

UNIVERSAL DESIGN IN LEGISLATIVE DRAFTING – HOW TO ENSURE LEGISLATION IS BARRIER-FREE FOR PEOPLE WITH DISABILITIES

M. David Lepofsky¹

and

Dr. Randal N. M. Graham²

1. Introduction

Anyone who buys consumer electronics, computer hardware or software knows the enormous frustration of trying to figure out how to use it. It is not uncommon to grumble in consternation: “If only the people who designed this thing thought more about us, the users!” This frustration is massively amplified in the case of consumers with disabilities. They so often find that products are designed on the palpably incorrect basis that those who will use them have two working eyes, ears, legs, feet and hands, and can mentally process information in the way most others do.

In the past, this has led some to have to spend excessive amounts on specially adapted products, designed for use by persons with disabilities. These tend to be far more costly, because smaller numbers of them are manufactured for this seemingly narrow, specialized market. Yet many without disabilities, who get a chance to see these specialized products, can be heard to enviously decry mainstream products, wishing all had the user-friendliness and accessibility of these specialty items.

A movement has grown in recent years in the design of consumer products, not to mention buildings and other facilities, called “universal design.” Universal design calls for products and facilities to be designed so that all can use them, not just persons without disabilities. Products and buildings incorporating universal design end up benefitting all

¹ David Lepofsky, CM, O.Ont., LL.B. (Osgoode Hall), LL.M. (Harvard) LL.D. (Hons) (Queen's, University of Western Ontario). David Lepofsky is counsel with the Crown Law Office Criminal, of Ontario's Ministry of the Attorney General. This article is written in the author's personal capacity, and doesn't purport to represent the views of Ontario's Attorney General or his Ministry.

² Faculty of Law, University of Western Ontario. The authors acknowledge with much gratitude the assistance of Donald Revell, one of Canada's greatest legislative drafters, for his advice and encouragement.

consumers, whether or not they have a disability. When a building's entryway is designed without steps, and with an automated door, this contributes to its accessibility for persons with disabilities. It also facilitates access for people with shopping carts, baby strollers, and luggage on wheels.

Telephones increasingly come equipped with a tiny call-display screen, showing an incoming call's phone number. This information is inaccessible to persons who cannot read print due to vision impairment or dyslexia. Specialty devices for persons with these disabilities had to be invented and separately marketed some years ago: the devices are added to a phone and call out the incoming caller's phone number via a computer-synthesized voice. Many persons without these disabilities found this invention highly desirable. When a call comes in, they don't have to rush across the room and squint at the phone to know who is calling. Implementing universal design principles, some more visionary manufacturers are now producing phones for the mainstream market which include both visual display and "talking" call-display. This benefits all users, and helps ensure that persons with disabilities can equally use and enjoy these products. The cost to the consumer of mass-produced upgrades of this nature is minuscule.

This article calls for those who craft and review legislation to join this growing movement, by using principles of universal design in the drafting or revision of legislation. It aims to provide those who draft or review legislation with the important principles and practical tips they need to ensure that legislation is barrier-free for persons with disabilities. It describes the legal basis for the important obligation for legislation not to create or perpetuate legal barriers to full participation for members of the public with disabilities, and sets out the duty of legislators to take into account the needs of persons with disabilities when drafting or operating legislation and legislative programs. It describes some of the most common kinds of recurring barriers to full participation that persons with disabilities can face. It then provides a helpful, non-exhaustive list of Do's and Don'ts for legislative drafting. Finally, it offers some suggestions on questions a legislative drafter might ask government policy officials who instruct them, to help foresee and prevent barriers in the legislation they draft.

This topic may at first seem narrow and rarified. Yet this article speaks to a wide

audience. This includes anyone involved in drafting legislation, whether statutes, regulations or even municipal by-laws; anyone who works in any level of government developing legislation, whether in a legal branch or a policy branch of a government department, ministry or agency, and who takes their plans to legislative counsel to turn them into the text of a proposed statute, regulation or by-law; anyone who votes on legislation at any level of government or who advises those who vote on legislation; anyone working for an agency that provides independent oversight of government, such as an ombudsman's office or human rights commission. Similarly, this article speaks to those outside government who advocate to government at any level on public policy issues, including issues of concern to persons with disabilities. Anyone who advocates on legislative issues for any community or business constituency will be concerned about this article's issues, because they and their clients don't want a Bill, for which they worked so hard, later struck down by a court for contravening legal guarantees of equality to persons with disabilities.

In this article, "disability" doesn't just refer to obvious physical disabilities, like paraplegia or quadriplegia, requiring the use of a wheelchair. It refers to any degree of physical, mental and/or sensory disability. The need to design legislation to be barrier-free for persons with disabilities affects everyone. Everyone either has a disability now or will (if they live long enough) get one later in life, since aging is the greatest cause of disability.

This article may be the first of its kind in Canada. The thrust of law journal articles on constitutional and statutory protections for equality rights, including those of persons with disabilities, focuses predominantly if not exclusively on courts, on judicial interpretations of equality rights, where they have gone right and where they have gone wrong. Yet those who design, draft and review legislation are uniquely positioned to take effective steps to protect the equality rights of persons with disabilities in legislation. Using practical strategies like those offered in this article, they can detect potential disability barriers in proposed legislation and work toward rectifying them before they are enacted. They can spot existing barriers in current legislation that is under review for any reason, whether disability-related or not, and take action to correct them in the process of the review of that legislation. They can alert policy-makers who work with them on new legislative projects to the risk of creating or perpetuating disability

barriers, early in the process of developing new legislation. An ounce of drafting prevention can prevent a mega-ton of later constitutional litigation.

Making use of this article will help make legislation at all levels of Canadian government live up to the requirements of the Charter of Rights and statutory human rights codes. Charter litigation before the Supreme Court is undoubtedly more sexy, dramatic, and headline-grabbing than the hard work of legislative drafters and designers, pounding away on keyboards in their offices. Yet those drafters and designers can do much more in that removed venue than can many courts in making disability equality rights a practical reality for over four million Canadians who now have a disability, and the vast majority of other Canadians who are destined to get a disability later in their lives.

This article can't foresee and document all the ways in which legislation can create or perpetuate barriers that impede persons with disabilities from full participation. Instead, it presents a model analysis of typical legislative barriers that undermine accessibility for persons with disabilities. The fact that a particular disability or barrier isn't specifically mentioned here by no means suggests that it isn't important.

2. Political Support for Barrier-Free Legislation

There is no entrenched sector of society which would oppose the task of making legislation barrier-free for persons with disabilities. In the 2007 provincial election the Ontario Government made an extraordinary election pledge – one which every political party across Canada should mirror. It promised to review all provincial legislation to identify barriers to equality against persons with disabilities. Premier Dalton McGuinty committed in writing to:

“... review all Ontario laws to find any disability accessibility barriers that need to be removed. The Ontario Liberal government believes this is the next step toward our goal of a fully accessible Ontario. Building on our work of the past four years, we will continue to be a leader in Canada on accessibility issues. For Ontario to be fully accessible, we must ensure no law directly or indirectly discriminates against those with disabilities. To make that happen, we commit to reviewing all Ontario laws to find any disability barriers that

need to be removed.”³

This was a non-partisan election issue. All three major political parties made comparable pledges on the issue. According to NDP leader Howard Hampton:

“The Ontario government should conduct an internal Government review of all provincial legislation and regulations to screen for any existing barriers against persons with disabilities, and put in place a permanent internal system to screen all new proposed provincial legislation, regulations or programs to ensure that they don't create or perpetuate barriers against persons with disabilities.”⁴

Conservative leader John Tory promised: “I support your request that the government show leadership by reviewing its own legislation to remove barriers against persons with disabilities.”⁵

This kind of systematic legislative review is inherent in the obligation of all levels of government under the Charter of Rights’ guarantee of equality for persons with disabilities.⁶ When the Charter was enacted back in 1982, its framers gave all levels of government an extra three years before the equality rights section went into operation. Section 15 of the Charter didn’t go into effect until April 17, 1985. This was because it was widely anticipated that governments would need that time to review their laws and programs to bring them up to speed to comply with that new constitutional requirement. To that end, some governments undertook legislative reviews and enacted omnibus statutes aimed at bringing their laws into compliance with s. 15. However, those legislative reviews were undertaken over twenty years ago. That was well before the Supreme Court enunciated the major transformative legal doctrines regarding equality rights generally and disability rights in particular. Several governments intervened before the Supreme Court to oppose some of the doctrines which the Supreme Court was later to adopt. Moreover, it is not clear that those reviews went beyond the text of legislation on the books, to consider whether there were any unconstitutional barriers to equality in government programs, which may not have been spelled out in the black and white text of the statutes and regulations that were reviewed.

³ September 14, 2007 letter from Premier Dalton McGuinty to the Accessibility for Ontarians with Disabilities Act Alliance.

⁴ Letter from NDP leader Howard Hampton to the Accessibility for Ontarians with Disabilities Act Alliance.

⁵ September 7, 2007 letter from Conservative Official Opposition leader John Tory to the Accessibility for Ontarians with Disabilities Act Alliance.

As such, there is ample need for a contemporary, new legislative review to bring all legislation across Canada into compliance with the guarantee of disability equality. That review must deploy the important legal principles concerning equality which Canadian courts have delineated since the Charter's equality rights guarantee went into operation, and which are summarized in this article.

3. Governments' Legal Obligation to Draft Barrier-Free Legislation

(a) Sources of the Obligation

Those who design, draft or implement legislation have a fundamental duty to ensure that legislation is barrier-free, so persons with disabilities can fully participate in and enjoy the rights, duties and benefits that the legislation creates. This duty is deeply entrenched in Canadian and Ontario law. It is constitutional and quasi-constitutional in character.

This duty is broad and important. It includes an obligation to ensure that the needs of people with disabilities are taken into account when governments design, draft, operate and review legislation. It means that those who participate in the legislative process cannot consciously or unconsciously assume that all those who will be affected by that legislation have no disabilities now and will never get one. It means that when drafting and designing legislation, it is essential to be keenly alive to the fact that many – hundreds of thousands if not millions – to whom that legislation may apply now have a disability, while most others will eventually get one during their lifetime if they live long enough.

Full equality for persons with disabilities imposes a duty on those who design and draft legislation to prevent the creation of new barriers in or under legislation. It also requires that existing barriers to equality – required or permitted in or under existing legislation – be removed. Perpetuating existing barriers is as much a denial of disability equality as is creating a new barrier.

