reach. Barrier-Free Canada's 14 Principles include:

> "5. The Canadians with Disabilities Act should require providers of goods, services and facilities to whom the Act applies to ensure that their goods, services and facilities are fully usable by persons with disabilities, and that they are designed based on principles of universal design, to accommodate the needs of persons with disabilities. Providers of these goods, services and facilities should be required to devise and implement detailed plans to remove existing barriers and to prevent new barriers within legislated timetables;
>
> 6. The Canadians with Disabilities Act should require organizations to whom it applies to take proactive steps to achieve barrier-free workplaces and employment within prescribed time limits. Among other things, those employers should be required to identify existing employment and workplace barriers which impede persons with disabilities, and then to devise and implement plans for the removal of these barriers, and for the prevention of new workplace and employment barriers."

Addressed further below, the Canadians with Disabilities Act should also include provisions which can address barriers that lie within provincial jurisdiction. It should do so in a manner that fully respects provincial legislative authority.

c) Put the Government of Canada In charge of Leading Canada to Full Accessibility

The Canadians with Disabilities Act must do more than proclaim the fully accessible Canada goal by a set date. Today's politicians and parties know they likely won't be in power when that deadline arrives. The Canadians with Disabilities Act must make someone ultimately responsible for leading Canada to that goal. Barrier-Free Canada's 14 principles include:

> "7. The Canadians with Disabilities Act should require the Government of

> Canada to lead Canada to achieving the Act's goals. It should specify actions the Government of Canada must take to fulfil this mandate. Among other things, it should require the Government of Canada to provide education and other information resources to organizations, individuals and groups who need to comply with the Act. It should also require the Government of Canada to appoint an independent person to periodically review and publicly report on progress towards full accessibility, and to make recommendations on any actions needed to achieve the Act's goals."

This doesn't mean that the Federal Government should be expected to fix every barrier in Canada, or to finance the removal and prevention of barriers in any federally-regulated organizations, such as private companies like Air Canada or Bell Canada. The Canada Human Rights Act requires those companies to become accessible by removing and preventing barriers, they are obliged to fulfil the duty to accommodate people with disabilities in their workplaces and in their goods and services, up to the point of undue hardship. Under human rights law, some hardship is "due". The duty to accommodate requires far more than trivial, low cost action. As well, the cost of preventing new barriers is itself typically trivial if not non-existent, and is readily less than the cost of removing existing barriers.

The Federal Government's duty will be to lead Canada to full accessibility, in so far as it can, by taking the specific actions that the Canadians with Disabilities Act mandates, further described below. Ontario's experience is instructive. The AODA requires the Ontario Government to lead Ontario to full accessibility by 2025. The AODA provides:

> "1. Recognizing the history of discrimination against persons with disabilities in Ontario, the purpose of this Act is to benefit all Ontarians by,
> (a) developing, implementing and enforcing accessibility standards in order to achieve accessibility for Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises on or before January 1, 2025; and
> (b) Providing for the involvement of persons with disabilities, of the Government of Ontario and of representatives of industries and of various sectors of the economy in the development of the accessibility standards. 2005, c. 11, s. 1."

And

> "7. The Minister is responsible for establishing and overseeing a process to develop and implement all accessibility standards necessary to achieving the purposes of this Act."

This has been and remains critically important. It has played a key part of Ontario advocacy efforts to point to the 2025 deadline, and the Ontario Government's duty to lead Ontario to that goal. It also played a key part in the work of the two statutorily-mandated AODA Independent Reviews over the ensuing decade.

Each federally-regulated organization has for decades had a legal duty to fund its own journey to

full accessibility. This is simply a routine cost of doing business. Federally-regulated organizations cannot claim the Canadians with Disabilities Act imposes a new duty, and demand that the Federal Government pay for it.

Governments ban organizations from polluting, without paying for those organizations to install scrubbers and filters to ensure that they don't pollute.

d) Create a Canada Accessibility Commissioner

The Canadians with Disabilities Act should create a new independent federal agency, to be called the "Canada Accessibility Commissioner." It should report directly to Parliament. As further described below, this agency should be responsible for discharging several important key functions under the Act, such as:

a) Leading the development of recommendations for accessibility standards to be enacted under the Canadians with Disabilities Act;

b) Leading the Canadians with Disabilities Act's enforcement; and

c) Playing an ongoing, highly visible role as Canada's national watchdog and advocate in support of accessibility for people with disabilities.

Experience with several comparable public agency roles show this kind of an agency can be very helpful. It can help ensure that accessibility remains front and centre on the federal agenda, after the Canadians with Disabilities Act is enacted, and after political attention turns to other pressing issues.

e) Establishing a Clear, Broad, Inclusive Definition of "Disability"

The Act's "disability" definition must be clear, broad and inclusive, not truncated or restrictive. Barrier-Free Canada's 14 Principles include the following:

> "2. The Canadians with Disabilities Act should apply to all persons with disabilities whether they have a physical, mental sensory, learning and/or intellectual disability or mental health condition, or are regarded as having one, and whether their disability is visible or invisible to others."

The AODA has a commendable disability definition. Section 2 of the AODA provides:

> "(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

(b) a condition of mental impairment or a developmental disability,
(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
(d) a mental disorder, or
(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997."

That definition is amply broad. It would be helpful to expand it to refer to disabilities that were not referred to in past laws such as communication disabilities and environmental sensitivities. A reference to "developmental disabilities," should be expanded to refer to intellectual disabilities.

f) Establishing A Broad, Inclusive Definition of "Barrier"

The terms "disability" and "barrier" combine to largely map out the law's reach. The Canadians with Disabilities Act should use a similarly-inclusive definition of "barrier." Barrier-Free Canada's second principle, referred to above, also provides that the Canadians with Disabilities Act "should apply to all accessibility barriers, for example physical, legal, bureaucratic, information, communication, attitudinal, technological, policy or other barriers."

The AODA 2005 includes a helpful definition of barrier. Section 2 of the AODA provides:

> "barrier" means anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability, including a physical barrier, an architectural barrier, an information or communications barrier, an attitudinal barrier, a technological barrier, a policy or a practice."

It would severely compromise the Canadians with Disabilities Act's effectiveness if it defined "barrier" too narrowly.

g) Requiring the Federal Government to Create Mandatory, Enforceable Accessibility Standards that Lead Canada to Full Accessibility

As a core ingredient, the Canadians with Disabilities Act should require the Federal Government to develop, enact and enforce all the mandatory, enforceable accessibility standards needed to ensure that as far as it can, the Federal Government will lead Canada to become fully accessible to all people with disabilities by the Act's deadline. Barrier-Free Canada's 14 Principles include:

> "4. The Canadians with Disabilities Act should require Canada, including organizations to whom it applies, to be made fully accessible to all persons with disabilities through the removal of existing barriers and the prevention of the creation of new barriers, within strict time frames to be prescribed in the legislation or regulations."

And

> "7. The Canadians with Disabilities Act should require the Government of Canada

> to lead Canada to achieving the Act's goals. It should specify actions the Government of Canada must take to fulfil this mandate. Among other things, it should require the Government of Canada to provide education and other information resources to organizations, individuals and groups who need to comply with the Act. It should also require the Government of Canada to appoint an independent person to periodically review and publicly report on progress towards full accessibility, and to make recommendations on any actions needed to achieve the Act's goals."

And

> "9. As part of its requirement that the Government of Canada lead Canada to the goal of full accessibility for Canadians with disabilities, the Act should require the Government of Canada to make regulations needed to define with clarity the steps required for compliance with the Canadians with Disabilities Act. It should be open for such regulations to be made on an industry-by-industry or sector-by-sector basis. This should include a requirement that input be obtained from affected groups such as persons with disabilities and obligated organizations, before such regulations are enacted. It should also provide persons with disabilities with the opportunity to apply to have regulations made in specific sectors of the economy to which the Act can apply. The Act should require the Government of Canada to make all the accessibility standards regulations needed to ensure that its goals are achieved, and that these regulations be independently reviewed for sufficiency every four years after they were enacted."

Accessibility standards are mandatory, enforceable regulations that the Federal Government would enact to specify in detail exactly what an organization must do, and by when, to become fully accessible. As noted earlier, the charter and Canada human rights act do not provide this detailed specificity, and don't drive home to many obligated organizations what specific steps they must take to remove and prevent disability barriers.

Accessibility standards should give the specific direction that obligated organizations need and people with disabilities deserve. They can dramatically reduce the need for people with disabilities to battle foreseeable, recurring accessibility barriers one at a time, one obligated organization at a time, through innumerable human rights or Charter challenges. They make it far easier for obligated organizations to undertake orderly planning for accessibility.

Mandatory accessibility standards can save obligated organizations a great deal of time and money, as they try to figure out what they must do to become accessible. Instead of each obligated organization having to reinvent the accessibility wheel, hiring accessibility consultants and seeking legal advice, a well-crafted accessibility standard will show the way. It will also help ensure a level playing field among competitors. All obligated organizations will readily know what they have to do.

The Ontario Government's duty to create accessibility standards is a core responsibility under the AODA. Section 6(6) of the AODA provides:

> "(6) An accessibility standard shall,
> (a) set out measures, policies, practices or other requirements for the identification and removal of barriers with respect to goods, services, facilities, accommodation, employment, buildings, structures, premises or such other things as may be prescribed, and for the prevention of the erection of such barriers; and
> (b) require the persons or organizations named or described in the standard to implement those measures, policies, practices or other requirements within the time periods specified in the standard."

The Canadians with Disabilities Act should require in clear terms that an accessibility standard must identify barriers that must be removed or prevented, and must specify what action an obligated organization must take. It is not enough for an accessibility standard to say that an obligated organization should "have regard to accessibility" or "consider accessibility" or "plan for accessibility" in any specific context.

Some of Ontario's accessibility standards provide the specificity that is needed. For example the Integrated Accessibility Standards Regulation s. 14 identifies websites as a place where barriers can exist, and specifies the standard that must be met for website accessibility.