What is the legal basis of this duty? It has multiple legal foundations. First and foremost,

⁶ See section 3, "Governments' Legal Obligation to Draft Barrier-Free Legislation", below.

section 15 of the Canadian Charter of Rights and Freedoms entrenches in the supreme law of Canada the constitutional right to be equal before and under the law, and to enjoy the equal protection and equal benefit of the law, without discrimination on grounds including mental or physical disability. This includes a ban on direct discrimination in or under law (a law, policy, program, practice or other government action singling out persons with disabilities for worse treatment) or “adverse effects discrimination” (a law, policy, program, practice or other government action which on its face treats all the same, the apparently equal application of which has the effect of disproportionately burdening persons with disabilities or preventing them from accessing its benefits). The Supreme Court has recognized that adverse effects discrimination or systemic discrimination (which is typically subtle) is much more common than the cruder overt direct discrimination.⁷

The Supreme Court has repeatedly held that this constitutional right of equality for persons with disabilities imposes on governments an obligation to actively accommodate the needs of persons with disabilities in programs that the government either operates itself or delivers through private sector front-line providers. The right of persons with disabilities to be accommodated is central to the constitutional guarantee of equality.

In its first major ruling on the Charter’s disability equality guarantee, *Eaton v Brant County Board of Education* (1997),⁸ the Supreme Court expansively described the distinctive way equality should be deployed in disability cases:

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

⁷ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU (“Meiorin”)*, [1999] 3 S.C.R. 3, at para. 29.

⁸ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241

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.⁹

Subsequently, in *Eldridge v. British Columbia* (1997),¹⁰ the Supreme Court unanimously held that British Columbia had a duty to provide or fund sign language interpretation services in hospital emergency rooms, to enable deaf patients to communicate effectively with emergency room doctors. It affirmed more generally from an earlier dissent:

Not only does s. 15(1) require the government to exercise greater caution in making express or direct distinctions based on personal characteristics, but legislation equally applicable to everyone is also capable of infringing the right to equality enshrined in that provision, and so of having to be justified in terms of s. 1. Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.¹¹

The Supreme Court reaffirmed its earlier recognition in the equality rights context that for persons with disabilities "...it is often the failure to take into account the adverse effects of generally applicable laws that results in discrimination."¹² As a result of these and numerous other cases, it is clear that the Charter of Rights and Freedoms imposes on governments the duty – up to the point of undue hardship - to ensure equality for persons with disabilities in the pursuit of any government function. Of course, the passage and review of legislation is a primary function of all provincial and federal governments. As a result, the Charter imposes a positive duty on them to remove legislative barriers that create or propagate inequality for persons with disabilities, as well as a duty to refrain from creating additional barriers in the future. Moreover,

⁹ Id., at para 67.

¹⁰ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

¹¹ Id., at para 64, citing *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at page 549.

as is explored in section 5(b), below, the supremacy of the Charter carries the further implication that, in cases of doubt or ambiguity, provincial and federal and legislation must be interpreted and applied in a way that is consistent with the Charter's anti-discrimination provisions.

Supplementing the Charter is the second foundation for the duty to produce and maintain barrier-free legislation. Section 1 of the *Ontario Human Rights Code*, a law which is near-constitutional in stature, guarantees that everyone has the right to equal treatment with respect to goods, services and facilities without discrimination because of disability. This law binds the Crown, applies to government and private sector activities, and supersedes and overrides all other provincial and municipal legislation, unless that other legislation has a clause expressly making it override the Human Rights Code. More or less comparable quasi-constitutional human rights legislation exists at the federal level and in all provinces.¹³

As in the case of the Charter of Rights, the right to equality for persons with disabilities in human rights codes also includes a right to have disability-related needs reasonably accommodated, up to the point of undue hardship. Again, this is central to the right to equality. It seeks to ensure that persons with disabilities can fully participate in and equally benefit from services and facilities available to the public.

Every employer, provider of goods, services or facilities or landlord has a duty to accommodate the disability-related needs of persons with disabilities up to the point of undue hardship. The presumption in law, whether under the Charter or human rights legislation, is that such accommodation is feasible. The party obliged to do the accommodating has the burden to prove that they did all they could up to the point of undue hardship, and that it is impossible to do more to accommodate without undue hardship. The duty is to take serious and substantial steps, not de minimis efforts. The larger the organization with the duty to accommodate, the harder it is for the organization to justify a failure to provide needed disability accommodations.

In the Human Rights Code context, using reasoning that equally applies to the Charter's

¹² Id., at para 65.

¹³ See, for example, the *Canadian Human Rights Act* (R.S., 1985, c. H-6)

equality guarantee, the Supreme Court has ruled that the duty to accommodate includes more than just the duty to provide measures that actually enable persons with disabilities to fully participate. It also imposes a duty on employers, service providers, and by logical extension, governments, to investigate options for effective accommodation. This is sometimes referred to as the procedural duty to accommodate.¹⁴

In 2001 and 2005 Ontario's Legislature created the third and fourth legal foundations for the duty to enact and maintain barrier-free legislation: two novel statutes designed to help implement the right of persons with disabilities to live in a barrier-free society, as guaranteed by the Charter and Ontario Human Rights Code. These statutes provide for the systematic identification, removal and prevention of barriers. These include, among other things, barriers in or connected to legislation or regulations, or programs operated under such legislation, within Ontario's jurisdiction.

The *Ontarians with Disabilities Act (2001)* addresses barriers in the broader public sector. It requires all public sector organizations to make public an annual accessibility plan. These plans are to identify steps the organization took in the previous year, and the measures it will take in the next year to eliminate and prevent barriers against persons with disabilities. Organizations that must do this include all provincial government ministries, hospitals, school boards, colleges, universities and public transit authorities. The Act's preamble proclaims, inter alia:

Ontarians with disabilities experience barriers to participating in the mainstream of Ontario society...The Government of Ontario is committed to working with every sector of society to build on what it has already achieved together with those sectors and to move towards a province in which no new barriers are created and existing ones are removed. This responsibility rests with every social and economic sector, every region, every government, every organization, institution and association, and every person in Ontario.

An Ontario Government ministry, when developing its annual accessibility plan under the *Ontarians with Disabilities Act (2001)*, should be examining all legislation and regulations for which that ministry has responsibility for the purpose of ascertaining if these or programs

¹⁴ See *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U. ("Meiorin")*, [1999] 3 S.C.R. 3 at para. 66)

operating under them contain barriers to accessibility for persons with disabilities.

The *Accessibility for Ontarians with Disabilities Act 2005* legislatively obliges Ontario to be fully accessible for people with physical, mental and sensory disabilities in the areas of access to goods, services, facilities, accommodation, employment, buildings, structures and premises by January 1, 2025. It creates a new statutory regime for developing, enacting and enforcing mandatory accessibility standards. These enforceable accessibility standards will apply to the public and private sectors. They will require removal of existing barriers and prevention of new barriers.

Building on all these important foundations, the Supreme Court further enhanced the duty to accommodate persons with disabilities in *Council of Canadians with Disabilities v. Via Rail*.¹⁵ The Court held that Via Rail, Canada's national government-owned passenger rail service, violated its statutory duty imposed by s. 5 of the Canadian Transportation Act,¹⁶ linked to equality rights and human rights obligations, to operate a rail service free of undue obstacles to passengers with disabilities. It did this when it spent some \$134 million on 139 new passenger rail cars (up to one third of its passenger fleet) that had barriers to full and equal use by passengers with disabilities.

Upholding the Canada Transportation Agency's finding that Via Rail contravened this requirement, the Supreme Court enunciated important principles elaborating on the content of equality rights for persons with disabilities. The overall thrust of this decision recognizes that the duty to accommodate includes not only a duty to remove existing barriers, but a similarly powerful duty to prevent new barriers from being created. It recognized that "...a significant cause of handicap is the nature of the environment in which a person with disabilities is required to function."¹⁷

(b) Persons to Whom the Obligation is Owed

The obligation to create and maintain legislation (as well as legislative programs) free of

¹⁵ *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650

¹⁶ S.C. 1996, c. 10

accessibility barriers is owed to all people who have a disability. The laws that establish and support the right to enjoy a barrier-free society use very broad, inclusive definitions of disability. The Ontario Human Rights Code's definition,¹⁸ which is mirrored in the *Ontarians with Disabilities Act 2001* and the *Accessibility for Ontarians with Disabilities Act 2005*, defines disability as:

- (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; ("handicap")¹⁹

As a practical matter, of course, the duty to create and maintain a barrier free society is owed to all Canadians. Whether they have a disability now or live long enough to have a disability in the future, all Canadians have the right to have their disabilities accommodated up to the point of undue hardship, and to live and work under legislative regimes that are free of accessibility barriers.

(c) Content of the Obligation

The duty to ensure that legislation is barrier-free for persons with disabilities doesn't simply require legislative drafters and other government officials to look for and carefully

¹⁷ *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at para 181.

¹⁸ The definition is found in s. 10 of the Code.

¹⁹ Case law under the Charter has crafted a comparably expansive definition of mental or physical disability. See *Granovsky v. Canada (Minister of Employment and Immigration)* [2000] 1 S.C.R. 703 (SCC). See also the liberal approach to defining "handicap" under the Quebec Charter of Human Rights And Freedoms in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec* [2000] 1 S.C.R. 665 (SCC)

scrutinize the explicit references to disabilities in general, or certain identifiable disabilities in specific, in the text of legislation. When the Charter of Rights was first enacted, some officials involved in the design, drafting or review of legislation for Charter compliance incorrectly thought that all they had to do was to ensure that nothing in a statute or regulation explicitly or overtly singled out people with any disability, or with a specific kind of disability, for conscious disadvantageous treatment, absent some pressing justification for doing so. By that view, the Charter's guarantee of equality for persons with disabilities would be engaged in exceedingly rare cases, such as cases involving a law that banned all blind people from ever serving on a jury, regardless of whether eyesight was needed to appraise the case's evidence, or by a law denying the right to vote in an election to persons with any degree of mental disability. The Charter's guarantee is not confined to such extreme cases. This duty goes much further. The legal and constitutional guarantees of equality to persons with disabilities in Canada speak to not only the use of such terminology and the singling out of persons with disabilities on the face of legislation. They also prevent barriers to the equal protection and equal benefit of the law which are implicit in legislation, or which are created or permitted under the mandate of legislation, even if they are not spelled out in explicit disability-tied terms in the wording of the enactment.

In *Eldridge*,²⁰ no B.C. statute banned the provincial government from providing or funding sign language interpretation for deaf patients in hospital emergency wards. It was the B.C. government's failure to provide that accommodation, whether via legislation or otherwise, that led the Supreme Court to conclude that B.C. had violated the Charter of Rights' guarantee of equality to persons with disabilities. Thus, had a legislative review simply revealed that the legislation was silent on point, that wouldn't have been sufficient to ensure that that legislation didn't contravene the Charter. On the contrary, the government had a positive duty to combat accessibility barriers that were created or perpetuated by prevailing legislation, whether or not the law made any reference at all to persons with disabilities.