Other Ontario accessibility standards do not include these needed ingredients. For example Ontario's 2007 Customer Service Accessibility Standard largely tells obligated organizations to develop a policy on accessible Customer Service, to train staff on it, and to have a customer feedback mechanism. With few exceptions it does not list the barriers to Customer Service that need to be addressed, and then tell obligated organizations what they must do regarding those barriers.

To be effective, accessibility standards enacted under the Canadians with Disabilities Act should at least meet the accessibility for an obligated organization imposed under the Canada Human Rights Act, the Charter of Rights, or both. Otherwise, obligated organizations will be frustrated to find that they did what the Canadians with Disabilities Act required, only to learn that they have further Charter and/or human rights accessibility duties. It would also frustrate the Canadians with Disabilities Act's goal of relieving people with disabilities of the burden to battle every barrier, one at a time, if an accessibility standard directs obligated organizations that they can do less, or take longer, than The Charter and human rights laws permit. Regrettably, neither Ontario's nor Manitoba's accessibility laws require accessibility standards to meet the human rights yardstick. According to the Ontario Human Rights Commission, in some respects Ontario's accessibility standards fall short of or fail to live up to the Ontario Human Rights Code's requirements. See http://www.aodaalliance.org/strong-effective-aoda/03212011.asp. This is counterproductive. AODA accessibility standards too often direct obligated organizations to do less than the Ontario Human Rights Code requires them to do. They can erroneously think they have met their accessibility duty. Stronger legal medicine is needed to controvert this trend, than the commendable AODA provision that requires that where more than one law speaks to disability accessibility, the one that imposes the highest accessibility duty always prevails.

It is not sufficient for the Canadians with Disabilities Act to merely provide that the Federal

Government "may" create accessibility standards. It must require the Federal Government to create accessibility standards. The weak Ontarians with Disabilities Act 2001, the precursor to the AODA, permitted the Ontario Government to create accessibility standards, but did not require the Government to do so. Over the four years after it was passed, and before the stronger AODA was enacted, the Ontario Government created no accessibility standards under the Ontarians with Disabilities Act.

It would be insufficient for the Canadians with Disabilities Act to merely require the Federal Government to make some accessibility standards. It should require the Federal Government to make all the accessibility standards needed to ensure that the Act's purposes are achieved. Section 7 of the AODA commendably provides:

> "7. The Minister is responsible for establishing and overseeing a process to develop and implement all accessibility standards necessary to achieving the purposes of this Act."

The Canadians with Disabilities Act should include an independent process to kickstart a log – jam in getting started on accessibility standards. It needs a safeguard that ensures that the Federal government acts in a timely way to direct development of needed accessibility standards.

The Ontario experience illustrates this need. The AODA does not give the disability community a way to get the Ontario government to create a needed accessibility standard if the government refuses to act. For example, Ontarians with disabilities pressed the Ontario government for at least five years to create an AODA Education Accessibility Standard. Ontario's many education accessibility barriers are widely known. Yet the Ontario government has not made a decision.

The process for developing accessibility standards under the Accessibility for Manitobans Act is similar to Ontario's process. However, the Manitoba Act assigns all work on developing recommendations for the contents of any accessibility standards to one body, Manitoba's "Accessibility Advisory Council," created under that Act.

h) Ensuring a Prompt, Effective and Open Process for Developing and Reviewing Federal Accessibility Standards

The Canadians with Disabilities Act should ensure an open and inclusive process for the development of accessibility standards. Ideas for this can be garnered from the Ontario and Manitoba experience.

Ontario has developed accessibility standards in five areas, customer service, employment, transportation, information and communications, and the built environment in public spaces. Manitoba has developed an accessibility standard in the area of customer service. The Ontario experience with the development of accessibility standards has been reviewed by two successive AODA Independent Reviews. The first of these, conducted by Charles Beer in 2009 – 2010, commendably recommended needed improvements to the standards development process. Ontario's experience since then with the Ontario Government's action on those Beer Report recommendations is also informative.

The AODA requires the government to appoint a Standards Development Committee to develop recommendations for the contents of an accessibility standard. That committee includes representatives from the broader public sector, the disability community, and the private sector. The AODA does not require the Standards Development Committee to have equal representation from the disability sector. However, Ontario experience during the two years after the AODA was enacted show it was necessary to ensure equal disability sector representation. Accordingly, in the 2007 Ontario election, Ontario Premier Dalton McGuinty promised to ensure equal disability sector representation on each future Standards Develop an Committee.

Under the AODA, a standards development committee is directed to deal with a specified area, either a sector of the economy such as transportation, or a field cutting across the economy, like customer service, information and communication, the built environment, or employment.

An AODA standards development committee is required to develop an initial proposal for an accessibility standard's contents, in the area it is studying. It need not be written like legislation. It can identify the barriers to be addressed, the corrective measures to be required, and the time lines to be instituted for corrective action. Its initial recommendation is made public. The public is invited to give the Standards Development Committee feedback. The AODA Standards Development Committee is then required to review that input, and formulate its final recommendations for the Ontario Government. It sends its finalized recommendations to the Ontario Government.

The AODA requires the Ontario Government to post the Standards Development Committee's final recommendation for public comment, for 45 days. The government is then required to take action in response. It can develop a proposed regulation. The regulation can vary from the specifics in the recommendation that it has received from the standards development committee. None of the AODA accessibility standards enacted to date have included all the actions that the relevant Standards Development Committee recommended.

Once the Ontario Government develops the actual accessibility standard regulation it wants to enact, the AODA requires it to post it as a draft regulation. Public comment is invited for 45 days. After that, the Ontario Government is expected to review that input. After that, the Ontario Government can enact a final regulation. The accessibility standard becomes the law.

Within five years after an accessibility standard is enacted, the Ontario Government must appoint a Standards Development Committee to review it, and recommend any revisions needed to ensure that the AODA's purposes are achieved.

The 2010 Beer AODA Independent Review Report identified significant problems with the process under the AODA for developing accessibility standards. That report made specific recommendations to fix those problems.

The Beer report was not able to capture all the problems with the standards development process, since four accessibility standards were still being developed when the Beer report was written.

Between 2006 and 2008, the Ontario government appointed five standards development committees, addressing customer service, employment, transportation, information and communication and the built environment. This experience showed that it would be more efficient if one central body develops recommendations for all accessibility standards. This is more effective than having several Standards Development Committees working in silos, disconnected from each other.

This led the Beer Report to recommend in 2010 that all future standards development should be concentrated in one body, independent of the Ontario Government. To its credit, the Ontario government agreed to do this. However it did this through the Accessibility Standards Advisory Council, which was neither resourced or structured to truly operate independently of the Ontario government. It has no staff or administrative capacity.

To date, this reform has been a failure. The least effective standards development process since the AODA was enacted was the 2013-14 review of the 2007 Customer Service Accessibility Standard by the Accessibility Standards Advisory Council (ASAC), to whom the Ontario Government assigned future standard development.

The Ontario experience shows that a Standards Development Committee must actively consult the public as it develops its proposals, including face-to-face consultations. To date, Ontario's Standards Development Committees appear not to have done this much, if at all, apart from formally posting an initial recommendation and receiving written input. Evidently at least sometimes, an Ontario Standards Development Committee only get a summary of written input received, not all the actual submissions from the public. That is far too removed from hearing directly from stakeholders.

As a government works away on a new accessibility standard, there is a risk that obligated organizations will sit back and wait, rather than taking needed immediate action on accessibility, because they want to see what accessibility regulations will be enacted before they do anything. The following recommendations are designed both to avert that risk and to ensure that the accessibility standards that result are strong, effective, practical and constructive. Other proposals to address this risk are set out near the end of this Discussion Paper.

Although it can involve extensive work, the standards development process should be as brief as possible. It should not take any more time than absolutely necessary to avoid delaying progress towards full accessibility.

The work of Standards Development Committees should be conducted under the auspices of the new Canada Accessibility Commissioner. This can help avert several of problems experienced in Ontario, where such an agency was not created.

It would be counterproductive to simply expect the members of one council or board to develop every recommendation for every new accessibility standard. This will log-jam the process, since such a council or board may only be able to work on one accessibility standard at a time.

Having a number of Standards Development Committees operating under the auspices of the Canada Accessibility Commissioner would have the benefit of having several accessibility standards in the works at the same time. It would also have the benefit of ensuring that the work of different Standards Development Committees will be coordinated and harmonized.

From beginning to end, the standards development process should be very open and transparent. The public should be able to readily tell what proposals are being considered, what objections or concerns are being raised, and whose viewpoints are being taken into account.

The standards development process should ensure an equal seat at the table for the disability community. It should include full opportunities for obligated organizations to have their concerns taken into account as accessibility standards are developed. It should ensure that the public has a full and fair opportunity to give input. The standards development process should not let the Federal Government impose arbitrary constraints on what barriers and what solutions a Standards Development Committee considers.

The Federal Government should ensure that the chair of a Standards Development Committee is regarded as a neutral party. They should be respected and recognized as skilled at mediating and leading in consensus building.

The standards development process should ensure that the disability sector representatives on a Standards Development Committee are provided research supports so that they can exchange ideas with obligated organizations, represented on the Standards Development Committee, on a footing of equality. In Ontario's experience, representatives of obligated organizations were more likely to come to the standards development table with more resources to mount their case and advance their interests. In contrast, disability sector representatives, volunteers or employees of voluntary charitable organizations, did not come to the table with comparable support. For that reason, the Ontario government commendably committed in 2007 to provide staff support to disability sector representatives on future AODA standard development committees.

A Standards Development Committee should conduct its work in three phases. First, it should identify recurring accessibility barriers arising in the sector of the economy which it is exploring. An obvious way to collect this information is by broadly canvassing people with disabilities.

Second, the Standards Development Committee should bring together a list of different options that could be adopted to address these barriers. It could canvass obligated organizations for examples of successful strategies. To compile that list, the Standards Development Committee can turn to practices tried by obligated organizations in Canada, as well as conducting research on what is done in other jurisdictions, what other laws here and abroad have required, what Charter and human rights case law requires, and what trade or self-governing professional organizations recommend as "best practices."

Third, after deciding which recurring barriers the accessibility standard will address, and the corrective measures to be required, the Standards Development Committee should develop proposals on timelines to be required for these actions, potentially geared to obligated

organizations' size and capacity.

When a Standards Development Committee is formulating its recommendations, it should vote clause by clause on them. Members should not face an "all or nothing" vote. The early Ontario experience shows that that leads to the substantial weakening of any proposals that the Standards Development Committee reports out to a government.

Members of a Standards Development Committee should be able to dissent. The Standards Development Committee should be able to submit majority and minority reports to the Federal Government. This allows for a diversity of views to be expressed in a final report, which can enrich the Government's deliberations and public feedback.

The Canadians with Disabilities Act should set clear, short timelines for the work of a Standards Development Committee. In Ontario these spread out over two or more years in the mid to late 2000s. By time-limiting their work, they can ensure that the process of developing accessibility standards doesn't delay progress towards full accessibility.

The work of a Standards Development Committee should be conducted in the open. The Ontario government did not require this in the AODA. Instead, the AODA only requires that a standards development committee make public the minutes of its meetings. Those minutes have not provided the needed openness, accountability and oversight. Moreover, at least some of the posted minutes were hard for the public to meaningfully follow.

The Canadians with Disabilities Act should require a Standards Development Committee to invite stakeholders from the disability community and regulated sectors to meet with the Standards Development Committee face-to-face, to discuss issues that the Standards Development Committee finds contentious. Receiving written submissions from stakeholders may be good enough for some of its work, but on more important and more contentious issues, there is no substitute for a frank face-to-face exchange. When stakeholders from different perspectives have a lively dialogue, the Standards Development Committee's deliberations can be greatly enriched.

The Canadian Human Rights Commission should be extensively involved in the formal and informal work of each Standards Development Committee. This is especially important during review of public input and during discussion on specific recommendations.

The work of Standards Development Committees should be conducted as much as possible at arm's length from the federal public service. Having the Standards Development Committee process run by the Canada Accessibility Commissioner can help achieve this.

The federal public service will be the largest organization that will be obliged to comply with federal accessibility standards. It will have a strong institutional interest in watering down federal accessibility standards. At times the Ontario Public Service has revealed such a predisposition.

The federal government will understandably want the Federal Public Service's input, as it develops accessibility standards. To help ensure that the federal public service does not unduly

water down accessibility standards, any federal public service input, either to the Standards Development Committee during its development of recommendations, or to the federal government after the standards development committee is rendered as recommendations, should immediately be made public. This lets the public scrutinize the federal public service's input. The public has a right to know what the Federal Public Service proposes.

The recommendations of the Standards Development Committee should be made public. The public should be given an opportunity to give input on the Standards Development Committee's recommendations. Before the Federal Government can enact an accessibility standard, it should be required to post it for public comment.

The Federal Government should be required to appoint a Standards Development Committee to review each accessibility standard within five years of its enactment, and to recommend revisions. The purposes of revisions should be to ensure that the accessibility standard better ensures that the Act's goals will be reached. It should be made clear that the Federal Government cannot revise an accessibility standard, after it is enacted, without complying with this review process.

i) Ensuring Effective Enforcement of the Canadians with Disabilities Act

The Canadians with Disabilities Act must be effectively enforced. It must spell out effective enforcement powers, impose effective enforcement duties, and ensure timely, effective public reporting and accountability on enforcement efforts.

It is not enough for the Canadians with Disabilities Act to designate public officials who are permitted to enforce this legislation. It is essential that the Act require designated federal officials to take specified steps to ensure its ongoing effective enforcement. Barrier-Free Canada's 14 Principles for the Canadians with Disabilities Act include:

> "8. The Canadians with Disabilities Act should provide for a prompt, independent and effective process for enforcement, and should require that the Act be effectively enforced. This should include, among other things, an effective avenue for persons with disabilities to raise with enforcement officials violations of the Act that they have encountered. It should not simply incorporate the existing procedures for filing discrimination complaints with the Canadian Human Rights Commission or under the Canadian Charter of Rights and Freedoms, as these are too slow and cumbersome, and can yield inadequate remedies."

Enforcement is pivotal to the Canadians with Disabilities Act's success. If obligated organizations do not think that they face significant legal consequences if they don't comply, they will be far less likely to comply. Drivers are far more likely to obey speed limits when they see police, speed traps, or photo radar. The same goes for mandatory seat belt laws, and bans on texting while driving.

Human beings are hard-wired to be creatures of habit. Accessibility laws require individuals and obligated organizations to break deeply-rooted habits. Even the powerful economic benefits of

accessibility have not gotten many obligated organizations to break their bad habits on disability accessibility.

It is wrong to assume that all obligated organizations need is to be educated on the benefits of accessibility, and then they will comply, driven by their own enlightened self-interest. Decades of experience with human rights legislation and with newer accessibility laws show that such an approach has failed. Effective enforcement of strong accessibility laws are needed to get obligated organizations to resist the powerful human nature to keep doing business exactly as they always have.

The Ontario experience proves this point. The AODA provides for effective tools for enforcement. The Ontario government promised the AODA's effective enforcement. However, as of the time of writing, it has a proven three-year track record—from 2013 to 2016—of not doing so. This the case even though it has known throughout of rampant violations, has the power to act, and had unused funds available appropriated for the AODA's implementation.

The AODA establishes a regime of inspections and inspectors. It also establishes directors with powers to issue compliance orders and, where needed, monetary penalties. An obligated organization can appeal such orders to a tribunal.

Ontario has only appointed a tiny number of officials to conduct AODA inspections and audits. As of partway through 2015, the Government had only appointed three directors and one inspector to enforce the AODA across all of Ontario's public and private sectors.

The Ontario Government's audit and inspection activities appear to be limited to paper audit of an obligated organization's compliance records, rather than visiting an obligated organization's premises to see what is happening on the ground. As long as an obligated organization can send the Ontario Government the right paperwork, they are deemed to be providing sufficient accessibility in compliance with the AODA, no matter how little accessibility the organization actually provides to people with disabilities. Such an approach reflects an impoverished approach to accessibility and its enforcement.

In 2004, the Ontarians with Disabilities Act Committee, the predecessor to the Accessibility for Ontarians with Disabilities Act Alliance, made public a comprehensive Discussion Paper on options for an enforcement/ compliance regime for the proposed Ontario accessibility law, entitled "Putting Teeth into the Ontarians with Disabilities Act, available at http://www.odacommittee.net/ODA_Discussion_Paper.html. Drawing on that work, and on experience over the decade since, then, the following are the key ingredients that the Canadians with Disabilities Act should include in an enforcement/compliance regime:

It should ensure strong and effective remedies for non-compliance. These should be sufficient to incentivize obligated organizations to comply. Non-compliance should be made more costly than compliance.

Remedies should also include orders requiring that sufficient specific action be taken to bring an obligated organization into compliance, and to ensure future compliance. Where there is

protracted, persistent or systemic non-compliance, more extensive remedies should be available. These should include, e.g. independent monitoring and public reporting.

Responsibility for discharging enforcement powers should be vested in an independent agency, that is arm's-length from the federal government. The Canada Accessibility Commissioner, referred to above, should be given this mandate.

The largest obligated organization will be the federal government. It would be inherently problematic for the government to investigate and enforce this law against itself. Experience with the Ontario government's perennial lax enforcement of the AODA has reaffirmed and reinforced the view that disability advocates originally expressed to the Ontario Legislature from 2001 to 2005 that it is best if enforcement powers are vested in an independent arm's-length organization, with appropriate public accountability and reporting obligations.

Whoever is responsible for the Canadians with Disabilities Act's enforcement should be required to regularly report to the public on its enforcement activities, and on the results yielded. In Ontario, it was necessary to resort to a series of freedom of information applications to reveal the extent to which the Ontario government was not enforcing the AODA, despite the fact that it knew of rampant violations, and despite having funds on hand for enforcement.

The 2014 final report of the Mayo Moran AODA Independent Review made important recommendations about the need for openness and transparency of AODA enforcement activities:

> "Since sharing information can among other things help to enhance compliance, transparency is an increasingly significant feature of modern regulatory systems. Indeed, transparency is a common practice within the Government of Ontario itself. For example, the Ministry of Labour posts the number of employment standards inspections, investigations and prosecutions as well as lists of employers convicted, nature of offences and fines. It also identifies the top five complaints for each year. Similarly, the Ministry of Government and Consumer Services has a searchable online public record that lists businesses that have been charged and/or convicted under consumer protection legislation or that have not responded to the Ministry regarding a complaint. The Ontario Energy Board website posts annual complaints data for electricity retailers and natural gas marketers, by company (number of complaints per 1000 contracts).
>
> In this context, it is important for the AODA enforcement plan to incorporate transparency. Making the results of AODA enforcement activities known in a timely way will achieve key accessibility objectives including encouraging greater compliance as well as enabling consumers and others to direct their choices to organizations that support accessibility.
>
> I emphasize that timeliness is a key aspect of transparency. While time frames vary widely across government, some regulators post enforcement information on a quarterly basis or even more frequently. Given that enforcement was a top issue

raised during the consultations for this Review, I recommend that the ADO release information on AODA enforcement actions at least every three months. This information should be posted promptly and should reflect quarterly results as well as year-to-date totals, broken down by sector and size of organization. At a minimum, it should include such measures as:
"Number of notices of proposed order issued
"Total amount of proposed penalties
"Number of orders issued and total amount of penalties imposed
"Number of appeals from orders and the outcome
"Total amount of penalties including changes ordered by the appeal tribunal
"Orders categorized by subject matter."

An educational feature should be built into the Canadians with Disabilities Act's enforcement regime. To achieve this, the initial enforcement order should be a compliance order. It should give an organization a short time to bring itself into compliance. A monetary penalty and mandatory action order should follow if that initial compliance order is violated.