The duty to create and maintain statutes that are free of accessibility barriers is well established and rooted in fundamental laws. It is a duty the government owes to all Canadians. It is a duty to do far more than simply search for and eliminate legislation that unfairly singles out

²⁰ Note 10, above.

persons with disabilities: on the contrary, it is a duty to ensure that all legislation – even statutes that make no references to persons with disability and that seem to be perfectly neutral on their face – is crafted in such a way as to ensure that our society is as barrier-free as possible. How can governments – and, more specifically, those who design, draft and review the government’s legislation – discharge this duty? How can governments ensure that their work furthers the constitutional goal of a barrier-free society? The following sections of this paper provide some helpful tips and strategies.

4. Creating Barrier-Free Legislation-The Background You Need

(a) Understanding the Inequality Facing Persons with Disabilities

The first step toward creating barrier-free legislation is to learn about and be alert to the inequalities faced by persons with disabilities. An understanding of these inequalities helps legislative actors (including legislators and drafters) recognize those instances in which statutory language may have the effect of undermining the goal of a barrier-free society, and allows them to identify language that undermines accessibility and exacerbates the inequalities persons with disabilities already face.

Governments and courts widely recognize that people with disabilities in Canada are a large and substantially disadvantaged minority. They are at least 15 % of the public.²¹ Aging is the most frequent cause of disability. Thus the percentage of persons with disabilities is increasing as the average age of the public climbs.

Exceeding four million Canadians, people with disabilities are often subjected to serious disadvantage. Most Canadians object to national unemployment rates if they are as high as 10 or 11%. According to 1991 federal data, employable age persons with disabilities faced unemployment rates of 52%.²² In 2006, only 54.9% of Ontarians with disabilities participated in the workforce, compared with 80.5% of Ontarians without disabilities.²³

²¹Ministry of Human Resources & Development Persons with Disability: A supplementary Paper (Minister of Supply and Services Canada, Hull: 1994), 3.

²² *ibid.* 4 and The Daily Statistics Canada (Statistics Canada: 1993), 3-7.

The poor are overrepresented among persons with disabilities, while people with disabilities are over represented among the poor.²⁴ They are underrepresented among persons who graduated from post-secondary educational institutions.²⁵ They are underrepresented in the mainstream of Canadian society where the chance for upward mobility is most likely to occur.

This chronic disadvantage comes from decades of barriers that impede persons with disabilities from fully participating in society. Most mainstream institutions, organizations, facilities and technology have been designed and operated on an unarticulated, erroneous, unfair and often unconscious premise that only persons without disabilities could, would or should participate in or use them. Most buildings, public transit services, communication and telecommunication systems, consumer products (including consumer electronics) and job descriptions were historically designed without ensuring that people with disabilities could fully avail themselves of these.

A helpful definition of “barriers” is found in s. 2 of the *Accessibility for Ontarians with Disabilities Act 2005*, namely “anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability”. Barriers that impede people with disabilities from full and equal participation in society come in several recurring forms. Some of the most common barriers are described in the following paragraphs. These barriers are not described in order of importance or frequency of occurrence.

First, there are attitudinal barriers. People with disabilities continue to encounter an often insurmountable wall of discriminatory attitudes when trying to fully participate in society. They are often the subjects of pity, patronization, paternalism, and stereotypes that they are less able than people who have no disabilities. These attitudes can present themselves as sincere concern for people with disabilities’ well-being.

This stereotyping can be illustrated in the employment setting. Employers still too often decline to hire people with disabilities, assuming consciously or subconsciously that a person

²³ See <http://www.statcan.ca/english/freepub/89-628-XIE/2008008/tables/table5-en.htm>

²⁴ Ministry of Human Resources Development, *supra* note 21, at 4.

²⁵ For example, according to Ministry of Industry, Science and Technology *A Portrait of Persons with Disabilities* (Ministry of Industry, Science and Technology:1995), 37-39

without a disability will more likely be more productive. Such presuppositions often come from stereotypes that equate disability and inability, and which view persons with disabilities as more suited for charity than equality.

Second, persons with disabilities too often encounter physical barriers to the built environment. These can include, for example, stairs which impede persons with mobility disabilities, doorways that aren't wide enough for a wheelchair or scooter, lighting that is insufficient for persons with low vision. Even buildings that are publicly labelled as "accessible" can include barriers impeding disability access. Many incorrectly think that building code legislation rectifies this problem. In fact, building codes tend only to apply to certain public buildings, not all buildings. They tend only to require accessibility features in newly-built buildings or in parts of existing buildings that are under renovation. Other buildings can remain inaccessible indefinitely. Building codes typically include only a limited, inadequate range of accessibility requirements, and are too often out-of-date.

A third category of recurring barriers is communication barriers. These can include, for example, the lack of Sign Language interpretation for deaf people or real-time captioning to facilitate face-to-face communication with persons who are deaf, deafened or hard of hearing. Similarly the lack of a TTY phone system²⁶ at a government office can impede effective communication over the phone for these individuals.

Communication barriers take on an even more powerful significance in the context of legal proceedings, where any barrier to full and meaningful participation can have enormous consequences. Communication barriers in this context are dealt with by s. 14 of the Charter which provides, among other things, that deaf persons involved in legal proceedings as parties or witnesses have the constitutional right to an interpreter.

Informational barriers are a fourth category of recurring obstacles. These impede people with certain kinds of disabilities from getting effective and independent access to needed information otherwise available to the public. If important information is only provided in ink print,

²⁶ Also known as a teletype phone system.

this is not accessible to persons who cannot read print due to vision loss or dyslexia. Such barriers are commonly overcome if the same information can be made available in a timely fashion in an accessible alternative format, such as large print for those with low vision, Braille for blind Braille-readers, or audio recording for those with vision loss or dyslexia. Where information is made available on internet web pages, computer users with vision loss or dyslexia can access it with a computer equipped with screen-reading software that reads the text aloud in a computerized synthetic voice. However, if websites don't include design features to make them compatible with screen-reading software, they are inaccessible. Similarly some computer file formats are very accessible to screen-reading software, such as HTML, TXT or MS Word format. PDF format, which regrettably is increasingly being used, can present major accessibility issues for persons using screen-reading software.

Fifth, technological barriers are those which prevent a person with a disability from fully using a piece of technology. For example, a blind person or a person with limited use of or coordination in their arms and hands can't operate an airport check-in kiosk with a touch-screen interface.

Finally, legal or bureaucratic barriers can include legislation, policies or practices that impede a person with a disability from fully participating in an activity or opportunity. A requirement to produce a valid driver's licence as identification for some purpose other than driving serves as a barrier to a person who cannot qualify to drive due to a disability. A policy of "no dogs allowed" is a barrier to persons with disabilities using service animals such as guide dogs for persons with vision loss. A policy permitting guide dogs, but not similar service animals used by persons with hearing loss or mobility disabilities, impedes those with these latter kinds of disabilities.

Ironically, the actual potential of persons with disabilities to participate in and contribute to society has been increasing and continues to expand. Historically, persons with disabilities have very often been able to meet the challenges that their disabilities pose, and to develop the capacity to live independently, to pursue gainful employment, and to participate in society to the extent that society will give them the chance to do so. This was accomplished by devising alternative methods

to perform life's daily tasks. Braille was invented two centuries ago to enable blind people to read. Sign language was devised to facilitate communication by deaf persons. Wheelchairs provided a low-tech method to provide mobility to persons who cannot walk. One's capacity to meet the challenges posed by a disability was often a product of one's desire to do so, the availability of resources to do so, and one's access to social support, family support, and rehabilitation training and technologies.

This capacity for living an independent, productive life has increased dramatically in recent years, because of the evolution of new adaptive technologies. For example, 20 years ago, the main methods by which a blind person could access the printed word were by having volunteers transcribe books into Braille, or by having them read books aloud in person or on an audio recording. The process of transcribing printed materials into Braille or onto an audio recording was slow and labour-intensive. Hence visually impaired people often had access to only a limited range of printed materials and, even then, only after significant delays.

For example, people with vision loss have recently gained far greater and swifter access to the printed word. A Braille computer display presents a computer screen's contents on a metallic screen in electronically generated Braille. Screen-reading software, described above, gives a vision impaired computer-user instant access to any text, presented on a computer screen via a speech synthesizer.²⁷ New software allows a low-vision computer user to dramatically enlarge the printed text displayed on a computer's video monitor, so that it can be visually read by users with very limited eyesight.

People with disabilities thus face two cruel ironies. First, their potential for fully participating in society is increasing. Yet the old barriers that have impeded them for years too often remain in place.

Second, people with disabilities face new barriers that make their participation in mainstream society even more difficult. For example, even though the technologies described above have been devised to enable persons with vision loss to access the printed word on the computer

²⁷ This article is being written on such a system.

screen, new mainstream software keeps coming out which isn't compatible with screen-reading programs, on which computer users with vision loss depend. These new software barriers threaten to undermine the gains which people with visual disabilities have made in the past in the area of computerized access to the printed word. Specialized software developers must keep rushing to revise screen-reading software to overcome these new barriers.

(b) What Equality Means for Persons with Physical, Mental and Sensory Disabilities

The next important step for a person who develops, drafts or reviews legislation to equip himself or herself to make legislation barrier-free for persons with disabilities is to understand what equality for persons with disabilities is. To do this, it thankfully isn't necessary to plough through and make sense of masses of Canadian equality rights case law. It boils down to some simple yet powerful propositions.

Much of the Canadian academic scholarship and jurisprudence on equality rights unfortunately talks about when legislation can or cannot "draw distinctions" between different people or groups in society. For persons with disabilities, inequality is not best described in terms of "drawing distinctions." Inequality is about denying full participation and full inclusion in the opportunities, benefits and rights that are extended to the public. Equality is about persons with disabilities being able to fully participate and be fully included in a barrier-free society, one in which existing barriers are identified and removed and in which no new barriers are created.

A person in a wheelchair who cannot readily get into a courthouse or courtroom, or find a useable washroom in that building, doesn't feel that he or she has had a distinction drawn against them. They have suffered the experience of being obstructed by a barrier to equality, to full inclusion and full participation.

If a public official who develops, drafts or reviews legislation is only on the look-out for situations where the wording of legislation or proposed legislation "draws a distinction" against persons with some sort of disability, they will, for the most part, be missing the boat.