The Canadians with Disabilities Act should provide a clear, open and accessible way for members of the public to lodge complaints with the enforcement agency, to seek the Act's enforcement. The Federal Government should not simply tell members of the public that they must bring their own human rights or Charter complaint. A core purpose of the Canadians with Disabilities Act is to remove or dramatically reduce the need for individuals to battle barriers, one at a time, where they are within federal jurisdiction. It is not expected that the Canadians with Disabilities Act will ensure a federal investigation of every complaint. Like a police force, the public agency and officials, charged with enforcing the Canadians with Disabilities Act, will have discretion to set enforcement priorities. However federal decisions on where to take enforcement action should be informed by complaints from the public. Where a complaint warrants enforcement action, the federal enforcement agency or officials should act on it. Those complaints should not just be used to compile statistical information or to track trends.

Ontario commendably set up a toll-free number for the public to report AODA violations. It had promised to do so. It took months of delay and community pressure to get the Ontario Government to act on that promise. It has not kept its promise to publicize that phone number for receiving AODA complaints. There is no public indication that the Ontario Government has used complaints received on that phone line to initiate any AODA enforcement action in any case.

The federal government is unlikely to hire a large enough team, assigned full time to enforce the Canadians with Disabilities Act, that can effectively ensure nation-wide compliance. A cost – effective, constructive way to supplement those full time enforcement officials is for the federal government to also deputize federal inspection and enforcement officials under other federal laws, with the mandate to also enforce the Canadians with Disabilities Act. If inspectors and other enforcement officers under other federal laws are visiting a federally-regulated organization for any reason, they could take that opportunity to also eyeball the organization for compliance with the Canadians with Disabilities Act. They can have a "Canadians with Disabilities Act enforcement checklist" in hand. The Ontario government committed to explore this in the 2014 election. The Ontario Government has not reported to the public any problems

with efforts it has tried.
The Canadians with Disabilities Act should designate a single federal administrative tribunal, with appropriate disability equality expertise, with the mandate to consider any hearings under the Canadians with Disabilities Act. The most obvious candidate for this is the Canadian Human Rights Tribunal. In Ontario, without consulting people with disabilities, the Ontario Government gave this mandate under the AODA to the Licensing Appeal Tribunal. That tribunal had no prior expertise in disability or accessibility issues. It has only heard a handful of cases.

It is important that monetary penalties not be mechanistically and artificially reduced based on the frequency of violations, as is now the case under the AODA. That approach, coupled with scant AODA enforcement, has led AODA penalties to be so small as to trivialize the importance of disability accessibility.

The Canadians with Disabilities Act enforcement regime should generate a real and significant incentive for senior management, especially in large corporate or governmental organizations, to ensure that their organization fully meets its accessibility requirements. The Canadians with Disabilities Act should make an obligated organizations' senior officials, and not just the corporate entity, liable for accessibility denials within their personal authority. If only the corporate entity and not its senior officials are found liable for an accessibility denial, senior management officials will feel little if any impetus to ensure that their organization complies with the Canadians with Disabilities Act.

j) Ensuring Strong Centralized Action on Disability Accessibility Among Federal Regulatory Agencies

As part of an effective regime for the Canadians with Disabilities Act's implementation and enforcement, people with disabilities must have one place to go to seek relief. It is similarly important for one central federal agency to have a lead mandate for the Canadians with Disabilities Act's enforcement. People with disabilities should not have to chase around the Federal Government, to find which agency will enforce their accessibility rights. For example, now if people with disabilities file a human rights complaint with the Canadian Human Rights Commission, they can find that all or part of it gets punted to another regulatory agency, like the CRTC or the Canada Transportation Agency. This is an unfair gift to any federally regulated organizations that seek to avoid timely administrative justice. They can drag out proceedings, throw barriers in the path of timely enforcement, and wear down the victims of accessibility barriers.

The Canadians with Disabilities Act should ensure that there is one place to go to get accessibility disputes resolved. It should have all the powers needed to do so.

If, despite this, Parliament decides to leave any jurisdiction over accessibility with different regulatory agencies, like the Canada Transportation Agency or the CRTC, then the Canadians with Disabilities Act should ensure that:

a) All those other regulatory agencies are given the fullest range of remedial powers, at least as broad as those which the Canada Human Rights Tribunal has.

b) Those agencies should all be given an explicit mandatory duty to create and effectively enforce accessibility standards within their mandates, along time lines to be set out in the Canadians with Disabilities Act and, and similarly affording people with disabilities with input into the standards-making process

c) Those regulatory agencies should all be required to give strong weight to accessibility concerns when discharging any discretionary or decision-making powers.

k) Ensuring that the Strongest Accessibility Law Always Prevails

Several federal laws address aspects of accessibility for people with disabilities. It is important for the Canadians with Disabilities Act to clarify which laws prevail. Barrier-Free Canada's 14 Principles include:

> "3. The Canadians with Disabilities Act's requirements should supersede all other legislation, regulations or policies which provide lesser protections and entitlements to persons with disabilities. The Act and regulations made under it should not take away any rights that Canadians with disabilities now enjoy;"

Two objectives need to be achieved. First, nothing in the Canadians with Disabilities Act or actions taken under it can reduce disability accessibility protections under any other law. The Canadians with Disabilities Act should never reduce accessibility protection, permit barriers or slow progress.

Second, the Canadians with Disabilities Act must prevail over any other federal law that provides less disability accessibility protection. Government and private sector organizations, used to working with other laws, tend to be pre-occupied with those more familiar laws, often treating human rights and accessibility laws as a secondary after-thought. If those more familiar laws impede accessibility or more weakly protect it, obligated organizations must be clearly directed that they give way to the stronger Canadians with Disabilities Act.

The AODA addresses this, providing:

> "38. If a provision of this Act, of an accessibility standard or of any other regulation conflicts with a provision of any other Act or regulation, the provision that provides the highest level of accessibility for persons with disabilities with respect to goods, services, facilities, employment, accommodation, buildings, structures or premises shall prevail."

l) Ensuring that Public Money is Never Used to Create, Perpetuate or Exacerbate Accessibility Barriers

The Federal Government can give Canada a major boost towards full accessibility, by making sure that taxpayers' money is never used by the Government itself, or by any other recipient of public money, to create, perpetuate or exacerbate disability barriers. This requires no increase in

federal spending. It just requires the Federal Government to spend its existing budget more wisely.

Three areas of federal spending should be targeted:

a) Every year, the Federal Government spends billions of public dollars on capital projects, including new infrastructure. That includes infrastructure in which the Federal Government builds, as well as transfers to provincial or municipal governments, or other organizations, for capital and infrastructure projects.

b) The Federal Government annually spends billions of public dollars on goods and services that it buys for use by the Federal Public Service and the public.

c) The Federal Government spends large amounts annually on grants and loans for business development, as well as on research grants for universities and other organizations.

This massive annual federal spending gives the federal government substantial leverage in the economy, to promote accessibility for people with disabilities. It is for that reason that Barrier – Free Canada's 14 principles includes:

> "10. The Canadians with Disabilities Act should require that the Government of Canada ensure that no public money is used to create or perpetuate barriers against persons with disabilities. For example, all federal departments, agencies, and crown corporations should be required to make it a strict condition of funding any program, or any capital or other infrastructure project, or of any transfer payment, subsidy, loan, grant (such as research grants) or other payment of public funds, that no such funds may be used to create or perpetuate barriers against persons with disabilities. They should also be required to make it a condition of any procurement of any services, goods or facilities, that these be designed to be fully accessible to and usable by persons with disabilities. Any grant (including for example, research grant), loan, subsidy, contract or other such payment which does not so provide is void and unenforceable by the grant-recipient or contractor with the department, agency, or crown corporation in question. The Government of Canada should be required to monitor and enforce these requirements and to periodically report to the public on compliance."

The Canadians with Disabilities Act should require the Federal Government to attach clear, strong and enforceable accessibility strings to all these areas of federal spending. Any infrastructure or other capital project built in whole or in part with Government money should be required to be fully accessible. This includes projects built either by the Federal Government or by any recipient of a federal infrastructure or transfer payment grant such as a provincial government agency, municipality, hospital, school board, public transit provider, college or university. As well, no infrastructure money should be given to improve a building, if that improvement is located in a part of a building that is not accessible, unless it will become accessible. Good public money should not be thrown after bad money.

When the Federal Government purchases or rents goods, services or facilities for its own use or for use by the public, it should ensure that those goods, services or facilities are themselves fully accessible to and useable by people with disabilities. If more than one competitor bids on a procurement project, they should be required to specify that the goods, services or facilities are accessible, or commit to the steps that the vender will take to make them fully accessible. The Government should ascribe significant weight to this, when deciding which vender should win the bidding competition.

If an organization applies for any other kind of Government grant or loan, or a subsidy for business development, the Government should make it clear that a preference will be given to applicants who ensure that their workplace, goods, services and facilities are accessible, or that stipulate accelerated deadlines for achieving full accessibility.

Any research grants that include public funding should impose a condition that people with disabilities will be properly included in the research. Any psychological or medical research should ensure, where possible, that test subjects are not solely people without disabilities.

These measures would create a substantial, positive new incentive for the public and private sectors to produce accessible goods, services, facilities and capital projects, and to operate accessible programs and workplaces. The benefits of this strategy can be far-reaching. Once a recipient organization ensures that their goods, services or facilities are accessible, all of their customers with disabilities will benefit from their accessible offerings. That vender can also meet the unmet demand across Canada and around the world, for accessible goods, services and facilities. There are an estimated one billion persons with disabilities around the world, a huge untapped market.

There are far more organizations across Canada who try to get federal loans or grants, or who try to sell or rent goods, services or facilities, to the Federal Government than the Government can contract with. This puts the Government in a great position. It can choose among competing applications or bids. By making accessibility an important and highly visible factor in this process, applicants for federal loans and grants, and bidders for federal contracts, can be motivated to try to out-bid each other on their accessibility commitments.

The Ontario experience shows that these requirements must be clearly legislated. If the federal government simply adopts it is a matter of policy, rather than setting it is an enforceable legal requirement, it will not be consistently followed. Moreover, if it is merely instituted as a government policy, a future government can eliminate or weaken it without requiring Parliament’s the approval.