(c) The Costs of Barrier Removal vs. the Costs of Barriers

In any discussion about achieving equality for persons with disabilities, the issue of cost will arise. How much will it cost? Can we afford it? Aren't there other more pressing public budget priorities?

Here are some thoughts to bear in mind. First, it should not be presumed that providing equality for persons with disabilities is too expensive and cannot be afforded. The Charter of Rights rejects any such presumption as itself inherently discriminatory. If government is to deny the Charter's equality rights guarantee, it has the burden to prove that this was necessary to do, that it can't provide equality, that there is no other way to reasonably achieve its pressing legislative goals except by denying persons with disabilities their right to equality, that it is impossible for government (the largest institution in society) to take further steps to accommodate the needs of persons with disabilities without undue hardship. This is a significant burden of proof.

In any consideration of the issue of cost, it is important to remember that preventing future barriers usually costs little or nothing. As well, society must bear substantial costs when it denies equality to people with disabilities. When a city operates a public transit system with inaccessible buses, it must provide an accessible para-transit service for passengers with disabilities, which tend to be more costly on a per-ride basis to operate than the conventional public transit service. If society fails to meet the public transit needs of people with disabilities, it must bear the costs of this group having less ability to get to jobs, and to the training programs that enable them to seek employment. Society shoulders the cost of paying such individuals social assistance, rather than benefitting from those individuals getting a salary, participating in the economy and paying income tax into the public purse.

The cost of providing accessibility must be assessed assuming government uses the least-cost option for providing it. There is an unfortunate tendency for some to exaggerate the cost of providing accessibility and full inclusion for persons with disabilities. Typically, with a little imagination and planning, low-cost, high yield ways of doing this can be crafted. For example, when municipal bus services were asked to announce all bus stops for the benefit of blind passengers, some complained about the cost of installing fancy automated stop-announcement technology. Yet this reasonable accommodation, required by human rights legislation, can be

provided cost-free by simply having the bus driver call out each stop. Every bus has a driver. Every driver has a mouth. Presumably each driver knows where they are on their route.

Finally, with advances in technology and elsewhere, the cost of implementing universal design features keeps dramatically dropping. This trend can be expected to continue and even accelerate.

Developing a basic understanding of the inequalities faced by persons with disabilities, as well as an understanding of the costs imposed by accessibility barriers, is an important first-step in achieving the goal of a barrier-free society. It is an introspective, philosophical step, a question of training and sensitivity, the adoption of a new, inclusive perspective involving the willingness to engage in creative thought concerning methods of achieving a society free of barriers. And while introspective, philosophical steps are undeniably important, they don't instantly translate into an accessible society. What we need are practical tools, tips and strategies that help to implement the vision of a barrier-free legislative landscape. Some hands-on tips regarding the creation and maintenance of barrier free legislation, as well as arguments concerning the proper venue for the elimination of accessibility barriers, are discussed in the following sections of this paper.

5. Getting Down to Business: Eliminating Accessibility Barriers in Legislation

(a) Interpretation vs. Drafting

When getting down to the job of crafting barrier-free legislation, a drafter might be tempted to ask an obvious and important preliminary question: Why bother? A person asking this question may be sensitive to the needs of persons with disabilities; a person asking this question might be committed to the goal of a barrier-free society. This question isn't based on the assumption that accessibility barriers are acceptable or unimportant. On the contrary, it is based on an entirely different assumption: the assumption that legislative barriers to accessibility, where they exist, will be eliminated by courts. And if the courts are going to eliminate such barriers through judicial interpretation or the application of constitutional norms, why should legislative drafters – drafters who are, quite frankly, already up to their elbows in countless issues of government policy and language – worry about incorporating accessibility requirements into the statutes that they draft?

It is critically important to explicitly write accessibility requirements into legislation. To some who develop, draft or review legislation, it might seem sufficient to simply draft an enactment that doesn't include explicit language that singles persons with disabilities out for worse treatment. They might reason that the Charter of Rights and human rights legislation already impose a strong duty to accommodate persons with disabilities. Legislation is supposed to be interpreted in a manner consistent with the Charter and human rights law. Over-worked legislative drafters, often called on to produce results in a hurry, may question the benefit of going any further.

This article's core message is that such a response is not sufficient. This section explains why. It also explains how particular types of legislative barrier can be eliminated (or at least reduced) by careful and creative drafters who are attuned to the government's obligation to produce barrier-free legislation.

(b) Non Judicial Interpreters

The first reason to eliminate legislative barriers at the drafting stage involves the nature of most instances of statutory construction. Contrary to the views implicit in most academic texts on statutory interpretation, most acts of interpretation take place outside of the courts. Indeed, most legislation is interpreted "on the ground" and applied to members of the public by persons other than lawyers and judges: consider, for example the legion of police officers, by-law enforcement officials, election administrators, welfare workers, parole officers, and administrators of statutory programs who must interpret legislation every day. These non-judicial interpreters often turn to legislation without getting legal advice on its construction – advice that takes time and costs money to obtain. The vast majority of those non-lawyers will typically have no idea about the rarified principles of statutory interpretation, about the duty to prevent and remove barriers to accessibility imposed by the Charter of Rights and human rights legislation, and about the roles these play in the construction of legislative language. They will most typically read the plain language of legislation through the eyes of lay people, drawing on its plain and obvious meaning. If it doesn't direct steps to be taken regarding disability accessibility, they likely won't think of it. If the legislation does speak to this, they will see that that is what the law says they are to do.

Reliance on the courts to eradicate legislative barriers ignores those cases in which the

courts don't get involved: the lion's share of cases involving statutory construction, the many instances in which members of the public depend on administrative, on-the-ground construction and application of legislation without recourse to the judiciary. In these cases, the absence of legislative language expressly addressing or eliminating accessibility barriers will result in the perpetuation of discrimination against persons with disabilities.

(c) Judicial Interpretation of Obscure Legislative Text

The second reason to eradicate barriers at the legislative drafting stage (rather than relying on subsequent judicial interpretation) is counter-intuitive: in many instances, judicial interpretation not only fails to eliminate barriers found in legislative text, but actually creates new barriers that did not exist when the legislation was drafted. Creative drafters who are committed to a barrier-free society can eliminate this problem.

How can judicial interpretation be a *cause* of accessibility barriers in legislation? The answer calls for an understanding of the sources of obscurity in legislative text.

The four principal sources of obscurity in legislative language have been categorized as vagueness, ambiguity, subtext, and analogy.²⁸ Each of these problems is distinct, with its own peculiar causes and proper method of resolution. While each of these sources of obscurity can cause problems for every member of the public, one of these defects of legislative language, namely vagueness, raises particular difficulties for those intent on eradicating legislative barriers to the equality of persons with disabilities. The defect in question is vagueness.

What is "vagueness" in the legislative context, and how does it undermine the goal of a barrier-free society? For present purposes, language may be defined as "vague" where it gives rise to a broad range of meanings that vary from one another by matters of degree.²⁹ Consider the word "discrimination". "Discrimination" might be given a very broad meaning (Interpretation A), encapsulating any choice that is made based upon a settled criterion (e.g., when one chooses

²⁸ See R. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Edmond Montgomery, 2001).

²⁹For a more thorough discussion of vagueness, see chapter 4 of Graham, *Statutory Interpretation: Theory and Practice*, note 28, above.

orange-juice over grapefruit-juice because orange-juice tastes better).³⁰ “Discrimination” might, on the other hand, be interpreted narrowly (Interpretation B), confined to unfair preferences given to individuals based on irrelevant traits such as race, disability, sex or sexual preference. When interpreting the word “discrimination”, however, the interpreter is not confined to a choice between these two competing meanings.³¹ On the contrary, the interpreter has the freedom to choose from an almost infinite number of meanings ranging between (or even beyond) interpretations A and B. Perhaps the interpreter will decide that affirmative action programs are excluded from the term “discrimination”. Perhaps the interpreter will decide that discrimination based on *bona fide* job requirements is not included. Perhaps the legislation’s interpreter will hold that only discrimination against traditionally disadvantaged groups counts as “discrimination” for the purposes of this hypothetical statute. It is impossible to know (with any amount of confidence) whether the author’s intention coincides with interpretation A, interpretation B or one of the countless variations found between these two extreme constructions. Indeed, the legislation’s author may not have even settled upon a precise meaning of “discrimination” – he or she may have simply had a rough idea of the meaning being conveyed, hoping that the details of the word’s meaning would be settled later on through others interpreting it.

Vagueness is a feature of virtually every legislative text. For example, section 23(1) of the *Food and Drugs Act*³² provides that “an inspector may at any reasonable time enter any place where the inspector believes on reasonable grounds any article to which this Act or the regulations apply is manufactured”. The term “reasonable” appears twice in this section, with no guidance as to what might constitute a “reasonable time” to conduct a search, and no indication of what might amount to “reasonable grounds”. The phrase “reasonable time” might confine permissible searches to regular business hours (interpretation A) or it may allow searches at any

³⁰The concept of “discrimination” can be seen to carry this meaning when employed in the phrase “discriminating taste”.

³¹ This distinguishes vagueness from ambiguity. Whereas a vague word or phrase gives rise to a broad continuum of meanings, ambiguous words or phrases give rise to simple equivocation, requiring interpreters to make an “either/or” choice between a set number of discrete, alternative meanings. The phrase “you will be lucky if you can get David to work for you”, for example, is ambiguous, in that it either means that David is a highly recommended employee or that David is lazy – an interpreter of this phrase is confined to choosing one meaning or the other.

³²RSC 1985, c. F-27

time provided that adequate notice is given (interpretation B). The legislation's interpreter is not, however, required to select either of these constructions – the interpreter may select interpretation A, interpretation B or some radically different construction that the interpreter deems “reasonable” in the context. An interpreter of such language is not confined (by the language itself) to a finite number of specific and discrete interpretive choices. On the contrary, the interpreter of vague language has interpretive discretion, engaging in a process of “interpretive line-drawing” whereby he or she decides where - along a continuum of meaning - one can find an appropriate meaning for the language being construed.

How can vague statutory language contribute to the creation or perpetuation of barriers against persons with disabilities? In part, the answer requires an understanding of the way in which the courts contend with vagueness. In most cases, judges interpret vague language by resorting to what is known as “dynamic” or “progressive” interpretation, – interpreting language without reference to the intention of its framers, choosing instead to create an “adaptive” meaning that may shift and evolve “in response to both linguistic and social change.”³³ Peter Hogg describes this form of statutory interpretation as the process through which statutory language “is continuously adapted to new conditions and new ideas”.³⁴ In effect, the judge ignores (or at least downplays) the historical intention of the relevant statute's framers, choosing instead to create a meaning that advances prevailing norms.³⁵ The question of what really advances ‘prevailing norms’, together with the question of what those norms are in the first place, is left up to the judge. In effect, this clothes the judge with the power to infuse the legislation with the meaning the judge considers preferable in the circumstances, a meaning that will inevitably be coloured (in the words of Frederick Shauer) by “the judge's views about the immediate equities of the case at hand, the judge's less particularistic views about public policy, or the judge's array of philosophical, political, and policy views, an array that is nowadays called

³³ Ruth Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994), at 137.