Ontario accessibility advocates have pressed the Ontario Government for many years to implement effective actions to ensure that public money is never used to create, perpetuate or exacerbate accessibility barriers. There has been limited success in getting some new laws enacted and policies adopted. They lack the needed visibility, strength and enforcement. They have not made the kind of impact needed. As a result, the Ontario Government has largely missed out on huge opportunities to leverage its billions in annual infrastructure and procurement spending to generate greater accessibility in Ontario for people with disabilities.

On June 24, 2011, the Ontario Government unveiled a Ten-Year Infrastructure Plan for Ontario. It enunciated the policies and principles to govern any of the billions of dollars of Ontario Government infrastructure spending over the next decade.

As a result of grassroots disability advocacy efforts, mandatory accessibility requirements were enshrined in this 10-year plan. That Plan requires that:

> "All entities seeking provincial infrastructure funding for new buildings or major expansions/renovations to demonstrate how the funding will prevent or remove barriers and improve the level of accessibility where feasible."

However, the Ontario Government has not made public any plans for effectively implementing, monitoring and enforcing this requirement.

Provisions in the weak Ontarians with Disabilities Act 2001 passed in 2001, the precursor to the AODA, and of the Integrated Accessibility Standards Regulation enacted under the AODA, also address accessibility requirements when the Ontario Government engages in capital or procurement spending. The Ontarians with Disabilities Act 2001 included these provisions for which there was no enforcement:

> “Government buildings, structures and premises
> 4. (1) In consultation with persons with disabilities and others, the Government of Ontario shall develop barrier-free design guidelines to promote accessibility for persons with disabilities to buildings, structures and premises, or parts of buildings, structures and premises, that the Government purchases, enters into a lease for, constructs or significantly renovates after this section comes into force.
>
> Level of accessibility
>
> (2) The guidelines shall ensure that the level of accessibility for persons with disabilities is equal to or exceeds the level of accessibility required by the Building Code Act, 1992 and the regulations made under it.
>
> Different requirements
>
> (3) The guidelines may impose different requirements, including different times at which the requirements must be met, for different buildings, structures or premises or different classes of buildings, structures or premises and may specify buildings, structures or premises or classes of buildings, structures or premises for which there are no requirements.
>
> Duty to comply
>
> (4) The Government of Ontario shall ensure that the design of buildings, structures and premises, or parts of buildings, structures and premises, that it

purchases, constructs or significantly renovates after this section comes into force complies with the guidelines before occupation or regular use by its employees.

New leases

(5) If, after this section comes into force, the Government of Ontario enters into a new lease for a building, structure or premises, or part of a building, structure or premises, for the occupation or regular use by its employees, the Government shall have regard to the extent to which the design of the building, structure or premises, or part of the building, structure or premises, complies with the guidelines, in determining whether to enter into the lease.

Not regulations

(6) The guidelines are not regulations within the meaning of Part III (Regulations) of the Legislation Act, 2006.

Government goods and services

5. In deciding to purchase goods or services through the procurement process for the use of itself, its employees or the public, the Government of Ontario shall have regard to the accessibility for persons with disabilities to the goods or services.

The Integrated Accessibility Standards Regulation, enacted in 2011 under the AODA, includes these requirements for accessible procured goods, services and facilities, including accessible electronic kiosks:

“5. (1) The Government of Ontario, Legislative Assembly and designated public sector organizations shall incorporate accessibility design, criteria and features when procuring or acquiring goods, services or facilities, except where it is not practicable to do so. O. Reg. 191/11, s. 5 (1); O. Reg. 413/12, s. 4 (1).

(2) If the Government of Ontario, Legislative Assembly or a designated public sector organization determines that it is not practicable to incorporate accessibility design, criteria and features when procuring or acquiring goods, services or facilities, it shall provide, upon request, an explanation. O. Reg. 191/11, s. 5 (2); O. Reg. 413/12, s. 4 (2).

(3) The Government of Ontario, Legislative Assembly and designated public sector organizations shall meet the requirements of this section in accordance with the following schedule:

1. for the Government of Ontario and the Legislative Assembly, January 1, 2012.

2. for large designated public sector organizations, January 1, 2013.

3. for small designated public sector organizations, January 1, 2014. O. Reg. 191/11, s. 5 (3).

Self-service kiosks

6. (1) Without limiting the generality of section 5, the Government of Ontario, Legislative Assembly and designated public sector organizations shall incorporate accessibility features when designing, procuring or acquiring self-service kiosks. O. Reg. 191/11, s. 6 (1).

(2) Large organizations and small organizations shall have regard to the accessibility for persons with disabilities when designing, procuring or acquiring self-service kiosks. O. Reg. 191/11, s. 6 (2).

(3) The Government of Ontario, Legislative Assembly and designated public sector organizations shall meet the requirements of this section in accordance with the schedule set out in subsection 5 (3). O. Reg. 191/11, s. 6 (3).

(4) Large organizations shall meet the requirements under subsection (2) as of January 1, 2014 and small organizations shall meet the requirements as of January 1, 2015. O. Reg. 191/11, s. 6 (4).

(5) In this section,

“kiosk” means an interactive electronic terminal, including a point-of-sale device, intended for public use that allows users to access one or more services or products or both. O. Reg. 191/11, s. 6 (5).”

Provincial election promises and these provisions in Ontario law have been ineffective at ensuring that no new barriers are created with Ontario public money. In Ontario public money has continued to be used to create, perpetuate or exacerbate disability accessibility barriers.

In 2010, the Ontario government unveiled a new Presto Smart Card, for paying public transit fares. Despite public commitments to its accessibility, it was designed with accessibility barriers. The machines for the public to check their card balance at transit stations only provided the information on a screen. There was no audio output for people with vision loss or dyslexia.

The Ontario Government built large new provincial courthouses in Durham Region and Kitchener Ontario. Only one quarter of the courtrooms can a judge using a mobility device access the judicial dais.

Accessibility strings attached to federal money must go further than simply requiring that “accessibility will be considered” or that "the Canadians with Disabilities Act will be obeyed.” The Canadians with Disabilities Act should require the development of detailed standards on accessibility strings to be attached to receipt of federal loans, grants or to the sale or rental to the

Federal Government of goods, services or facilities. It should mandate an effective process for monitoring and effective enforcement.

m) Ensuring that No Federal Laws Authorize or Require Disability Barriers

For Canada to reach full accessibility, it is important to ensure that all federal statutes and regulations are barrier-free. The Federal Government must ensure that all existing federal statutes and regulations, and any new laws do not require or mandate the creation or perpetuation of barriers against persons with disabilities. Among other things, the Federal Government must ensure that federal statutes and regulations incorporate measures to ensure the full accessibility of the programs, policies, rights and opportunities that they authorize or address.

Accordingly, the Federal Government must conduct a thorough review of all of its statutes and regulations for accessibility barriers. Where any are found, these laws must be amended to ensure they are barrier-free. The Federal Government must also implement new proactive measures to ensure that in the future, new statutes or regulations are carefully screened before they are enacted, to ensure that they are barrier-free.

Barrier-Free Canada's 14 Principles include:

> "11. The Canadians with Disabilities Act should require the Government of Canada to review all federal legislation and regulations to identify possible accessibility barriers that they may impose or permit, and to propose omnibus legislation within a specified time to address these barriers. It should require the Government of Canada to review all future proposed legislation and regulations, before they are enacted, to certify and ensure that they do not create, perpetuate or allow for accessibility barriers in them or in activity or programs operated under them. …"

This is a core Federal Government responsibility under the Eldridge decision, discussed earlier. In almost two decades since Eldridge, we have seen no indication that Eldridge led to a comprehensive Federal Government review of all federal laws and programs for accessibility barriers, and for Eldridge compliance.

The need for this Federal accessibility review of its laws also arises from Article 4(1)(b) of the CRPD, which requires contracting parties to:

> "…take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities."

In this review, the Federal Government must look for more than federal statutes or regulations that explicitly single some or all people with disabilities out for worse treatment. It is also essential for this legislative review to investigate if federal laws ensure that people with disabilities can fully participate in all the rights, privileges benefits and duties that federal law extends to the public. For a detailed guide on how to conduct such reviews, see David Lepofsky

and Prof. Randal Graham "Universal Design in Legislative Drafting – How To Ensure Legislation is Barrier-Free for People with Disabilities" (2009), 27 National Journal of Constitutional Law 129-157.

As one example, federal legislation gives a range of regulatory agencies and tribunals statutory powers to make and implement a wide spectrum of policies and decisions. These can impact on accessibility. When they exercise a discretionary statutory power, it can inadvertently create new disability barriers, or exacerbate existing ones. No federal agency should implement policies or discretionary decisions that undermine accessibility.

Federal legislation and regulations should be amended to ensure that a duty to explicitly consider and ensure accessibility is imposed on any federal agencies, boards, commissions, or other like public entities that can have an impact on accessibility. When federal legislation gives a board, commission or tribunal or other public official a discretionary power of decision, it should provide that when exercising that discretion, it shall consider the decision's impact on the creation or removal of barriers against persons with disabilities and to the need to ensure disability accessibility. Removing and preventing disability barriers is everyone's business.

Why should this legislative review for accessibility be spelled out in the Canadians with Disabilities Act? Why not leave it to the Federal Government to conduct it as a matter of good policy?

Ample experience shows the need for this to be legislated. Were it something the Federal Government would do on its own initiative, it would have done so within the nearly two decades since the Eldridge decision.

Ontario experience shows the need for this to be legislated. In the 2007 Ontario election, all political parties promised that if elected, they would conduct such a legislative accessibility review. Yet nine years later, the Ontario Government has only reviewed a mere 55 of its 750 statutes and none of its regulations.

Barrier-Free Canada's principles call for the results of this legislative review to be brought forward as amendments presented in an omnibus bill in Parliament. An omnibus bill is the only efficient way to get a large number of laws amended at one time. Otherwise, each minister must bring one law forward at a time, to get its accessibility barriers fixed. That could take an eternity.

An accessibility review of federal legislation must include a detailed and thorough accessibility review of the Criminal Code of Canada, and related criminal legislation such as the Youth Criminal Justice Act. A significant proportion of persons accused of crime, and of persons who come before the courts as alleged victims of crime, have one or more disabilities. While the Criminal Code includes some provisions to accommodate them, a complete accessibility modernization of Canada's criminal laws is in order.