³⁴ Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), 1391.

³⁵ For a thorough account of this interpretive method, see William Eskridge, *Dynamic Statutory Interpretation*, Cambridge, MA: Harvard University Press, 1994. For the particular application of dynamic interpretation in the construction of vague language, see R. Graham, *Statutory Interpretation: Theory and Practice* (note XXX, above) and R. Graham, “A Unified Theory of Statutory Interpretation”, (2002) 23: 1 *Statute Law Review* 91 (Oxford University Press).

‘ideology’.³⁶ This grants the judge a vital role in the creation of the relevant statute’s meaning, permitting the judge to shape the law according to the judge’s personal views. According to Manfredi:

Individual justices are goal-oriented actors whose personal attitudes and beliefs shape their interpretation of the law. They behave strategically to maximize the probability that their preferences will become binding rules. In the end, the Supreme Court makes policy not as an accidental by-product of performing its legal function, but because a majority of justices believes that certain legal rules will be socially beneficial.³⁷

This is particularly true in the case of vague legislative language. Where a judge interprets language that is vague, the judge is clothed with virtually unfettered interpretive discretion. He or she is able to choose among an almost infinite array of competing meanings for the purpose of doing justice (as defined by the relevant judge) in the lion’s share of cases.

The whole notion of “doing justice in the lion’s share of cases” raises an obvious problem for persons with disabilities. When a judge engages in the “line drawing” inherent in the interpretation of vague legislative text, the judge – of necessity – will focus on the typical cases to which the relevant legislation will apply. The judge will focus on what he or she perceives to be typical litigants, typical fact scenarios, and typical members the public governed by the relevant Act. The needs of persons with disabilities can easily not be considered and can by the wayside unless specifically drawn to the judge’s attention. Legislative language meant to apply to the public at large often fails to reflect the needs of persons with disabilities. Judicial interpretation of vague legislative language typically fails to take these needs into account. This can lead to the creation of barriers where none are justified or intended. Here are potential

³⁶ F. Schauer, “Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior” (2000) 68 U. Cin. L. Rev. 615, at 619. See also R. Posner, “What do Judges Maximize” (1993) *Supreme Court Economic Review*, Vol. 3, 1, and R. Graham, “Politics and Prices: Judicial Utility Maximization and Constitutional Construction” (2007) 1 *Indian Journal of Constitutional Law*, 57.

³⁷ C. Manfredi, “The Life of a Metaphor: Dialogue in the Supreme Court, 1998 – 2003”, in G. Huscroft and I. Brodie (eds.), *Constitutionalism in the Charter Era* (Toronto: LexisNexis, 2004), 105, at 131. See also B. Friedman, “The Politics of Judicial review” (2005) 84 *Tex. L. Rev.* 257, where Friedman notes (at 258) that “Many positive theorists suggest that judicial ideology plays a significant role in how judges decide cases and that judges respond to pressures from other political actors. Positive scholars believe these forces play a large hand in shaping the content of the law, especially constitutional law”. At 272, Friedman goes on to note that “attitudinal” scholars believe that “...the primary determinant of much judicial decisionmaking is the judge’s own values. Judges come onto the bench with a set of ideological dispositions and apply them in resolving cases. As the most notable proponents of the

examples:

- Section 93 of *Ontario's Business Corporations Act* provides that shareholder meetings may be held “at any place” approved by the company’s board of directors. Assume that a judge construes this provision broadly, holding that the directors of the company may choose “any place” considered acceptable by a majority of the relevant company’s shareholders. By construing the legislation in those terms, a judge would inadvertently give the board of directors the authority to choose meeting locations that present accessibility barriers to persons with mobility limitations.
- Section 61 of Ontario’s *Planning Act* provides that “Where, in passing a by-law under this Act, a council is required ... to afford any person an opportunity to make representation in respect of the subject-matter of the by-law, the council shall afford such person a fair opportunity to make representations but throughout the course of passing the by-law the council shall be deemed to be performing a legislative and not a judicial function.” The phrase “fair opportunity” is vague. Assume that a judge construes the provision to mean that council’s obligations under the section are discharged where the council holds a public meeting during which any person affected by the by-law may make oral representations. This may create unintended accessibility barriers for those who because of disability are unable to be present at a meeting or who are unable to make oral representations (either at all or without appropriate accommodations). In effect, the judge could interpret the section in a way that has the result of ensuring that the views of persons with disabilities, or certain segments within this population, are excluded and hence ignored.
- Section 37(1) of Ontario’s *Law Society Act* provides that “A licensee is incapacitated for the purposes of this Act if, by reason of physical or mental illness, other infirmity or addiction to or excessive use of alcohol or drugs, he or she is incapable of meeting any of his or her obligations as a licensee”. A judge interpreting the provision’s vague language without regard for the duty to accommodate the needs of persons with disabilities in the workplace may construe the language in such a way as to limit the capacity of persons with disabilities to engage in the practice of law.

Judges engaged in the interpretation of vague legislative language may carry out their task of “legislative line drawing” unaware of the fact that the lines they draw may, in effect, leave persons with disabilities outside the lines, unable to avail themselves of the rights or protections created by the relevant legislation. Unless the interpreter of vague language has

attitudinal model, Jeffrey Segal and Harold Spaeth, explain: “Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal”.

experience with disability, or is faced with advocates or litigants who take the time to draw the needs of persons with disabilities to the relevant court's attention, vague legislative language may be interpreted in a way that creates barriers, rather than eradicating them, that increases inequality, rather than decreasing it, and that increases the burden placed on persons with disabilities rather than accommodating their needs. As a result, vague language – coupled with the typical judicial strategies for interpreting vague language – has the potential to fail to advance, if not impair the goal of a barrier-free society.

Of course, the possibility that judges *may* create barriers when interpreting vague language doesn't mean that the judge *will* create such barriers. Advocates of a judicial solution to legislative barriers (as opposed to a solution rooted in corrective drafting) might argue that the problem of vague language is best addressed by better advocacy: those who argue for particular interpretations of vague language should bear the burden of ensuring that judges fail to create accessibility barriers in their construction and application of legislation. This argument should be rejected. Indeed, there are several reasons that an interpretive solution (that is, the elimination of barriers through judicial interpretation) is never as useful as a “legislative fix” (that is, remedial drafting which expressly addresses accessibility barriers, or provides the courts with legislated interpretive parameters that promote the goal of a barrier-free society).

An interpretive solution to the problem of vague language may have intuitive appeal. After all, those who hope to convince a court to generate a “barrier free” interpretation of vague language have a number of useful arguments on their side. First, they can draw the courts' attention to the legislative directives described in section 3(a), above. The Charter, coupled with human rights laws and other “access friendly” enactments, compels the legislature to craft laws that support and respect the elimination of barriers for persons with disabilities. A court faced with vague language can be reminded that any interpretation that undermines accessibility may cause a statute to run afoul of constitutional (or quasi-constitutional) guarantees. As McLachlin J. wrote in *R. v. Zundel* (1992)³⁸:

... where a legislative provision, on a reasonable interpretation of its history and on the plain reading of its text, is subject to two equally persuasive interpretations, the Court

³⁸ [1992] 2 SCR 731.

should adopt that interpretation which accords with the *Charter* and the values to which it gives expression.³⁹

As a result, reference to the legislature's constitutional duty to promote the goal of equality for persons with disabilities can cause the courts to prefer interpretations which eliminate accessibility barriers over those which undermine the goal of a barrier-free society. Moreover, a litigant interested in promoting a barrier-free society can direct the court's attention to the interpretation act of the relevant jurisdiction. In the case of federal legislation, for example, advocates can make reference to s. 12 of the federal *Interpretation Act*, which requires that all laws be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Whether legislation is aimed at the extension of benefits, the creation of programs or the provision of statutory protection to the public, a "large and liberal construction" that "best ensures the attainment" of the legislative objective will typically be one that ensures that the relevant benefits, programs and protections are not withheld from large or vulnerable segments of the public (such as persons with disabilities). As a result, interpretive guidelines set out in federal and provincial *Interpretation Acts* can have effect of guiding courts toward interpretations that reduce or eliminate barriers to accessibility.

Notwithstanding the powerful arguments favouring "barrier free" interpretations of legislative language, the interpretive solution is never the optimal remedy for vague statutory text. While judges are good at what they do, and can (if seized of the issue) craft judicial interpretations that accommodate the needs of persons with disabilities, their services are incredibly expensive. Litigation is costly, and the resources required for the "legislative fixes" described below (e.g., a little *ex ante* remedial drafting) pale in comparison to the massive resources required to fund a protracted fight in the courts. Also important is the placement of the economic burden: where legislative barriers are addressed the drafting stage, the resources required to eliminate these problems are expended by the government (which is, after all, the party with the constitutional burden to eradicate such barriers), and ultimately borne by Canadians as a collective. Where legislative barriers are dealt with *ex post* (that is, after they have caused an actual problem for persons with disabilities), any litigation will be funded by the victim of the relevant barrier, at least until the victim achieves a victory in the courts. As noted

³⁹ *Id.*, at 771.

above, persons with disabilities are disproportionately represented among the poor, making the prospect of successful litigation far less likely.

A second reason for preferring the *ex ante* “legislative fix” over the *ex post* “interpretive solution” involves the scope of the remedy. A judicially crafted solution will, where successful, provide prospective relief for all persons with disabilities (i.e., by reading vague language in a manner that accommodates persons with disabilities, by “reading in” language eradicating barriers or by striking down the relevant legislation). It may also provide some form of retrospective relief for the party bringing the litigation (i.e., in the form of damages making up for the imposition of the barrier). But it cannot (except in rare cases involving class actions) provide widespread relief for those who have, before the litigation, been victimized through the imposition of legislative barriers. A drafting remedy, by contrast, eradicates the legislative barrier before it can ever harm the public.

Finally, for legislative drafters to rely on the interpretive fix to ensure that the legislation they draft doesn’t create or perpetuate any barriers to accessibility for persons with disabilities assumes several things, none of which can be safely assumed. First, it assumes that the provision in question will ever get before a judge to be interpreted. As noted earlier, most legislation never gets to court for judicial exposition. Second, it assumes that one of the parties before the court have an interest in using their scarce resources and taxing the court’s limited attention by arguing about the provision’s impact on persons with disabilities. Most litigants won’t. Most people with disabilities won’t have the resources to litigate such issues.⁴⁰ Even if they had the inclination, the resources, and the access to legal services, they may well have no standing to appear in court to raise the issue, depending on the case’s circumstances.