The review of federal legislation also must include a thorough review of Canada's immigration and refugee legislation. Disability barriers should be addressed in both the rules on who is permitted to immigrate to Canada and in the process for assessing immigration and refugee

claims.

n) Ensuring Federal Elections Become Fully Accessible to Voters and Candidates with Disabilities

Canadians with Disabilities Act should include provisions requiring the Federal Government to make ensure that elections are fully accessible to and barrier-free for voters and candidates with disabilities. Barrier-Free Canada's 14 principles calls for this legislation to require a review of all federal legislation for accessibility barriers, addressed above. The 11th principle then continues:

> "As an immediate priority under these activities, the Government of Canada should get input from voters with disabilities on accessibility barriers in election campaigns and the voting process, and should develop reforms to remove and prevent such barriers."

Voters and candidates with disabilities are entitled to fully accessible, barrier-free federal elections. They cannot be expected to fight these barriers one at a time. If a polling station and/or ballot lack full accessibility, a Charter or human rights case, fought after the fact, cannot restore a right to participate in an election which is already decided.

The opportunity to fully participate as voters and candidates in federal elections is fundamental in a democracy. These are important ways for people with disabilities to have their voices and concerns heard in the Federal Government.

Barriers impeding voters with disabilities recur in federal, provincial and municipal elections across Canada. Here are prominent examples:

a) Voters with physical disabilities are not assured that polling stations will be fully accessible.

b) Voters with limited or no vision, as well as voters with other print disabilities or motor limitations, are not assured that they can mark their own ballots independently and in private, and then verify that their ballot was properly marked in accordance with their wishes.

c) Election campaigns can include campaign information and communication that is not provided in a way that is accessible to people with vision loss, dyslexia and/ or hearing loss.
These barriers are illegal, unfair and bad public policy. They benefit no one.

The Federal Government's duty to honour these important accessibility rights has several legal bases:

a) Section 3 of the Charter guarantees:

> "3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

b) Charter s. 15's guarantee of equality rights to persons with disabilities.

c) The Canada Human Rights Act's right to equal treatment in services and facilities;

d) The CRPD imposes these duties on Canada:

> "Article 29 - Participation in political and public life
>
> Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:
>
> a. Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
>
> > i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
> > ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
> > iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice."

In 2010, the Canadian Human Rights Tribunal decided *Hughes v. Elections Canada* 2010 CHRT 4, a landmark ruling under the Canada Human Rights Act, recognizing the rights of voters with disabilities to accessible polling stations during federal elections. Its facts are shocking but, to people with disabilities, unsurprising:

> "[9] On March 17, 2008, he proceeded using his walker to vote at St. Basil's Church. The Church is in a beautiful, old building in downtown Toronto. It has three entrances: entrance #1 (main one, south side); entrance #2 (back one, north side); and entrance #3 (side one, west side). …
>
> [10] From the street, the Complainant walked up a sloped hill on a long, winding path to entrance #1. At the front door was "a perfectly acceptable handicap ramp," said the Complainant. He said he found some "cryptic, yellow" EC signs, but they pointed away from entrance #1 and toward entrance #3. Entrance #1 was locked. Said signs indicate to me as well that EC (at least the official who put up the signs) was aware that entrance #1 was locked and unusable as an accessible entrance, for disabled and non-disabled voters. Mr. Hughes proceeded around the building to entrance #3. When he opened the door, he was somewhat startled to find a flight of stairs leading downward. It was clearly not an accessible entrance.

[11] Mr. Hughes was not able to get down the stairs without assistance. He called out for assistance and someone came over. The person appeared to be an EC official and told him he could either come down the stairs or walk around the building (to entrance #2). He chose to deal with the known obstacle rather than face the unknown ones. The official took his walker down the stairs and Mr. Hughes then proceeded to go down the stairs "on the seat of my pants." The Complainant testified that this was rather humiliating. He was concerned as well about falling. They then put the walker back together and he walked down the hallway to the election polling stations in the basement hall.

[12] His experience with inaccessibility did not end there. When in the hall, he was not able to vote in the polling booth because the tables were placed too close together, blocking his path. EC officials had to re-arrange the tables. A person using a walker or wheelchair did not have a direct pathway to the private voting booth.

[13] While in the Church basement hall, Mr. Hughes told a male EC official about his "difficult voting experience." He does not remember the name of the official. Mr. Hughes averred that the person replied that the lack of accessibility was for financial reasons and that "in federal by-elections they are not given sufficient funds to have an accessible polling station." Mr. Hughes was "appalled". EC avers that if this in fact occurred, the official was factually wrong and was not in a position to make such comments. Nothing came of his verbal complaint. I accept Mr. Hughes' testimony on this topic.

[14] Mr. Hughes eventually got to mark his ballot that day. However, his departure was no less easy. Rather than go back through entrance #3 with its barrier-ridden path, the EC officials offered to help this voter with a disability leave through the back way, entrance #2, adjacent to the parking lot. Mr. Hughes had to walk up a "steep, narrow ramp". It was only "marginally possible" for use with his walker. The two doors leading out to the parking lot weren't open. There was no automatic opening mechanism for the doors. Mr. Topping, who did an onsite inspection on behalf of EC and gave expert opinion evidence at the hearing, agreed that they are heavy, steel doors. Only one of the two double doors was operable. Mr. Hughes' walker had to be folded in order to get it through. Outside the doors, he confronted snow on the ground which hadn't been sufficiently cleared. He stated that the width shoveled looked like it had been done with ambulatory people in mind. It was barely wide enough for his walker's wheels, and certainly not wide enough for a person using a wheelchair. There was a sloped ramp downward. He described it as steep and slippery. I accept Mr. Hughes' testimony that he could not have exited through entrance #2 without assistance.

[15] Mr. Hughes described the entrance at the back as a "freight/emergency entrance". In his view, it was demeaning and not dignified. He remarked that it

> doesn't affirm a person as an actual person, but signals they should be handled as freight. I accept that he felt this way. There was a debate among counsel as to whether this constituted a segregated entrance, reminiscent of the images of the Old South in the United States. I make no finding in this regard. Suffice to say, the back entrance was not ideal or acceptable in the circumstances. None of the three entrances to the Church was accessible to Mr. Hughes. Entrance #1 was closed; entrance #2 was fraught with barriers (physically and symbolically); and entrance #3 was inaccessible due to the flight of stairs….
>
> …voting on October 14th, except for the snow on the ground. When he went to St. Basil's, the front door (entrance #1) with its accessible ramp was again unavailable. This time he proceeded to entrance #2, where he found one of the doors was being held ajar by a broken rock. The Complainant testified that he could not open the heavy steel door himself. With assistance, he entered via entrance #2, voted and left the same way."

The Tribunal reached these important findings:

> "(1) EC (Elections Canada) denied the Complainant barrier-free access to voting in both the 2008 by-election and general election in that not one entrance was accessible to a person with the disability that Mr. Hughes has;
>
> (2) EC denied him a service and adversely differentiated against him in its sub-standard investigation of his verbal and written complaints to it. EC didn't even record his March 17th election day verbal complaint. EC's response to his written complaint to it and his CHRA Complaint was tardy and inaccurate, and its tone dismissive. It is disappointing that in its August 6th letter to the Commission addressing the CHRA Complaint (five months after his complaints to EC), EC made so many factual errors. The most glaring one was that all three entrances "were unlocked during voting hours." Notwithstanding EC said in the August 6th letter that in the course of its review of his complaint "election officers were interviewed and an on-site inspection of the polling station was conducted", no one at EC's national headquarters in Ottawa realized that the only accessible entrance (main, front door #1) had been locked on election day until November 2008 when the investigation was completed, according to Mr. Roussel's testimony. But the August 6th letter states that EC's investigation had been completed by then. Had EC done a competent investigation sooner, it no doubt would have realized this fact and rectified it for the October 2008 general election by either contacting St. Basil's Church and making sure it kept the door unlocked on election day or seeking out a different (and accessible) location. I accept Mr. Hughes' evidence that EC's poor handling of his verbal and written complaints to EC and his Complaint to the Commission, including the tone and content of the August 6th letter, upset him as much or more than the actual two voting events."

These election accessibility problems recur at the provincial level. For example, Ontarians with disabilities have campaigned since at least 1999 to try to ensure full voting accessibility in

provincial and municipal elections. This has led the Ontario Government to only implement insufficient partial solutions. The Ontario Government has largely left their resolution to the discretion of provincial election officials who have shown that acting alone, they can't solve them. This is documented on the internet at length at http://www.aodaalliance.org/strong-effective-aoda/ElectionInOntario.asp The Canadians with Disabilities Act must go much further, if this recurring problem is to effectively be solved.

o) Ensuring a Fully Accessible Federal Government

It is important for the Federal Government to lead by a good example on accessibility. Other obligated organizations will look to see how seriously the Federal Government takes the Canadians with Disabilities Act. If the Federal Government does not take its accessibility duties sufficiently seriously, other obligated organizations will tend to think that they can and should do the same. Moreover, if the Federal Government does not hold itself to full and strict compliance with the Canadians with Disabilities Act, other obligated organizations will tend to think they can get away with the same level of non-compliance.

Even though governments have more resources available to them than many other organizations, large governments can lag behind other organizations, when it comes to accessibility. A large Federal Government that stretches right across Canada, employing tens of thousands of people, will face challenges, when trying to maintain consistent positive accessibility practices.

A stark example of the federal government leading by a poor example was its protracted and vigorous opposition to ensuring that its websites met rudimentary accessibility requirements. In *Jodhan v Canada* 2010 FC 1197, the federal government vigorously opposed a blind person's Charter claim that federal websites failed to provide required accessibility features for persons with vision loss. Blind people can readily navigate the web using software that reads aloud the information on their computer screen, but only if websites are designed to comply with internationally-mandated website accessibility standards. After losing in the Federal Court trial division, the federal government used public resources to drag out its losing battle. It lost in the Federal Court of Appeal. See *Jodhan v. Canada* 2012 FCA 161.