Even if the foregoing wasn’t enough, there is also no assurance that a judge, even called on to decide such issues, will necessarily get it right. If not, it would be necessary to appeal, thereby drawing on yet more time and scarce resources. There may be no right of appeal. In the

⁴⁰ In the early 1980s a judicial inquiry by Judge Rosalie Abella, now a justice on the Supreme Court of Canada, documented that persons with disabilities were substantially under-served by Ontario’s legal profession. Over two decades later, Ontarians with disabilities still have many unmet legal needs. See Ontario, Report of a Study by Judge Rosalie S. Abella: Access to Legal Services by the Disabled (Toronto: Queen’s Printer, 1983) at 55 60.

meantime, government and private parties may have conducted themselves for years under the legislation, wrongly approaching it without regard to the need to fulfil their duty to accommodate. Finally, even if all these formidable hurdles are overcome, and the judge gets it right, there's no assurance that other public officials and private parties, using that legislation in the future, will learn of this judicial interpretation. As noted earlier, most legislation is used by non-lawyers without necessarily getting up-to-date legal advice from lawyers on the twists and turns of judicial interpretation.

For each of these reasons a legislative fix is always preferable to an interpretive solution. But what form should the legislative fix take? An intuitive solution is to avoid the vague language altogether: if vague language has the capacity to undermine the objective of a barrier-free society, vague language should be avoided. Unfortunately, this is not always feasible. And even if it were feasible it would be a bad idea.

Unlike other sources of obscurity in law, vague language serves a number of useful purposes. Indeed, the appearance of vague language in a statute is almost never the result of a drafter's error. On the contrary, vague language is generally the result of the drafter's conscious choice. This may seem counter-intuitive. As we have seen, vagueness can be an obstacle to clear communication. Why would a statutory drafter, whose job it is to construct a meaningful law that implements legislative policy, purposely draft the law in language that impairs a reader's ability to understand the statute's meaning? Elsewhere⁴¹ it has been shown that legislators employ vague language to achieve at least three important legislative goals, namely (1) the avoidance of difficult political choices (i.e., the passage of broad legislative principles when the government is unable to secure majority approval of specific legislative language), (2) the delegation of "meaning making functions" to expert interpreters, such as judges or administrative tribunals, and (3) the need to enact legislation that can evolve with changing needs.⁴² In each of these three cases, legislators (and the drafters of legislation) employ vague language as an expedient, allowing the timely passage of important legislation that might otherwise die on the

⁴¹ See Graham, footnote 28, above.

⁴² A good example of this last use of vagueness might involve the passage of a statute prohibiting "obscenity". The word "obscene" is vague. While it would be open to a drafter to enumerate particular forms of expression that count

parliamentary floor. Without the expedient of vagueness, important bills would die. As a result, any problems caused by vagueness cannot typically be resolved by eliminating vague statutory language altogether.

If legislative vagueness cannot be avoided altogether, what types of “legislative fix” can be employed for the purpose of reducing or eliminating the danger that vague language will impair the goal of a barrier-free society? There are a few potentially useful possibilities:

- **Preambles**. According to s. 13 of Canada’s *Interpretation Act*, “[t]he preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object”. Provincial Interpretation Acts have similar provisions.⁴³ The effect of these provisions is to make it clear that preambles provide admissible evidence of the meaning of an enactment, and form part of the overall statutory context in which the provisions of an enactment must be applied. Where the provisions of an enactment should be interpreted by reference to policies established in other documents (such as anti-discrimination policies embodied in treaties or other statutes, or accessibility policies found in other enactments) these other documents should be incorporated by reference into the preamble. The effect is to ensure that the provisions of the enactment are read and applied in a manner that is consistent with the policies incorporated in the preamble. While this undoubtedly helps in litigation concerning the proper meaning of a statute, it can also provide guidance to those who apply and enforce a law on a daily basis, preventing the creation of accessibility barriers from the outset.⁴⁴
- **Purpose statements**. The role of a “purpose statement” in a statute is similar to that of a preamble. It is intended to guide the interpretation and application of the relevant statute. These purpose statements can be incorporated into the body of legislation, expressing the policies underlying the relevant Act. Where an Act has the potential to create accessibility barriers, a purpose statement expressly referencing the statute’s policies with respect to persons with disabilities may help stave off any reading of the act that might undermine accessibility.
- **Interpretation provisions**. The problem with vague language is that it provides the court with very few parameters as to the meaning of the provision in which it resides. An interpretation provision (for example, one providing a partial definition of an otherwise vague term) can solve these problems. For example, a statute providing that the directors

as “obscene”, the use of the un-defined vague word may allow the statute to evolve alongside shifting community standards, allowing the legislation to operate over a long period of time without the need for constant revision.

⁴³ See, for example, s. 14 of Newfoundland’s *Interpretation Act*, RSN 1990 c. I-19 and s. 13 of Manitoba’s *Interpretation Act*, RSM 1987, c. I-80, which provides that “[t]he preamble of an Act forms part of it and is intended to assist in explaining its meaning and intent.

⁴⁴ For an excellent example of the use of a preamble to establish a statute’s meaning, see the decision of the Supreme Court of Canada in *Quebec v. Boisbriand*, [2001] 1 SCR 665.

of a company may hold a meeting of shareholders “at any place” selected by the directors may have a partial definition, making it clear that, for the purposes of the section, “any place” does *not* include a place within a building or structure that fails to provide access for persons with disabilities.

- **Operative Provisions** The optimal solution to the problem of vague language is to include specific operative provisions that directly address accessibility barriers, or that create explicit requirements for the accommodation of the disability-related needs of persons with disabilities. By this option, as with the preceding one, the drafter takes on the potential barrier head-on, by drafting its provisions to address the problem.

While each of these options can be helpful in the elimination of barriers caused by vague legislative language, the most effective and efficient “legislative fix” is the operative provision: this is the optimal solution because of the importance of “non-judicial” interpreters, who are more easily guided by clearly worded and enforceable operative provisions than by the indirect “contextual” interpretive guidance given by preambles and purpose statements.⁴⁵

(d) Invisible Legislative Barriers: Identification and Elimination

Not all barriers to accessibility are caused by vague language. Indeed, some of the greatest accessibility barriers are the result of legislation that appears to be completely free of obscurity. Even a law that is apparently free of interpretive problems, though, can give rise to unintended barriers for persons with disabilities. Such laws are designed to apply to the general public and, all too frequently, are drafted in a manner that assumes that the general public is comprised entirely of persons without disabilities. The application of these ostensibly neutral laws to persons with physical or mental disabilities can result in the creation of unintentional barriers – “invisible” legislative barriers with the effect of robbing persons with disabilities of the full benefits and protections they should enjoy under the relevant legislation.

The discovery of invisible legislative barriers is a matter of training and effective consultation with those most familiar with disability accessibility issues. Drafters who become familiar with the inequalities faced by persons with disabilities are better positioned to detect the sorts of barriers that arise when legislation designed for the public has been drafted on the

⁴⁵ Consider a set of instructions for assembling a model airplane. While an introductory purpose statement describing the overall shape of the final product might be useful in cases of doubt or ambiguity, the most helpful and easiest-to-follow instructions are of the “insert tab A into slot B” variety.

erroneous and often inadvertent assumption that the public is free of physical, mental or sensory disabilities.

When one drafts legislative language while keeping the goal of a barrier-free society in mind, potential barriers are not difficult to discover. And happily, the discovery of such barriers is 90% of the battle. Once such a barrier is discovered, it is typically a matter of relatively simple remedial drafting to eliminate the barrier in question.

Any legislative program that is premised on the assumption of a public with no disabilities has the potential to create barriers. As a result, there are as many potential accessibility barriers as there are potential legislative programs.

The following discussion offers practical tips on how to draft barrier-free legislation based on principles of universal design. This is addressed in three parts. First, some recurring kinds of barriers are identified. Second, some tips are offered for what a person should do while developing, drafting or reviewing legislation to make sure that it incorporates universal design principles. Third, a specific example of accessibility provisions that could be added is offered to illustrate this, namely in legislation governing the conduct of elections.

6. Eliminating Typical Legislative Barriers

(a) Seven Typical Barriers

Before you can work to eliminate a legislative barrier, you have to know where to find it. This section accordingly describes seven of the most common types of accessibility barrier created or perpetuated by legislative language. These examples should help alert legislative drafters and policy official to some of the things to watch for when designing, drafting or updating legislation.

(i) Provisions Giving Notice

At times legislation will impose on a party an obligation to give the public or some designated sector of the public notice of something. A landlord may be required to give notice to tenants of an intention to seek a rent increase. A property owner may have to give notice to

neighbours of an application for a zoning by-law change for which the property owner is applying. A party to a legal proceeding may have to give notice of that legal proceeding to certain other people, such as the party that they are suing or others directly affected by the proceeding.

Even where “public notice” legislation is well-drafted and free of vagueness or obscurity, it can create important barriers for persons with disabilities. Persons with certain kinds of disabilities cannot read printed material. They are at times referred to as persons with print disabilities. This includes, people with vision loss, whether totally blind or partially sighted, and persons with some kinds of learning disabilities such as dyslexia.

Where legislation requires notification via a public posting in printed form, the legislation should mandate provision of sufficient comparable notice in an alternate format to enable persons with print disabilities to get comparable notice. Where legislation requires notification to be published in a newspaper, comparable announcement where feasible via radio would assist in reaching those who cannot read print as a result of a disability.

It would be best if the legislation specified what measures had to be taken. However, some drafters may balk at this, preferring to state in more generic terms that where such notice is given in printed form, adequate reasonable alternative measures should be taken to provide notice to persons who cannot read printed materials due to a disability. While this latter method is better than no provision at all, it suffers from the defects of the ex post “interpretive remedies” described above: it will be the courts, after all, who may determine whether an alternative measure is “reasonable” within the meaning of the relevant statute, if anyone has the time, money, inclination and standing to litigate the issue. As a result, the optimal method of drafting any notice provision is to include specific instructions as to how those giving notice should accommodate the needs of persons with disabilities.

(ii) Legislative Programs and the Internet

Governments increasingly use the internet as a means to provide or engage in

communication with the public regarding government services, government information, or other notifications to the public. Unknown to many, including many government policy officials and legislative drafters, there are serious disability accessibility issues regarding the internet. There are some websites that are easy for computer users with disabilities to access. Others can be difficult if not impossible to access. Persons with vision loss or dyslexia may, as noted above, have difficulty accessing certain internet sites. Similarly, spoken-word information on a website creates an accessibility problem for computer users with hearing loss.

The good news is that there are well-established international standards for disability accessible web design. These can be found at www.w3c.org. If complied with, these maximize the accessibility of websites. These can be implemented without compromising on any existing web design features. This is because a website can be as inaccessibly graphical as the designer wishes, so long as a link at or near the top of the web page offers the option of an alternative, accessible, text-only site that incorporates the requisite accessibility features.

Where legislation provides for the use of the internet to deliver government services or to provide public notification of any required information, that legislation should require that the internet site be disability accessible. Again, a range of different degrees of legislative specificity can be considered. At the most general, the legislation could simply say that the website used should be reasonably accessible to computer users with disabilities. For more specificity, the legislation could provide that the website will accord with accepted international standards of accessible website design. For even greater specificity, the W3C standards could be explicitly referenced. In either event, such legislation serves to alert those operating under this legislation to address website accessibility, something they otherwise may well overlook.

Where information is posted in PDF format, it should also be available in alternative accessible formats, such as HTML or Microsoft Word.⁴⁶ There are features available to make

⁴⁶ Section 6 of the Ontarians with Disabilities Act 2001 includes an omnibus provision to this effect. It provides:

6. The Government of Ontario shall provide its internet sites in a format that is accessible to persons with disabilities, unless it is not technically feasible to do so. S.O. 2001, c. 32, s. 6, in force December 31, 2002 (O. Gaz. 2002, p. 898- 899).

PDF documents somewhat more accessible than was the case in the past. However, even when used, PDF documents still present annoying accessibility problems. The usual excuse for using PDF is that it protects a document against being altered. In reality, that protection is ephemeral and easily circumvented. It provides no compelling justification for failing to provide fully accessible electronic documents.

(iii) Limitation Periods

Wherever legislation provides for a limitation period of any sort, it should include an exception for any person who, due to disability, was unable to comply with that limitation period. That could apply to, for example, a person who, due to mental disability, was unable to act earlier on the issue to which the limitation period pertained, and where no guardian could reasonably know about the need to act. It would also cover persons who, due to disability, couldn't read a document served on them in an inaccessible format.

(iv) Communication with Government

Many government programs require members of the public to communicate with government in writing or by spoken word. There are a myriad of government forms, some of which are mandated in or under legislation. These are inaccessible to persons with print disabilities.

It isn't necessary for governments to stock Braille versions of every form that a government may produce. There are various sufficient low-cost measures short of this that can meet the requirement of accessibility. If legislation requires government forms to be printed with a sufficiently large font, they will automatically expand the usefulness of these forms to a great number of people. Government can be required to simply provide such forms in an accessible alternative format on request, with the request provided a reasonable time in advance.⁴⁷ Finally, access can in a limited range of non-sensitive situations be reasonably provided by providing a

⁴⁷ Section 7 of the Ontarians with Disabilities Act sets out a broad but unenforceable omnibus provision regarding access to government documents. It provides as follows: "7. *Within a reasonable time after receiving a request by or on behalf of a person with disabilities, the Government of Ontario shall make an Ontario Government publication available in a format that is accessible to the person, unless it is not technically feasible to do so. S.O. 2001, c. 32, s. 7, in force September 30, 2002 (O. Gaz. 2002, p. 898- 899).*" Regrettably, the Ontario Government

public official who can assist with the completion of the form, so long as they are legally required to keep confidential the information related.

Where a member of the public must communicate with a government official to comply with a legislative requirement, or to avail themselves of a right, benefit or opportunity mandated or permitted under legislation, persons who are deaf, deafened or hard of hearing, or who have other communication disabilities, will require interpretation services or other communication accommodations to ensure that this communication can be effectively undertaken. Legislation should make provision for this, to ensure that it is provided in a timely fashion.⁴⁸ Once again, it is not enough for legislative drafters to assume that an interpretation requirement will be read-in by judicial interpretation or imposed by a separate statute: in many instances, such legislation is interpreted and applied by non-legally-trained administrative officials who may not be aware of requirements imposed by statutes other than those that they are specifically responsible for enforcing.

(v) Government Properties and Facilities

Where legislation requires an event to occur which a member of the public will be obliged to attend, an all-too-common barrier than can be encountered is that the premises where that event occurs isn't fully accessible to persons with disabilities, particularly those with a mobility disability. For example, if a person must attend an office to file an application for some sort of government benefit, or to appear before some court, public official or board, agency or tribunal, that facility must have effective barrier-free access. Legislation that provides for the requirement to appear before that body should also stipulate that the official or body before whom they appear should be located in premises that provide barrier-free access for persons with disabilities. Stipulating this in legislation helps ensure that those responsible for implementing that legislation will meet this too-often unmet requirement. Omitting it will create the real risk that the legislation, as implemented, will create or perpetuate a significant barrier against persons with disabilities.

has not instituted a fast, efficient government-wide process for fulfilling this obligation, seven years after it was passed into law.

⁴⁸ See *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

In drafting such legislation it may be tempting to cross-reference to existing legislative requirements for accessible building construction, such as a jurisdiction's Building Code. It is strongly recommended that this not be done. As noted earlier, such building codes tend to be out-of-date, and to set insufficient accessibility standards. It is better to simply mandate in the legislation that the premises for such activity must be accessible to persons with disabilities. This will help direct the government to take action, without imposing insufficient standards such as those too-often found in building codes.

(vi) Discretionary Powers of Regulatory Agencies and Tribunals

Under federal and provincial legislation, a wide range of regulatory agencies and tribunals have statutory power to make and implement public policies and decisions that can impact on accessibility. It is important for the duty to promote disability accessibility to be explicitly extended to all government bodies that can have an impact. When a public official such as a board, commission, or tribunal, exercises a discretionary statutory power, it can inadvertently create new barriers against persons with disabilities, or perpetuate old ones. It is important to ensure that no provincial government agency adopts or implements policies or makes discretionary decisions that work against the goal of disability accessibility. Removing and preventing disability barriers is everyone's business.

For example, in the 1990s, the Ontario Government mandated a provincial commission to recommend to the provincial government which hospitals should be closed, or their facilities reduced as part of a provincial strategy of health care restructuring. That commission should have taken into account the duty not to make the hospital and health care system more inaccessible. Instead there were instances of more accessible facilities being closed with services transferred to other less accessible facilities. This is inexcusable. Yet it should not fall to persons with disabilities, most of whom are poor, to have to hire lawyers to judicially review such government action.

It is recommended that when legislation gives a board, commission or tribunal or other public official a discretionary statutory 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 achieve accessibility for persons with disabilities.

(vii) Legislation Imposing Explicit Barriers on Persons with Disabilities

It is important to be especially vigilant about and to quickly red-flag any legislation that purports to impose added burdens on persons with disabilities, whether all persons with disabilities or persons designated as having a certain kind of disability. Strong constitutional justification will be required to defend any such legislation under section 1 of the Charter as a reasonable limit that can be demonstrably justified in a free and democratic society.

An illustration of this can be found in a regulation that the Ontario Government enacted in 2007 under the Accessibility for Ontarians with Disabilities Act 2005. Addressed earlier in this article, that statute requires the Ontario Government to develop, enact and enforce accessibility standards to make Ontario fully disability-accessible by 2025.

The first accessibility standard which the Ontario Government has enacted under it is intended to make customer services in Ontario disability-accessible. Yet this Accessibility Standard for Customer Service⁴⁹ includes a provision that creates or mandates the creation of barriers against persons with disabilities. It lets a provider of goods or services to the public require a customer with a disability to bring a support person with them (presumably at the expense of the person with a disability) if they are to be admitted to the premises, and potentially to charge an added admission fee for that support person, if a support person is necessary to protect the health or safety of the person with a disability or the health or safety of others on the premises. An enactment that is supposed to eliminate barriers against persons with disabilities in accessing goods and services should not give goods and service providers added power to exclude customers with disabilities, potentially relying on prevailing stereotypes that underestimate the abilities of persons with disabilities and that exaggerate the risk they may pose

⁴⁹ Ontario regulation 429/07

to themselves or others.⁵⁰

(b) Steps for Removing and Preventing Typical Barriers

Much of what legislative drafters will accomplish in the removal of barriers to accessibility may come from their discussions with the government policy officials who bring the legislative drafting project to them. Legislative drafters should draw their attention to possible barriers that the legislation might create, permit or perpetuate. They should discuss the possible impact of the proposed legislation on persons with disabilities. Cabinet ministers, legislators and policy officials should consider these issues well before bringing a policy project to a legislative drafter to transform into legislative language.

As part of government's internal policy development and approval process, government policy officials should consider possible barriers that a legislative proposal would create, permit or perpetuate. They should be briefing cabinet ministers on these issues and getting direction before preparing drafting instructions for legislative counsel. The policy documents that go to cabinet for approval should deal with disability accessibility issues so that all ministers may see how these issues will be addressed before deciding whether to approve a particular legislative proposal.

Thereafter, the drafting instructions given to legislative counsel should set out any specific directions on these disability-accessibility issues. Finally the legislative drafter should also be ready to flag issues that the policy officials may not have considered or sufficiently addressed. They should direct attention to those possible barriers and be prepared to question their clients on this issue. If legislative drafters are concerned about unresolved or unaddressed disability barrier issues, they should take the matter to their minister or to cabinet just as they

⁵⁰ This Accessibility Standard states in the material part:

4(5) The provider of goods or services may require a person with a disability to be accompanied by a support person when on the premises, but only if a support person is necessary to protect the health or safety of the person with a disability or the health or safety of others on the premises.

(6) If an amount is payable by a person for admission to the premises or in connection with a person's presence at the premises, the provider of goods or services shall ensure that notice is given in advance about the amount, if any, payable in respect of the support person.

would with unresolved constitutional issues.

At each stage of the legislative process - whether policy development, the preparation of drafting instructions or the drafting of legislation - those involved in developing or reviewing legislation should be guided by a fundamental principle. In simple terms, government policy developers and legislative drafters should do their work imagining that they are sitting at a table with a group of people with different kinds of disabilities, all asking how they are going to be able to take part in the program or opportunities that this legislation mandates or permits. It is a table where, historically, persons with disabilities too often haven't had a seat. As the last station on the legislative drafting rail line, drafters have a particularly important fail-safe quality control function. Even if policy officials say that they have considered accessibility issues, the drafter should be willing to raise them again.