The Canadians with Disabilities Act should therefore include strong additional measures, targeted at insuring that the federal government will become a fully accessible workplace and service-provider. Six examples are offered here.

First, the Canadians with Disabilities Act should require the Federal Government to designate a single minister and full time deputy minister, responsible for ensuring that the Federal Public Service becomes a fully accessible employer and service provider. Absent such leadership, no one will be in charge. Experience two successive AODA Independent Reviews have recommended this action. To date, the Ontario Government has not acted on it.

Second, the Canadians with Disabilities Act should require the Federal Government to implement a comprehensive permanent program for periodically auditing its workplaces and public services and facilities for disability accessibility. This program should include, among other things, on-site audits and inspections, and not merely paper trail audits. The results of this

monitoring should annually be made public.

Third, the Canadians with Disabilities Act should require the Federal Government to implement a program for ensuring accountability of public servants in the Federal Public Service for efforts on disability accessibility. Among other things, the Federal Public Service should require that every employee include in his or her annual performance review, performance goals on disability accessibility within the scope of their duties. Pay and promotion decisions should take their accessibility performance into account. The Ontario Human Rights Tribunal included such a requirement for senior Toronto Transit Commission officials in *Lepofsky v. TTC #2* 2007 HRTO 41 (CanLII)

Fourth, the Canadians with Disabilities Act should require each federal department to designate an accessibility lead in the office of their deputy minister or other chief executive officer. This official should have a mandate to ensure, via leadership from the top, that accessibility is embedded throughout their department. Past experience shows that if this is left to silos across a large government, or left to leadership from further down the government hierarchy, progress towards accessibility will be far too slow.

Fifth, the Canadians with Disabilities Act should require the Federal Government to develop and make public a multi-year plan for implementing the Act. The Federal Government should be required to report annually on progress on implementing that plan. It should require the Federal Government and key federal agencies to do the same. These plans and reports on them will enable the public to monitor progress.

Sixth, the Canadians with Disabilities Act should require the federal government to maintain a central fund to pay for workplace accommodations for federal public servants with disabilities. A comparable fund has commendably existed in Ontario since the late 1980s, and has been required by law in Ontario since 2001 by s. 8 of the Ontarians with Disabilities Act 2001. It provides in material part:

> "Section 8:
> …(5) The Management Board Secretariat shall, out of the money appropriated annually to it for this purpose, authorize reimbursement to a ministry for eligible expenses that the ministry has incurred in fulfilling the ministry's obligations under subsections (1) and (2).
>
> Amount of reimbursement
>
> (6) The reimbursement shall be in the amount that the Management Board Secretariat determines and be made in accordance with the guidelines established by the Management Board Secretariat."

p) Ensuring Full Accessibility of All Courts Within Federal Authority

Many courts across Canada are designed and operated by provincial or municipal governments. However there are a number of courts under federal authority, such as the Supreme Court of

Canada and the Federal Courts.

The Canadians with Disabilities Act should require the federal government to develop and implement a plan to ensure that all federally controlled courts become fully accessible to court participants with disabilities by the Act's full accessibility deadline.

Court participants with disabilities can include judges, lawyers, parties, witnesses, court staff, and members of the public who want to exercise their constitutional right to attend and observe court proceedings. They too often face barriers in court. Courts, like other institutions and organizations in Canada, have historically been designed and operated without ensuring that people with disabilities can fully participate in them on a footing of equality.

A commendable initiative has been underway in Ontario since 2005 aimed at making Ontario courts fully accessible to court participants with disabilities by 2025. Ontario experience shows that to achieve this, there needs to be joint leadership by the government, the judiciary and the legal profession, working together. If they operate in separate silos, existing barriers will persist, while new ones will be created.

The Canadians with Disabilities Act should follow an excellent blueprint for addressing this. It is the 2007 report entitled: "Making Ontario's Courts Fully Accessible to Persons with Disabilities," available on the Ontario Court of Appeal website at http://www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm That report, and activity in Ontario since 2007 aimed at implementing it, provide a good roadmap for action.

The Canadians with Disabilities Act should also mandate the federal government to work with all provinces and territories to encourage them to promote the adoption of similar strategies at the provincial and territorial levels. While being respectful of provincial/territorial authority in this area, the federal government has a shared interest in the administration of justice in each province and territory, in the courts that each province and territory operates.

q) Mandating a National Strategy for Expanding International Trade in Canadian Accessible Goods, Services and Facilities

Canada is always looking to expand its international trade. This includes seeking hitherto-untapped international markets, and helping Canadians gear up to serve those markets. Canada needs a long-term international trade strategy that promotes access to worldwide markets for disability-accessible goods, services and facilities. It is for that reason that Barrier-Free Canada's 14 principles include:

> "12. The Canadians with Disabilities Act should set as a national policy the fostering of international trade aimed at better meeting the market of up to one billion persons with disabilities around the world."

As noted earlier, people with disabilities around the world number as many as one billion. They need accessible products and services they can use. The international trend towards enacting accessibility legislation will place increasing demands on those who sell goods and services to

the public around the world to ensure that those goods and services are fully disability – accessible.

This is a huge, untapped market. There will be a major economic advantage to any country that plans to get a head start on serving this market. This has two major advantages. First, Canadian businesses will make more money and Canadian employment will expand if Canada's private sector produces accessible goods, services and facilities to sell internationally. Second, Canada's private sector could sell these goods, services and products in Canada as well. This would benefit people with disabilities in Canada.

The Canadians with disabilities act should mandate this at the federal level, including encouraging Federal/Provincial participation. When Canadian political leaders board an airplane to fly around the world with business leaders from Canada, selling our products and services, our political leaders should ensure that those private sector business leaders, invited on the plane, have made efforts to ensure that the goods and services that they are selling around the world are disability-accessible.

It is likely that no federal or provincial government has launched such a comprehensive concerted strategy. For example, in the 2014 Ontario provincial election, the Ontario government proposed to target information technology as an Ontario economic sector for the Ontario Government to help develop. However, the Ontario Government did not include in this announced strategy any plans to expand Ontario's capacity to produce disability-accessible information technology.

Supporting a new federal effort in this area is the proposal, discussed earlier, that the Canadians with Disabilities Act should require that any organization receiving federal money as part of an economic development strategy, commit that its workplace, products, goods, services and facilities will be disability-accessible.

r) Establishing Initial and Interim Measures to Promote Accessibility Pending Development of Federal Accessibility Standards

Getting key Federal Government implementation action up and running under the Canadians with Disabilities Act will require some lead time. The first accessibility standards will take several months to develop and enact. Obligated organizations should not be left to simply wait to take action on accessibility, while this start-up process unfolds.

It is important for obligated organizations to get to work on becoming accessible right away, even before any accessibility standards are enacted. Otherwise, obligated organizations will take a "wait and see" approach, holding off working on accessibility measures until they know what the regulations will require. It would be counter-productive for the enactment of the Canadians with Disabilities Act to initially slow progress on accessibility, rather than speeding it up.

The Canadians with Disabilities Act should therefore institute a regime for obligated organizations to take initial and interim action on accessibility, before any accessibility standards are enacted. These should aim at readily-achievable actions or "easy-to-fix" solutions. They

should also ensure that no new barriers are created over the time it takes for new accessibility standards to be enacted.

The Canadians with Disabilities Act cannot exhaustively detail such interim measures. It can provide a basic framework for initial federal action. It could mandate the Federal Government to conduct short, focused consultations, if needed, and issue directives for immediate, short term or interim action.

The development and promulgation of such readily achievable interim measures shouldn't be left to unfettered ministerial discretion, nor should the Canadians with Disabilities Act simply provide that the minister "consider" taking such steps. Rather, the bill should require the minister within a designated time frame to bring forward interim measures.

s) Ensuring that Efforts at Educating the Public on Accessibility Under the Canadians with Disabilities Act Don’t Stall or Delay Needed Implementation and Enforcement Action

Educating obligated organizations on accessibility might initially seem to be an appropriate first step in the Canadians with Disabilities Act. However, to require this as the first step would be counterproductive.

Education on disability accessibility is always worth offering to the public. However, implementing strong and prompt legislative action on accessibility should not be stalled pending some long term public education strategy. Experience among those who do public education on disability issues including accessibility reveals that “raising awareness,” without the backing of strong, effectively enforced accessibility legislation, does not significantly change deep-rooted organizational practices or human nature. In 2016, Canada is long past the point when large federally regulated organizations such as the Federal Public Service, banks, Via Rail, major airlines or telecommunication companies like Bell Canada or Rogers Communication should be treated as newcomers to accessibility issues.

That is not to say that there is no need for and no benefit to federal educational supports on accessibility. However, these must be offered as a support, and not as an excuse for any delay in taking action on accessibility.

The Canadians with Disabilities Act should mandate the federal government to establish a centre to provide educational supports to the public, including obligated organizations, such as technical accessibility compliance information. It should also mandate the federal government to issue policy guidelines or directives that give obligated organizations more specific direction on their obligations beyond that spelled out in the Act and in accessibility standards enacted under it. This will make it easier for obligated organizations to comply, and reduce their cost of compliance.

However, the Act and its implementation should not proceed on a wrong-headed basis that until an obligated organization has been federally educated on its accessibility obligations, it is not expected to comply and cannot face enforcement proceedings. The Canadians with Disabilities

Act will implement accessibility duties which the Canada Human Rights Act and, in the case of the public sector, the Charter have imposed on obligated organizations for up to a third of a century.

t) Assisting and Encouraging Provincial and Territorial Governments to Enact Comprehensive, Detailed Accessibility Legislation

Canada's federal government does not have constitutional authority to regulate all the accessibility barriers in Canada. Its reach is far narrower than the US Congress which passed the Americans with Disabilities Act 1990. However, Canada's federal government has various levers of power at its disposal to encourage provincial and territorial governments to enact comparable accessibility legislation. Only when all jurisdictions in Canada have in place strong, effective accessibility legislation can people with disabilities across Canada be assured that Canada is on the right road to full accessibility for all people with disabilities from coast to coast.

The federal government can assist by encouraging all provinces to pass accessibility legislation within their mandates. Therefore, Barrier-Free Canada's 14 Principles for the Canadians with Disabilities Act include:

> "13. The Canadians with Disabilities Act should require the Government of Canada to encourage all provincial governments to pass disability accessibility legislation to help ensure that barriers impeding persons with disabilities are removed and prevented throughout Canada and to convene a federal/provincial conference to that end, which will include representatives of persons with disabilities across Canada."

Federal action could include, for example, convening federal provincial and territorial conferences aimed at promoting the enactment of such legislation. Any effort at harmonizing legislative efforts across Canada should, of course, not aim to have any national accessibility standard sink to the lowest provincial or territorial standard that has been enacted anywhere in Canada. Rather, it should encourage all provinces and territories, and all obligated organizations across Canada, to rise to the full accessibility standard set by all human rights legislation in all jurisdictions across Canada, and by the Charter.

This approach does not exceed federal jurisdiction. Each province remains free to decide if it will enact a provincial accessibility law like the AODA or the Accessibility for Manitobans Act. Each province remains free to decide what to include in such a law.

The more provincial and territorial governments that pass strong effective accessibility legislation, the more likely it is that organizations that do business in more than one province will comply with their human rights accessibility duties, even in provinces that have no accessibility legislation. Voters in provinces with no provincial Disabilities Act will ask why theirs is a "Have Not" province, when it comes to disability accessibility protection.

u) Creating National Model Accessibility Standards Which Provinces, Territories and Other Organizations Across Canada Can Use

Many accessibility barriers fall within provincial legislative jurisdiction. The Canadians with Disabilities Act should require the federal government to take action that will assist in the removal and prevention of those barriers, while fully respecting the authority of each provincial legislature and government.

Beyond the accessibility standards referred to above, for the federally-regulated sphere, the Canadians with Disabilities Act should mandate the federal government to also develop model accessibility standards for important areas such as education, health, employment, transportation, residential housing, information and communications, customer service, and the built environment. These model national accessibility standards should aim to meet the requirements regarding the removal and prevention of accessibility barriers rooted in human rights legislation across Canada, and in the Canadian Charter of Rights and Freedoms. They should at least meet or exceed any accessibility standards in force in any province.

It would be open to any provincial or territorial government to adopt these model national accessibility standards, either as written, or with any modifications that the provincial or territorial government wishes to make. Once a province adopts a federal model accessibility standard, it would become law in that province.

These model national accessibility standards would serve three important objectives. First, they would provide an excellent resource for those provinces that do not now have a disabilities act, or that have not yet created accessibility standards in all these areas under its disabilities act. Any of those provinces could simply opt in to these federal model accessibility standards, with very little effort. Smaller provinces could get a good head start on accessibility regulation, without having to put in place the full standards development process that Ontario spent years developing.

Each province would not have to reinvent the same accessibility wheel. Yet each province would retain its provincial autonomy. Each province retains the full and exclusive power to decide which accessibility standards, if any, it will adopt for its part of the country.

Second, model national accessibility standards can be a great help for organizations operating in different parts of Canada. They now must face a patchwork of different provincial accessibility requirements. They would prefer having one national accessibility standard that if met, ensures that they comply with all provincial requirements. That would lead to more accessibility across Canada, while making an organization's compliance easier and more economical.

To achieve this, the model accessibility standard must be designed to at least meet the accessibility requirements in force in any province, whether under a provincial disabilities act, or under a provincial Human Rights Code. This strategy simultaneously advances the accessibility agenda across Canada, helps organizations that long for regulatory efficiencies, and helps provincial governments take new regulatory action on accessibility.

v) Setting Time Lines for Federal Government Action on Implementing the Canadians with Disabilities Act

This bill must be designed to ensure effective progress not only when Parliament's attention is temporarily focused on enacting the Canadians with Disabilities Act. It must also ensure effective, timely progress throughout the next years. It must be sufficiently durable to effectively cover each successive Federal Government and each successive minister that will be responsible for its implementation.

After Parliament moves on to other issues, there is a real risk that top Federal Government concentrated attention on achieving accessibility will diminish. The two AODA Independent Reviews, made public in 2010 and 2015, showed that this happened in Ontario, to the detriment of people with disabilities.

The Canadians with Disabilities Act must therefore set mandatory timelines which the federal government must meet for taking key implementation steps under the Act. It should provide a mechanism for members of the public to swiftly compel the federal government to meet those timelines, if they are not met.

As an illustration, on May 31, 2013, the Ontario government was required to appoint the second AODA Independent Review. Yet it did not do so, thereby violating its own accessibility legislation. The Ontario Government delayed appointing the second AODA Independent Review for a full 102 days after the statutory deadline. The Canadians with Disabilities Act should mandate short, swift summary proceedings, should such failures occur, with consequences imposed on the Federal Government for noncompliance.

w) Requiring Periodic Independent Reviews of Progress Under the Canadians with Disabilities Act

The Canadians with Disabilities Act should include a requirement that on a statutorily prescribed schedule, the Federal Government should be required to appoint an Independent Review of progress under that Act, to consult and report on progress towards full accessibility. Among other things, the seventh principle in Barrier-Free Canada's Fourteen Principles says the following regarding the Canadians with Disabilities Act:

> "It should also require the Government of Canada to appoint an independent person to periodically review and publicly report on progress towards full accessibility, and to make recommendations on any actions needed to achieve the Act's goals."

This Independent Review should be required to consult the public, including people with disabilities. It should be required to report within one year of its appointment. Its report should immediately be made public.

A good starting point for this is s. 41 of the AODA. It required the Ontario Government to appoint such an Independent Review of progress towards full accessibility, within four years after the AODA's enactment, and then, every three years after each successive Independent Review is made public. Section 41 of the AODA provides:

"41. (1) Within four years after this section comes into force, the Lieutenant Governor in Council shall, after consultation with the Minister, appoint a person who shall undertake a comprehensive review of the effectiveness of this Act and the regulations and report on his or her findings to the Minister. 2005, c. 11, s. 41 (1).

Consultation
(2) A person undertaking a review under this section shall consult with the public and, in particular, with persons with disabilities. 2005, c. 11, s. 41 (2).

Contents of report
(3) Without limiting the generality of subsection (1), a report may include recommendations for improving the effectiveness of this Act and the regulations. 2005, c. 11, s. 41 (3).

Tabling of report
(4) The Minister shall submit the report to the Lieutenant Governor in Council and shall cause the report to be laid before the Assembly if it is in session or, if not, at the next session. 2005, c. 11, s. 41 (4).

Further review
(5) Within three years after the laying of a report under subsection (4) and every three years thereafter, the Lieutenant Governor in Council shall, after consultation with the Minister, appoint a person who shall undertake a further comprehensive review of the effectiveness of this Act and the regulations. 2005, c. 11, s. 41 (5).

Same
(6) Subsections (2), (3) and (4) apply with necessary modifications to a review under subsection (5)."

The two AODA Independent Review reports that have been produced to date have played an important role in efforts on accessibility. They took Ontario's temperature, showed where progress was too slow, tracked down the cause for this, and recommended needed improvements.

To read the 2010 final Report of the Charles Beer AODA Independent Review, visit http://www.aodaalliance.org/strong-effective-aoda/05312010.asp

To read the AODA Alliance's June 3, 2010 analysis of the Beer Report, visit http://www.aodaalliance.org/strong-effective-aoda/06032010.asp

To read the 2014 final report of the Mayo Moran 2nd AODA Independent Review, visit http://www.aodaalliance.org/strong-effective-aoda/Final-Report-Second-Legislative-Review-of-the-AODA.docx

To read the AODA Alliance's analysis of the final report of the Mayo Moran AODA

Independent Review, visit http://www.aodaalliance.org/strong-effective-aoda/04292015.asp and http://www.aodaalliance.org/strong-effective-aoda/05012015.asp

As discussed earlier, learning from the Ontario experience, the Canadians with Disabilities Act should include a provision that will trigger the appointment of an Independent Review if the Federal Government fails to do so on time. It should permit a member of the public to apply to court for a judge to appoint the Independent Review if the Federal Government fails to do so by a statutory deadline.

Also learning from Ontario's experience, the Federal Government should be required to release this Independent Review immediately upon receiving it. The Ontario Government took four months to release each of the two AODA Independent Reviews it has appointed. In each case, the Ontario Government then took months after that to release its detailed response to or action plans, responding to those reports. People with disabilities cannot afford such delays.

x) Ensuring the Canadians with Disabilities Act is Meaningful

Barrier-Free Canada's final of its 14 Principles states:

> "14. The Canadians with Disabilities Act must be more than mere window dressing. It should contribute meaningfully to the improvement of the position of persons with disabilities in Canada. It must have real force, effect and teeth."

All provisions in the Canadians with Disabilities Act must be targeted at creating real action, not traditional tokenism.

For example, it is not good enough for the Act to lead federally-regulated organizations to create a paper trail on accessibility. They need to create a trail of real action on accessibility.

4. Conclusion

In 1990, the US Congress led the world by enacting the Americans with Disabilities Act. Over a quarter of a century later, it is certainly time for Canada's Parliament to catch up. In 1982, Canada led the western world by enshrining in its newly-patriated constitution, the Charter of Rights, which includes the only explicit constitutional guarantee of disability equality rights that could then be found in any western constitutional instrument of its kind.

A strong, effective, comprehensive and effectively enforced Canadians with Disabilities Act, reflecting the ideas in this Discussion Paper, could restore Canada to the global leadership role that was reflected in the vision that Canada's 1982 Charter of Rights embodied.

In 1980, Canada's proposed new Charter of Rights did not include disability equality. As it was then worded, courts could not interpret the Charter as protecting equality rights for people with disabilities. The grassroots advocacy efforts of people with disabilities in 1980-82 led the Government of Canada to agree to amend the Charter, while it was still before Parliament, to add disability equality rights. A quarter of a century later, Canada's Government and Parliament have

an extraordinary opportunity to make that constitutional right to equality for people with disabilities become a reality in the lives of all Canadians, both the four million who now have a disability, and the rest who are bound to get a disability as they age.