Set out below are 11 questions that should be asked in the process of developing, drafting and revising legislation. Answering these questions with respect to every new and existing legislative regime is an important pre-condition to discharging the government's duty to create and maintain barrier free legislation. In considering these questions, don't simply think of persons with disabilities as an indivisible group: think instead of separate physical, mental and sensory disabilities, and how the relevant legislation may create, permit or perpetuate barriers for persons with such disabilities. It should go without saying that the drafter may have other questions he or she thinks should be asked. Here are the questions:

1. What rights, benefits, opportunities, services, facilities, duties or burdens does this legislation confer on the public?
2. Will people with mental and/or physical and/or sensory disabilities be able to fully participate in these rights, opportunities, benefits, services, facilities or duties? How will persons with disabilities make use of this legislation? What barriers might they encounter? If there are potential barriers, what options are there for modifying the legislation to eliminate or prevent those barriers?
3. Will these rights, opportunities, benefits, services, facilities or duties be provided for in a place that is fully accessible to persons with disabilities?
4. What must a member of the public do to qualify for and take part in the program or opportunities that the legislation provides? Do any of these qualifications or

preconditions impose barriers on a person with a mental, physical and/or sensory disability?⁵¹

5. With whom must a member of the public communicate to take part in the legislation's program or opportunities? Does the method of communication raise barriers?
6. How is information conveyed to the public under the legislation? Does the method of conveying information create barriers?
7. What additional measures could be included in the legislation to ensure that persons with disabilities could fully participate in and benefit from the programs or opportunities that it mandates?
8. What measures can be written into the legislation to ensure that persons with disabilities are effectively accommodated when they seek to take part in the legislation's program or opportunities? (E.g. establishing a designated public official who is mandated to receive and respond to requests for accommodation)
9. What discretionary powers does the legislation give to anyone, especially to a judge, tribunal or other public official? What does the legislation include to ensure that that discretion won't be exercised in a way that creates or perpetuates barriers to accessibility confronting persons with disabilities?
10. Does this legislation authorize the giving of public money to any other private or public organizations or other recipients? If so, what does the propose legislation include to ensure that that public money isn't used to create or perpetuate barriers impeding persons with disabilities? It is important that not a dime of public money ever be used again to create or perpetuate barriers against persons with disabilities.
11. What steps did the policy officials, developing this initiative, take to ascertain its potential impact on persons with disabilities, and to reach out to and consult with persons with disabilities in developing it (i.e. those with obvious expertise in their needs)? If there was a public consultation used when the initiative was developed, what steps were taken to make sure it was a fully accessible, barrier-free consultation?

If real issues arise, a reviewer or drafter of legislation should encourage their instructing policy official to go back, reconsider these questions, and consult on these issues. They may benefit from consulting directly with persons with disabilities. Moreover, many governments have a dedicated office or staff with expertise on disability accessibility issues, with ideas, wisdom and solutions to share. There may be simple, low-cost ways to modify the legislation to make it barrier-free.

⁵¹ For example, must a citizen show a drivers' license to obtain a legislated benefit? Should the enjoyment of the

The long, painful experience of persons with disabilities with barriers reveals that inaccessibility, whether in legislation, buildings or technology, are rarely caused by a deliberate decision to keep persons with disabilities out. Typically, these barriers arise because no one thought about it in advance. Inaccessibility comes from a failure to plan. Accessibility happens if it is planned for. This article proposes that one who drafts or reviews legislation can have a dramatic impact on removing and preventing barriers if they blow the proverbial whistle, halt the legislative process, and engage in a focused dialogue on the foregoing questions.

The earlier in the legislative development process that these issues are considered, the easier they are to spot and solve. When identified late in the day, there may be resistance to making changes to a bill, though needed to make it barrier-free, because so many players within government are already invested in the product already drafted.

The easiest way to understand the ways in which legislation can create accessibility barriers, and the ways in which we can work to help remove them, is through the use of examples. The following section of this paper accordingly takes a fundamentally important legislative regime – namely, the legislative regime responsible for governing elections – and looks at it critically through the lens of a drafter interested in fulfilling the government’s duty to make the legislative regime barrier free.

(c) An Example: Making Elections Legislation Barrier-Free

Elections legislation provides an excellent illustration of how laws can be drafted or screened for disability barriers. In Canada, federal, provincial and municipal elections and election campaigns are intensively and extensively regulated by legislation. Elections legislation typically governs a wide range of activities, for example, who qualifies to vote or run for office, how and where one votes, what a candidate can do to campaign, how much a candidate can spend, and how and where the voting process occurs.

Persons with disabilities have too often encountered significant barriers when trying to take part in the democratic process by voting. Because of this, in the 2007 provincial general

election, all three of Ontario's major political parties wisely pledged to develop an action plan for making elections disability accessible. The requirement of fully accessible elections is required not only by the legal provisions addressed earlier in this article, but as well by s. 3 of the Charter of Rights. That provision enshrines the constitutional rights of all adult Canadian citizens to vote and to run for provincial and federal office.

Many scratch their heads in disbelief that disability/accessibility barriers to participation in the democratic process still occur in 21st century Canada. Unfortunately, such barriers still exist. Here are examples of barriers that can and do too frequently occur during election campaigns and voting: important election documents, including publicly distributed voting information and campaign literature can be provided in an inaccessible format for persons with print disabilities; ballots may not be adapted to enable a voter with a print disability to independently mark it and verify that it has been properly marked; polling stations can be situated in venues with barriers to access, and at locations too far removed from accessible public transit; communications supports can be unavailable for voters who, due to disability, cannot effectively communicate with elections officials in order to be able to vote; all-candidates debates can be held in inaccessible venues; campaign finance laws, which cap spending by candidates, may not accommodate the need of a candidate with a disability to make reasonable additional expenditures to enable them to overcome accessibility barriers during the campaign.

Here is a non-exhaustive list of measures that could be included in elections legislation to help achieve the goal of barrier-free elections:

- a) Requiring that no polling station shall be established in a location which is not fully accessible, that polling stations be located as near as reasonably practicable to accessible public transit, and providing for effective provincial oversight to ensure compliance with this requirement for a designated period of some weeks in advance;
- b) Requiring that ballots or voting machines be adapted or provided to enable voters with disabilities to exercise their vote themselves in private, and to verify that their vote has been validly and correctly cast;
- c) Requiring the government holding the election to provide American Sign Language interpretation or other like accommodation where needed for voters who are deaf, deafened or hard of hearing, or who have other communication-related disabilities, to enable them to participate fully in the voting process. For example, all returning offices

should be equipped with TTY phone lines for communication with persons who are deaf, deafened or hard of hearing;

- d) Requiring the Government to make available, on request by any person who cannot read print due to a print disability, all Government information concerning the election that is provided to the public;
- e) Requiring registered political parties to make campaign literature, provided to the public, available in an accessible format on request, for persons with print disabilities;
- f) Requiring the election officials' websites and political parties' websites to meet minimum disability accessibility requirements;
- g) Requiring that any government and political party advertisements pertaining to an election be closed-captioned for persons with hearing loss;
- h) Requiring all-candidates debates to be held in accessible venues where possible;
- i) Proxy voting should be mandated for persons who cannot attend at a polling station due to their disability, e.g. those in retirement homes, hospitals and others who are too ill to travel;
- j) Campaign finance and spending legislation should make an exception from candidate spending ceilings for reasonable expenses of a candidate with a disability to overcome barriers to access to the campaign.⁵²

⁵² An example of legislation to partially address these concerns is the Ontarians with Disabilities Act 2001, ss. 24, 25 and 30 of the Ontarians with disabilities Act 2001. These provisions made amendments to provincial and municipal elections legislation, to modestly improve election accessibility. These provide:

Election Act

24. (1) The heading immediately preceding section 55 of the Election Act is repealed and the following substituted:

ELECTORS WITH DISABILITIES

(2) The Act is amended by adding the following section:

Report on accessibility

55.1 (1) Within three months after polling day in the election, every returning officer for an electoral district shall prepare a report on the measures that the officer has taken to provide accessibility for electors with disabilities in the district and shall submit the report to the Chief Election Officer.

Availability to the public

(2) The Chief Election Officer shall make the report available to the public.

Election Finances Act

25. The definition of "campaign expense" in subsection 1 (1) of the Election Finances Act, as amended by the Statutes of Ontario, 1998, chapter 9, section 51, is further amended by adding the following clause:

(b.1) expenses that are incurred by a candidate with disabilities and that are directly related to the candidate's disabilities,

30. (1) Subsection 41 (3) of the Municipal Elections Act, 1996 is amended by striking out "The clerk may" and substituting "The clerk shall".

(2) Subsection 45 (2) of the Act is repealed and the following substituted:

Special needs

(2) In choosing a location for a voting place, the clerk shall have regard to the needs of electors with disabilities.

7. Conclusion: The Benefits of Enacting Barrier-Free Legislation

It may seem self-evident to some that it is beneficial to society to ensure that legislation is barrier-free. Yet the failure to do so in the past makes it worthwhile to consider the benefits of this activity. First and foremost, it fulfils an important constitutional and quasi-constitutional duty of all governments. It saves persons with disabilities the hardships and heartache of having to fight costly litigation to fight against barriers that they face. It saves public funds that governments must squander when defending such litigation. As indicated in this article's introduction, barrier-free environments and products frequently benefit all people, not just those with disabilities. The same holds true for barrier-free legislation.

Society as a whole amply benefits when persons with disabilities can fully participate in it. Conversely, if legislation mandates or permits barriers to accessibility for persons with disabilities, this ultimately hurts all members of the public. Millions of Canadians now have a disability. Virtually everyone acquires a disability some time in their life, if they live long enough. Moreover, as noted earlier, society must bear substantial costs when persons with disabilities are excluded from full inclusion in the services, facilities, goods and other opportunities that the public enjoys.

In the final analysis, an ounce of inaccessibility prevention is worth several tons of equality. It saves thousands of dollars in litigation, and can provide untold value in true accessibility for persons with disabilities, one of Canada's most chronically disadvantaged populations. Those who review and draft legislation are uniquely positioned to achieve this, without the limelight, the controversy and the hardened adversarial positions of the courtroom.

The old way of "addressing" these issues has too often been not to think of them at all, and to leave it to persons with disabilities to have to litigate against barriers one at a time. In the past, no one made a conscious decision that this was how legislation would be developed. It just too often happened that way. It's time for a conscious decision to change this. Let's be sure to

(3) Subsection 45 (9) of the Act is repealed and the following substituted:
Attendance on electors with disabilities

(9) To allow an elector with a disability to vote, a deputy returning officer shall attend on the elector anywhere within the area designated as the voting place.

write inequality out of all our legislation.

